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Foreign Bribery and Conspiracy: A New Plot Twist

Kenneth Jull, Gardiner Roberts LLP

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] and then "Foreign bribery and Conspiracy: The Plot Thickens".[2] The Ontario Court of Appeal affirmed the conviction of Mr. Karigar.[3]

In my previous articles 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 was "Buddy". The statement, also cited by the Court of Appeal, described the scheme as follows (and I have highlighted the names of the key players):

> *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?*

The sequel to the Hollywood script in *Karigar* was the conviction of Robert Barra and Shailesh Govindia. But in a new plot twist, the Court of Appeal has just declared a mistrial on appeal and ordered a new trial for both Mr. Barra and Mr. Govindia. Recall that Robert Barra was referred to by name in the email sent by Mr. Karigar to the FBI reprinted above.

To set the stage for this new plot twist, the history is that on January 11, 2019, Mr. Justice Robert J. Smith of the Ontario Superior Court of Justice found Mr. Robert Barra and Mr. Shailesh Govindia guilty of contravening s. 3(1) of the *Corruption of Foreign Public Officials*

[1] Toronto Law Journal February 2014
[2] Toronto Law Journal January 2018
[3] *R. v. Karigar*, 2017 ONCA 576, 350 C.C.C. (3d) 141 (Ont. C.A.).

Act (CFPOA). It was alleged that Mr. Barra and Mr. Govindia had agreed to give a benefit to foreign public officials to ensure Cryptometrics Canada would obtain a contract with Air India. Both Mr. Barra and Mr. Govindia were sentenced to 36 months' imprisonment.
An interesting aspect of the decision by Justice Smith was the acquittal of Barra on separate charges of bribing two Air India employees. Justice Smith concluded that the two Air India employees were indeed "foreign public officials" within the meaning of the CFPOA, consistent with the finding of Justice Hackland in *Karigar*. Central to this conclusion was the fact that Air India was "directly owned by the Indian Government". However, Smith J. also found that the Crown was required to prove that Mr. Barra knew the official character of the two Air India employees. Thus, while there was a conviction on the bribery of the Indian minister of civil aviation, there was also an acquittal on the bribery of the two Air India employees on the basis of Mr. Barra's lack of knowledge of their official status. The uncertainty in this case stems from the fine definitions about the status of crown corporations in foreign jurisdictions, compared to the definition of crown corporations in Canada.

The Court of Appeal upheld a number of aspects of Justice Smith's decision, which have implications for the evolution of substantive law under the CFPOA.[4] It was, however, a mistrial application related to disclosure issues that was the prosecution's undoing. This note will review both the substantive aspects of the decision, as well as analyzing the procedural ruling ordering the mistrial.

(A) BACKGROUND

Mr. Barra was a co-Chief Executive Officer ("CEO") of Cryptometrics U.S. The trial judge found as a fact that he was the "controlling mind" of both Cryptometrics U.S. and Cryptometrics Canada.

Mr. Govindia was the CEO of a company named Emerging Markets Groups Holdings Ltd. ("EMG").

The Court reviewed two phases of the scheme. In Phase One, Mr. Barra, Mr. Berini, Mr. Bell, and Mr. Karigar were alleged to have conspired to bribe Indian foreign officials as follows: they allegedly agreed to pay $200,000 to Air India employees who were in charge of the bidding process for the contract; and they allegedly agreed to pay $250,000 to Praful Patel, the Indian Minister of Civil Aviation, in order to obtain the contract with Air India.

In relation to Phase One, the trial judge concluded that, while Mr. Barra was aware that the $200,000 was in fact transferred for the purpose of bribing various Air India employees, he had a reasonable doubt as to whether Mr. Barra knew that the bribe was being made to "foreign public officials" within the meaning of s. 2 of the CFPOA.

