

Canada's First Foreign Bribery Conviction Shows Trend in Increased Enforcement

Article By:

Bora P. Rawcliffe

On August 15, 2013, the Ontario Superior Court found Canadian national Nazir Karigar guilty of conspiring to offer a bribe to Indian government officials under the Corruption of Foreign Public Officials Act (“CFPOA”). The CFPOA makes it an offense to directly or indirectly give or offer a loan, reward, advantage or benefit of any kind to a foreign public official in order to obtain or retain an advantage in the course of business.

The trial marks many firsts: it is the first trial brought under the CFPOA since it came into force in 1999; it is the first conviction of an individual under the CFPOA; and it is the first action brought under the CFPOA where there was no evidence or admission that the corrupt payments were actually made. The Court's opinion was issued soon after new amendments to the CFPOA went into effect earlier this summer to broaden the statute's reach. With at least two upcoming trials and close to 40 active investigations, Canada appears to be gearing up its enforcement efforts.

The Karigar Trial

Nazir Karigar is a Canadian businessman who was convicted in August for conspiring to bribe India's Minister of Civil Aviation and certain Air India officials to secure a major Air India contract for the provision of facial recognition software on behalf of Cryptometrics Canada (“Cryptometrics”). Cryptometrics entered into an agreement with Karigar whereby, as its agent, Karigar would help Cryptometrics secure the contract in return for 30 percent of the revenue stream from the contract. During the bid process, Karigar, his associates, and Cryptometrics openly discussed the need to pay bribes. Karigar gave Cryptometrics spreadsheets listing various Air India officials and how much money and how many company shares each official should be offered. Karigar also provided Cryptometrics with inside information on its potential competitors for the contract.

Subsequently, in response to an email from Karigar, Cryptometrics USA transferred \$200,000 to Karigar's Indian bank account to bribe the co-chair of the Air India selection committee. Karigar wrote in an email that the purpose of the bribe was to ensure that only two companies were short-listed. Two months later, Cryptometrics was short-listed as one of the two qualified bidders. Approximately six months later, Cryptometrics USA entered into another agreement with Karigar to transfer \$250,000 to his Indian bank account to “secure the Air India contract.” Eventually, Karigar and Cryptometrics had a falling out and Cryptometrics proceeded to attempt to have the contract

awarded through further monetary bribes sent through others. In the meantime, Karigar met with a Canadian trade commissioner in Mumbai and told her that Cryptometrics had used an agent to bribe Indian officials. Karigar also e-mailed the US DOJ to report the bribes and to request immunity, but it is not clear if the DOJ has initiated an investigation.

The court held the evidence proved beyond a reasonable doubt that Karigar conspired with executives at Cryptometrics to offer bribes to Indian officials even though the evidence did not prove that the bribes were actually paid to specific officials. After analyzing the language of the statute, the court found that receipt of a bribe is not required to prove a bribery offense. On policy grounds, the court also reasoned that to require proof of the offer of or receipt of a bribe and the identity of a particular recipient would require evidence from a foreign jurisdiction, which would make enforcement difficult and may offend international comity. This holding will make it easier to prove bribery offenses since neither an actual offer or receipt of payment nor the identity of a particular recipient is required.

Although the CFPOA amendments broadening the statute's jurisdictional reach did not apply at the time of trial, the court found it had jurisdiction over Karigar on the following grounds: Karigar is a Canadian national; Karigar was employed as an agent of a Canadian company; much of the work under the potential Air India contract would have been done in Canada; the payments were made from the U.S.; and most of the documents and emails were seized in Canada. As discussed below, based on the new amendments, Canadian courts will have jurisdiction over defendants who are Canadian nationals regardless of where the illegal conduct occurred.

Prior CFPOA Enforcement: Niko Resources and Griffiths Energy Guilty Pleas

The first significant foreign bribery action brought under the CFPOA ended in a guilty plea in 2011. In that case, Calgary-based Niko Resources Ltd. ("Niko") pled guilty to a single charge of bribery related to two 2005 incidents in which Niko provided a vehicle for the personal use of the Bangladeshi Energy Minister and covered the travel costs of the same minister to attend an Energy Expo in Calgary and to make a personal trip to New York. Niko's sentence included a \$9.5 million CAD fine and a probation order requiring court supervision of Niko's compliance efforts for three years. Significantly, the Niko investigation was a joint effort by the Alberta prosecution service and the U.S. Department of Justice (DOJ) and the probation order was drafted in consultation with the DOJ. The case attracted significant attention because of the steep fine, Canada's cooperation with the U.S., and the detailed compliance requirements provided in the probation order.

Griffiths Energy Inc.'s ("GEI") guilty plea followed in January 2013. After conducting an internal investigation, GEI disclosed a \$2 million CAD bribe paid to a consulting firm owned by the spouse of a Chadian public official to secure exclusive rights to explore and develop oil and gas reserves in southern Chad. The investigation cost GEI \$1.5 million CAD over five months and caused GEI to cancel its pending IPO, which cost the company another \$1.8 million CAD. As a result of its guilty plea, the company agreed to pay \$10.35 million CAD. Like the Niko action, the GEI guilty plea also attracted significant attention because it was the first self-disclosure case under the CFPOA. GEI's internal investigation, self-disclosure, and cooperation with authorities significantly reduced its fine.

Recent Amendments to the CFPOA

Six months after the GEI action, in June 2013, the CFPOA was amended to significantly broaden its scope and jurisdiction. Importantly, the amendments added a books and records offense. Unlike the US Foreign Corrupt Practices Act ("FCPA"), the CFPOA's books and records offense is limited to the bribery of foreign officials or the concealment of such bribery. The amendments also increased

the maximum jail time under the Act from five years to 14 years and broadened the CFPOA's jurisdiction to reach all Canadian nationals regardless of where the illegal conduct occurred. This is a significant change because, prior to the amendments, the CFPOA's application had been based on territorial jurisdiction requiring that a significant portion of the activities constituting the offense take place in Canada. Among other changes, the amendments also state that the exception for facilitation payments is now subject to elimination by an order of the federal Cabinet.

Preparing for Increased Enforcement and Government Scrutiny

The Niko probation order, discussed above, set forth detailed compliance requirements that may be helpful to companies as they assess and update their compliance programs. These requirements should serve as helpful guidance for companies seeking to comply with both the CFPOA and the FCPA given the Canadian government's record of past cooperation with the US and the DOJ's involvement in drafting the Niko probation order. They include:

- Implementation and maintenance of a system of adequate internal accounting controls;
- Implementation of a visible written anti-corruption policy applicable to all directors, employees, and third parties and designed to detect and deter violations of CFPOA and other anti-corruption laws;
- Implementation of policies governing gifts, hospitality, entertainment, travel, political contributions, charitable donations, facilitation payments, and solicitation and extortion;
- Conducting a risk assessment based on specific bribery risks facing the company;
- Reviewing and updating anti-corruption policies and procedures at least annually;
- Providing periodic training and annual certification of directors, offices employees, agents and business partners;
- Implementing systems for providing anti-corruption guidance within the company and to business partners, confidential reporting, and protection against retaliation;
- Enacting disciplinary procedures for violations of anti-corruption laws and policies;
- Instituting pre- and post-engagement due diligence and compliance requirements for third parties; and
- Including standard provisions in agreements with third parties to prevent anti-corruption violations.

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