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Canadian *Corruption of Foreign Public Officials Act*: Two Additional Convictions in the Cryptometrics Saga

Authors: [Léon H. Moubayed](#), [Chantelle Cseh](#) and Patrice Labonté

Two individuals were recently sentenced to 30 months' imprisonment after being convicted of agreeing to bribe a foreign public official, under the Canadian *Corruption of Foreign Public Officials Act* (Act).¹ These are the second and third convictions under the Act following a trial. In all other cases, the individuals charged to date have pleaded guilty or the charges were stayed.

Legal Context of the *Corruption of Foreign Public Officials Act*

The Act is the result of Canada's ratification (along with 43 other countries) of the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.

In cases of bribery of foreign public officials that occurred between February 14, 1999 (the date the Act came into force) and 2013, individuals or organizations may be criminally prosecuted in Canada provided that a real and substantial link is established between Canadian territory and the offence in question.² Thus, for that specific period, Canadian jurisdiction is territorially limited. Such jurisdiction is based on many factors, which included both the legitimate and the illegitimate aspects of the alleged infraction,³ such as Canada being the jurisdiction where the unfair advantage and fruits of the infractions were enjoyed, or where the persons who benefited from or participated in the alleged bribery are situated or where the evidence and witnesses are located.

However, the jurisdiction of Canadian courts was greatly expanded by an amendment to the Act in 2013.⁴ Since then, any Canadian individual and any Canadian company may be prosecuted in Canada for bribing public officials abroad (or accounting falsification), despite the absence of any additional territorial links with Canada. Henceforth, nationality is sufficient for Canadian jurisdiction.

The Cryptometrics Case

The RCMP conducted a major investigation after anonymous disclosure was made to the U.S. Department of Justice in 2007, alleging agreements to bribe Indian public officials to ensure that Air India awarded lucrative contracts to Cryptometrics, a Canadian company that specialized in security software. Ultimately, four individuals (one Canadian, one British national and two American nationals) were criminally charged under the Act.

The First Conviction After Trial in Canada Under the Act

After a first trial,⁵ Canadian Nazir Karigar was found guilty of having agreed to offer (i) US\$200,000 to Air India employees to ensure the technical approval of Cryptometrics as a bidder to a request for proposal, and (ii) US\$250,000 to the Indian Minister of Civil Aviation to influence his approval of this contract to Cryptometrics. The contract was never awarded to Cryptometrics and the relationship between Cryptometrics' representatives and Mr. Karigar eroded until he disclosed the bribery conspiracy to the U.S. authorities.

The trial judge and the Court of Appeal for Ontario both confirmed that Canada had territorial jurisdiction to prosecute the alleged offences against Mr. Karigar. Since the alleged infractions pre-dated the 2013 amendments to the Act, territorial jurisdiction, rather than jurisdiction based on nationality, had to be established. The Court concluded that there was a real and substantial connection between the offences and Canada since Cryptometrics and Mr. Karigar were both Canadians, the work that was to be performed and the revenues anticipated from the contract were expected in Canada and nearly all the evidence and witnesses were located in Canada.

The trial judge concluded that the offence of “agreeing to give” or “offering” a benefit to a foreign public official does not require proof of an agreement with, or payment to, a foreign public official. Thus, in addition to scenarios in which a foreign public official accepts a bribe, the offence also covers agreements that are intended to offer a bribe to a foreign public official. In addition, the Ontario Court of Appeal determined that bribery of a foreign public official is an offence under the Act, even if the official does not have the power or specific authority to influence the decision in question. The mere proof of an agreement to offer bribes is sufficient. Mr. Karigar was sentenced to three years in prison on May 23, 2014.

The Two Additional Convictions

On March 7, 2019, after a second trial in the Cryptometrics case, the Ontario Superior Court sentenced American national Robert Barra and British national Shailesh Govindia to 30 months' imprisonment each. The Court considered a second conspiracy to offer bribes in this case, which concerned the payment of an additional US\$500,000 bribe to the Indian Minister of Civil Aviation by Mr. Govindia to obtain the same contract as the one covered by the conspiracy with Mr. Karigar.⁶ Mr. Govindia was contacted by Mr. Barra, Cryptometrics' CEO and its directing mind, to complete the agreement (that ultimately failed) with Mr. Karigar. Although Mr. Govindia did not know about Mr. Karigar's prior involvement in the bribery scheme, the Court held that Mr. Govindia was part of the same conspiracy to pay bribes.

The trial judge indicated, among other things, that for the offence to be committed, it must be demonstrated that the accused knew that the person receiving the bribe was a foreign public official. Because Mr. Barra and Govindia were unaware that Air India's employees were foreign public officials within the meaning of the Act, they were acquitted on this part of the charges.

Finally, American national Dario Berini will face a trial in 2019 for charges laid in the same case.

The Impact of the Act on Organizations

Although Cryptometrics has not been charged in this case, the participation of its senior officers in the conspiracy to corrupt could have directly led to criminal liability against the company directly.⁷

In this regard, amendments to the Criminal Code came into force on September 21, 2018, that give discretion to the prosecutor to enter into a “remediation agreement” with an organization accused of economic crimes, whereby proceedings against the organization are stayed. Such a remediation agreement must include certain elements, notably a statement of facts and admission of responsibility by the organization and the undertaking to put in place or enhance compliance measures and to pay a financial penalty.⁸ The offences in respect of which a remediation agreement may be entered into include bribing a foreign public official and the maintenance or destruction of books and records to facilitate or hide the bribing of a foreign public official.⁹

Organizations must carefully consider the Act and its potential implications, and should implement robust integrity and prevention programs in order to avoid criminal acts by employees and the reputational and criminal consequences that such acts can lead to.

¹ *Corruption of Foreign Public Officials Act*, SC 1998, c 34. The conviction was entered on January 11, 2019.

² *R v Libman*, [1985] 2 SCR 178; *R v Karigar*, 2017 ONCA 576, paras. 24, and 29 to 32.

³ *R v Karigar*, paras. 21 and 30.

⁴ Section 5 of the Act.

⁵ *R v Karigar*, 2013 ONSC 5199.

⁶ *R v Barra and Govindia*, 2018 ONSC 57.

⁷ *Criminal Code* (RSC, 1985 c C-46), s 22.

⁸ *Ibid*, Part XXII.1, Remediation Agreements, at s 715.3ff.

⁹ *Ibid*, Schedule to Part XXII.1, s 2.

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