In any event, the trial Judge held that the $250,000 bribe was another story in this Hollywood plot. The trial judge concluded beyond a reasonable doubt that Mr. Barra not only knew that this amount was being paid to Mr. Patel, but he also knew that Mr. Patel was in fact a foreign

[4] Fairburn A.C.J.O., Watt and Zarnett JJ.A. Reasons were from The Court.

public official and that the money was being used as a bribe to obtain the contract with Air India.[5]

Phase Two allegedly involved a further plan by Mr. Barra, Mr. Berini, and Mr. Govindia to pay Mr. Patel a $500,000 bribe to further ensure the award of the Air India contract. In Phase Two, Mr. Govindia replaced Mr. Karigar as a member of the conspiracy.[6]

Mr. Barra elected not to call any evidence in defence. Mr. Govindia testified at trial. He acknowledged that he was present for the discussions undergirding Phase Two, discussions that took place in New York City. Mr. Govindia's testimony advanced a double cross theory that is yet another twist in the plot. He maintained at trial that his agreement to participate in the bribe, which was caught on audiotape, was a façade and that he never intended to actually pay the bribe. Rather, Mr. Govindia testified at trial that he "agreed" only so that he would be more likely to obtain the consulting contract that was on the table, having no intention of actually paying a bribe in the end. While Mr. Govindia acknowledged that it was a serious error of professional judgment on his part to have pretended to be willing to bribe Mr. Patel, he said that he cleared things up with Mr. Barra the morning following the recorded meeting, saying that he would not be involved in this type of conduct.[7]

(B) SECTION 11(B) RULING

Mr. Barra and Mr. Govindia brought a s. 11(b) application prior to the outset of trial, seeking a stay of proceedings. Section 11(b) rulings are typically very fact specific and in this case involved factors such as that, when the charges were laid, Mr. Barra was living in the United States, while Mr. Govindia was living in the United Kingdom. Therefore, the Crown was required to seek their extraditions to Canada.

The Court of Appeal found no error in the application judge's ruling. The *net* delay for both appellants is below the 30-month ceiling. There is no suggestion that the appellants' s. 11(b) rights were infringed if the net delay falls below that ceiling.

In *obiter*, the Court noted agreement with the application judge's reasons as they relate to the complexity in this case and how it could have factored in the s. 11(b) analysis. An interesting comment by the Court is that the provision under which the appellants were prosecuted is "a rarely used one and, therefore, there is little case law amplifying the correct legal course."[8] Critics may point to this observation as an example of Canada's poor track record in enforcing foreign bribery laws,[9] but this state of affairs will change going forward.

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[5] *R. v. Barra*, 2021 ONCA 568 at paras. 14- 16 [*Barra*].

[6] *Barra*, *ibid.*, at para. 14.

[7] *Barra*, *ibid*. at para. 18.

[8] *Barra*, *ibid*. at para. 41. Therefore, the Court states that even if they were of the view that this matter fell a distance above the 30-month ceiling, like the application judge, the Court would not have determined that it constituted unreasonable delay (at para. 42).

[9] Christopher Nardi, "Canada's efforts to fight foreign bribery are 'shockingly low,' new report says" (Oct 14, 2020). Canada is considered to be a country with 'limited' enforcement since 2016, putting us on par with Costa Rica, Argentina, Colombia, and well below other major allies, citing a report from Transparency International Canada.

(C) JURISDICTION

The CFPOA has since been amended to deem acts or omissions occurring elsewhere to have taken place in Canada if the perpetrator is a citizen or permanent resident of Canada or is present in Canada after the offence. None of those amended provisions applied to Mr. Barra and Mr. Karigar given the timing of the case.

In my previous articles about the *Karigar* case in this Journal, I reviewed the jurisdictional challenge made by Mr. Karigar which was rejected at his trial and by the Court of Appeal. Mr. Barra and Mr. Govindia argued that their situation is distinguishable.

The Court of Appeal confirmed that the alleged conspiracy had a substantial link — a real and substantial connection — to Canada. It was, after all, Cryptometrics Canada, a Canadian company, attempting to obtain a contract to supply its biometrics recognition system to Air India, through the unlawful means of paying bribes.

Mr. Barra and Mr. Govindia argued that the Crown's case conflates the individuals with Cryptometrics Canada, contrary to the principle of corporate separateness. The Court of Appeal held that there is no merit to that submission. "The conspiracy the appellants are alleged to have entered was to obtain a contract for Cryptometrics Canada, of which the appellant Mr. Barra was the controlling mind. No conduct of the company is being attributed to the appellants."[10]

This raises a separate question, discussed later in this note, as to why Cryptometrics was not charged in this case.

Mr. Govindia argued as well that the trial judge erred in failing to find that Count 1 of the indictment against him violated the principle of specialty, which prevents the Crown from prosecuting an extradited accused for an offence other than that for which he was extradited. The Court of Appeal found that the trial judge was entitled to find that the application for extradition included the actual wording of the conspiracy charge that ultimately appeared in the preferred indictment.

(D) THE *MENS REA* REQUIREMENTS FOR A CFPOA OFFENCE

The *mens rea* requirements for a CFPOA offence is a critical issue, particularly given the paucity of cases decided under this section, as noted by the Court of Appeal.

With respect to the *mens rea* of the offence set out in s. 3 of the *CFPOA*, the Department of Justice Guide to the *CFPOA* Guide states:

> No particular mental element (*mens rea*) is expressly set out in the offence since it is intended that the offence will be interpreted in accordance with common

[10] *Barra, supra* note 5 at para. 56.

> law principles of criminal culpability. The courts will be expected to read in the *mens rea* of intention and knowledge.[11]

In *Barra,* the trial judge held that s. 3(1) of the CFPOA, like bribery, is a specific intent offence. He relied on *R. v. Smith*[12] for the proposition that "knowledge by the accused of the official character of the person to whom the bribe is offered is an essential element of bribery".

The trial judge was not satisfied beyond a reasonable doubt that Mr. Barra nor Mr. Berini knew that the Air India officials who received bribes were foreign public officials as defined in the CFPOA. He found that Mr. Bell and Mr. Berini, but not Mr. Barra, reasonably but incorrectly believed that Air India was a Crown corporation; in fact, however, it was owned directly by the Government of India, making the Air India employees foreign public officials as defined in the CFPOA.

On appeal, the Crown argued that if Mr. Barra knew the bribes were going to Air India employees, the scope of their responsibilities, and their ability to influence the awarding of a contract by Air India, then he had the necessary *mens rea*. The Crown argued that question of how those facts fit within the definition of a foreign public official in s. 2 of the CFPOA is a question of law. An erroneous view of the law is not a defence.[13]

The Court of Appeal held that the trial judge did not err in his conclusion on *mens rea*. In order to have the necessary *mens rea* for an offence under s. 3(1) of the CFPOA, an accused must know that the person bribed or offered a bribe has the characteristics described in the definition of "foreign public official" by ss. 2(a)-(c) of the CFPOA. The Court then set out the test that should apply where the person bribed or offered a bribe is employed by a corporation:

> In a case where the person bribed or offered a bribe is employed by a corporation, to have the necessary *mens rea*, the accused must know not only that the person was employed by the corporation, but that the corporation was established to perform a duty or function on behalf of a foreign state, or is performing such a duty or function. The accused need not know that this is how the CFPOA defines a foreign public official, nor that bribing the person is illegal.[14]

As applied to the facts in *Barra*, the Court of Appeal observed that a corporation that has the name of a country in it is not necessarily one formed to carry out a duty or function of the government of that country:

> The trial judge did not find that Mr. Barra knew that Air India was established to perform a duty or function on behalf of the state of India. A corporation that has the name of a country in it is not necessarily one formed to carry out a duty or function of the government of that country. Although the trial judge referred to the belief of Mr. Berini and Mr. Bell that Air India was a Crown corporation, he also noted that their belief was inaccurate. Importantly, however, he did not draw the inference that Mr. Barra shared that belief and, in our view, he was not

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[11] Department of Justice, "The Corruption of Foreign Public Officials Act: A Guide" (May 1999): http://publications.gc.ca/collections/collection/J2-161-199E.pdf (CFPOA Guide), footnote 183 at p. 3.
[12] *R. v. Smith* (1921), 67 D.L.R. 273, at p. 275 (Ont. C.A.).
[13] *Criminal Code of Canada*, R.S.C., 1985, c. C-49, s. 19.
[14] *Barra, supra* note 5 at para. 80.

> obliged to. In light of that, it is unnecessary to consider whether that belief, if shared by Mr. Barra, would have been tantamount to knowledge that Air India was formed to fulfill a duty or function of the state of India.[15]

It is true that a corporation that has the name of a country in it is not necessarily one formed to carry out a duty or function of the government of that country. A classic example of this is Air Canada, which of course is not a government entity.

As a practical matter, it may be a high evidentiary bar for the prosecution to prove that the accused knew not only that the person bribed was employed by a corporation, but that the corporation was established to perform a duty or function on behalf of a foreign state, or is performing such a duty or function. Short of documentation such as e-mails that show knowledge, the prosecution may have to rely on testimony from associates that a given person was aware of the governmental status of an entity.

The high bar to prove such knowledge leads to a discussion of a sometimes forgotten aspect of *mens rea,* willful blindness, discussed in the next section.

(E) POTENTIAL APPLICATION OF THE DOCTRINE OF WILLFUL BLINDNESS

In my view, at the new trial, the doctrine of willful blindness should be explored as it potentially applies to the facts in *Barra*. The concept of *mens rea* includes the doctrine of willful blindness, which has been reviewed by the Supreme Court of Canada in the *Briscoe*[16] decision. Justice Charron for the Court observed that: "The doctrine of willful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries."[17]

In *Barra*, in relation to Phase One, the trial judge concluded that, while Mr. Barra was aware that the $200,000 was in fact transferred for the purpose of bribing various Air India employees, he had a reasonable doubt as to whether Mr. Barra knew that the bribe was being made to "foreign public officials" within the meaning of s. 2 of the CFPOA.[18] Given the size of this bribe, and the knowledge that a bribe was being paid at all, it is arguable that Mr. Barra should have made inquiries about the status of Air India. The question is whether this knowledge of the $200,000 bribe created a suspicion to the point where Mr. Barra saw the need for further inquiries, but deliberately choose not to make those inquiries.

The concept of willful blindness has a U.S. parallel in the doctrine of conscious avoidance or the "head in the sand" approach.[19] This concept has been developed in the anti-corruption area in cases such as the colourful *Bourke* case involving the "Pirate of Prague".[20] Tapes of phone

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[15] *Barra, ibid.* at para. 81.
[16] *R. v. Briscoe*, [2010] 1 S.C.R. 411, 253 C.C.C. (3d) 140.
[17] *Briscoe*, *ibid.*, at para. 21.
[18] *Barra, supra* note 5 at para. 15.
[19] Robert Tarun, ed., *The Foreign Corrupt Practices Act Handbook*, 3rd ed. (Chicago: American Bar Association, 2013) at pp. 9-10 ("Tarun, *Handbook*").
[20] *U.S. v. Kozeny*, 667 F.3d 122 (2d Cir., 2011)..

conversations in this case are illustrative of the type of discussions that constitute conscious avoidance or deliberate ignorance. The following passage is a transcript of Bourke's words:

> What happens if they break a law in … Kazakhstan, or they bribe somebody in Kazakhstan and we're at dinner and … one of the guys says, 'Well, you know, we paid some guy ten million bucks to get this now.' I don't know, you know, if somebody says that to you, I'm not part of it … I didn't endorse it. But let's say … they tell you that. You got knowledge of it. What do you do with that? … I'm just saying to you in general … do you think business is done at arm's length in this part of the world.[21]

The United States Court of Appeals for the Second Circuit concluded that the above type of comments could permit a rational juror to conclude that Bourke deliberately avoided confirming his suspicions that his business associate and his cohorts may be paying bribes.

In the *Karigar* case, Justice Feldman cites a meeting with the Consulate General for Canada in Mumbai where corruption in general in India was discussed and specifically how government figures would get up to eight percent of the value of a contract as a bribe payment:

> 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).[22]

It may be an issue in the retrial of Mr. Barra whether he was party to any general discussions about how government figures would get up to eight percent of the value of a contract as a bribe payment. If he was a party to such discussions, this could raise the issue as to whether or not he was willfully blind to the issue of whether or not the Air India officials who he knew were being bribed were government officials.

(F) THE MISTRIAL

The facts that justify the declaration of a mistrial are complex, and this short article can only summarize the highlights. Crown counsel proposed to adduce reply evidence from their principal witness, Mr. Berini, about the authenticity of a document allegedly bearing his signature, introduced by counsel for Mr. Govindia during his cross-examination of Mr. Berini.

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[21] *Kozeny*, *ibid.*, at p. 15.
[22] *Karigar*, *supra* note 3, at para. 43.

Counsel for the appellants sought an order declaring a mistrial on the basis that the Crown had failed in its disclosure obligations.

The key to understanding the mistrial is the advice provided by the Crown to defence counsel that that there was no deal, written or unwritten, in place for Mr. Berini. Yet, in the final set of disclosure, Crown counsel disclosed an email sent by Mr. Berini's counsel to the Crown confirming the terms of the witness preparation meeting. That email confirmed the agreement that anything communicated by Mr. Berini during the meeting could not be tendered by the Crown in any future proceedings against him. Thus, it could not be said, as the Crown had previously advised, that there was no deal in place for Mr. Berini. The Court of Appeal eloquently describes this arrangement whereby Mr. Berini was not a mere witness, but rather "a team player":

> In determining the nature and extent of their cross-examination of the critical Crown witness Mr. Berini, the appellants were entitled to know, contrary to what they had been advised by senior Crown counsel, that there was, in fact, an agreement with Mr. Berini about the future use of what he said during preparation. While s. 13 of the Charter would protect Mr. Berini's compelled testimony from being used against him at a subsequent trial, no similar protection would be offered for the content of the Crown interviews, to the extent they went beyond that to which was testified in court. The appellants were entitled to know that Mr. Berini's involvement in the case with the Crown extended well beyond what he said in the witness box. No mere witness, he. A team player.[23]

In the result, the Court of Appeal was persuaded of the reasonable possibility that the delayed disclosure affected the overall fairness of the trial process.

(G) THE ROLE OF CONSPIRACY

The trial was conducted on the basis that the offence alleged was a conspiracy and that proof of guilt could be made through application of the co-conspirator's exception to the hearsay rule. The appellants objected to the way in which the Trial Judge treated the first and second phases of the alleged conspiracy. Since the Court of Appeal decided to order a new trial on other grounds, the Court restricted their reasons on this issue to what is necessary to assist the judge presiding at the new trial.

The Court observed that, as a matter of criminal pleading, the count as framed did not allege conspiracy in the traditional sense, nor does s. 3(1) of the CFPOA, the offence-creating provision. The important point made in the following passage is that none could deny the availability of the co-conspirators' (common unlawful design) exception to the hearsay rule:

> It may be open to question whether, as a matter of criminal pleading, the count with which we are concerned alleges the inchoate or preliminary crime of conspiracy, as opposed to a count charging joint commission of a substantive offence whose external circumstances may include an agreement. However, as a means of proof, none could gainsay the availability of the co-conspirators'

[23] *Barra, supra* note 5 at para. 163.

> (common unlawful design) exception to the hearsay rule: *R. v. Koufis*, [1941] S.C.R. 481; *R. v. Cloutier*, [1940] S.C.R. 131.[24]

In this case, there was a common agreement that continued throughout — to obtain the Air India contract for Cryptometrics Canada. There was a common means to achieve that goal. "In a word, bribery."[25] Given the common agreement, the Court carves out some granular details that the Crown need not prove: "It was not necessary for the Crown to prove that the parties to the agreement were in direct communication with one another, that each was aware of the identity of the other alleged co-conspirators, nor that each was aware of all of the details. Provided each, as in this case Mr. Govindia, was aware of the general nature of the common design and intended to adhere to it, liability is established: Longworth, at pp. 565-66."[26]

(H) CORPORATE CRIMINAL LIABILITY

The company Cryptometrics was never charged as part of what I have referred to as this Hollywood saga. Mr. Barra was a co-Chief Executive Officer ("CEO") of Cryptometrics U.S. The trial judge found as a fact that he was the "controlling mind" of both Cryptometrics U.S. and Cryptometrics Canada.

In light of the allegations against Barra, it is an interesting question as to why the company was not also charged. This is a complex area, and there may have been issues with respect to Mr. Barra's scope of authority.[27] Perhaps one explanation relates to the fact that Cryptometrics was not successful in obtaining the Air India contract.[28]

CONCLUSION

The *Karigar* case ended with a Hollywood ending. That ending contained a message to the Canadian business community that anti-corruption compliance ought not to be relegated to the back row. The *Barra* decision adds several new plot twists and a sequel in the form of a new trial.

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[24] *Barra, ibid*. at para. 174.
[25] *Barra, ibid*. at para. 178.
[26] *Barra, ibid*. at para. 181.
[27] See Todd L. Archibald and Kenneth E. Jull *Profiting from Risk Management and Compliance* | Chapter 10. The Changing Face of Corporate and Organizational Criminal Liability § 10:23. Senior Officer Level — Acting Within the Scope of their Authority.
[28] https://www.theglobeandmail.com/news/national/executive-convicted-in-indian-bribery-conspiracy/article13804839/