CITATION: R. v. Karigar 2014 ONSC 3093
COURT FILE NO.: 10-G30208
DATE: 20140523

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN	)	Moray Welch for Her Majesty the Queen
- and -	)	
NAZIR KARIGAR	)	Israel Gencher and Martin Reesink for Nazir Karigar
	)	**HEARD:** April 1-3, 2014 (Ottawa)

HACKLAND J. (Orally)

SENTENCING DECISION

[1] The accused Nazir Karigar was convicted on a single count indictment of offering a bribe to a foreign public official contrary to section 3(1)(b) of the *Corruption of Foreign Public Officials Act,* S.C. 1998, c. 34 ("*CFPOA*"). The court's Reasons for Judgment are reported at *R. v. Karigar* [2013] O.J. No. 3661.

[2] Mr. Karigar conspired with several individuals employed by or associated with Cryptometrics Canada Limited of Ottawa, Ontario, to offer bribes to officials of Air India and to an Indian Cabinet Minister. This conspiracy had as its purpose the winning of a tender for a multi-million dollar contract to sell facial recognition software and related products to Air India.

The products were to be supplied principally from Cryptometrics Limited's operations in Ottawa utilizing the work force at that location.

[3] The *CFPOA* was enacted by Parliament in December of 1998 in order to implement Canada's obligations under the Convention on Combating Bribery in International Business Transactions of the Organization for Economic Co-operation and Development ("the Convention"), to which Canada is a signatory. The *CFPOA* criminalizes the offering of bribes or other advantages to foreign public officials.

[4] The Convention contains the following interpretative provision concerning the obligations of signatories to implement a range of penalties comparable to those applicable to the criminal penalties applying to bribery of domestic public officials:

> 1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.

[5] The over-arching principle here is that bribery of foreign public officials should be subject to similar sanctions as would be applied to the bribery of Canadian public officials occurring in Canada.

[6] The range of penalties for the offence of which Mr. Karigar has been convicted is imprisonment for up to five years. As a result of recent amendments contained in Bill S-14, *Fighting Foreign Corruption Act*, which received Royal Assent on June 19, 2013, and not yet proclaimed in force, this offence is now punishable by up to fourteen years imprisonment. Although that penalty cannot be retroactively applied to this case, it does illustrate Parliament's recognition of the seriousness of this offence and of Canada's obligation to implement appropriate sanctions.

[7] At the sentencing hearing the Crown called several government witnesses to say essentially that as a general proposition offences involving the bribery of foreign public officials

are complex and challenging to investigate and prosecute. There was also evidence that the OECD Working Group on Bribery, which monitors Convention compliance, had expressed concerns with Canada's enforcement efforts and with the leniency of one particular negotiated plea in another case. The opinion was also offered by a witness for the Department of Foreign Affairs that interest in the problem of bribery and corruption on the part of companies doing business in foreign countries was considerably enhanced when more significant penalties and prosecutions of individuals were identified as the likely outcome of future prosecutions.

[8] While helpful background, I am of the view that this information is not directly relevant to the sentencing issues at hand. Similarly, the evidence of U.S. sentencing guidelines based on tariffs and somewhat similar British guidelines are simply inapplicable in Canada. I do however take notice of the obvious reality that the corruption of foreign public officials, particularly in developing countries, is enormously harmful and is likely to undermine the rule of law. The idea that bribery is simply a cost of doing business in many countries, and should be treated as such by Canadian firms competing for business in those countries, must be disavowed. The need for sentences reflecting principles of general deterrence is clear.

Position of the Parties

[9] Mr. Welch, on behalf of the Crown, forcefully argued that the offence of which Mr. Karigar has been convicted, which he characterized as an elaborate and sophisticated fraud, should be treated in the same manner as a similar domestic fraud involving government officials, which he submitted required a general deterrence based penitentiary sentence in the range of three to five years.

[10] Defence counsel, relying primarily on the accused's age (67), lack of any prior criminal involvement and the fact that the accused and Cryptometrics Limited were never in fact awarded the contract in question, submitted that a sentence in the reformatory range, preferably to be served in the community, would be appropriate.

Aggravating Factors

[11] I would identify the following aggravating factors in this case.

(a) This was a sophisticated and carefully planned bribery scheme intended to involve senior public officials at Air India and an Indian Cabinet Minister. If successful, it would have involved the payment of millions of dollars in bribes and stock benefits, over time. The sum of $450,000 was advanced for the purpose of bribery while Mr. Karigar remained involved with this scheme.

(b) In addition to the contemplated bribes, the accused's participation in the bidding process involved other circumstances of dishonesty such as the entry of a fake competitive bid to create the illusion of a competitive bidding process and the receipt and use of confidential insider information in the bid preparation.

(c) The accused behaved throughout with a complete sense of entitlement, candidly relating to a Canadian trade commissioner that bribes had been paid and then urging the Canadian Government's assistance in closing the transaction.

(d) Mr. Karigan personally conceived of and orchestrated the bribery proposal including providing the identity of the officials to be bribed and the amounts proposed to be paid as reflected in financial spreadsheets he helped to prepare.

Mitigating Factors

[12] I would identify the following mitigating factors:

(a) There was a high level of co-operation on the accused's part concerning the conduct of this prosecution. Indeed he exposed the bribery scheme to the authorities following a falling out with his co-conspirators. He unsuccessfully sought an immunity agreement. A great deal of trial time was avoided as a result of the accused's extensive admissions concerning the documentary evidence.

(b) Mr. Karigar appears to have been a respectable business man all of his working life, prior to his involvement in this matter. He has no prior criminal involvements. He is also in his late 60's and not in the best of health.

(c) Of considerable importance is the fact that the entire bribery scheme was a complete failure. The accused and his co-conspirators failed to obtain the sought after contract with Air India, or any other benefits. The harm resulting from this scheme was likely restricted to the promotion of corruption among a limited group of foreign public officials.

Jurisprudence under the *CFPOA*

[13] The starting point of the court's analysis must be the jurisprudence under the *CFPOA* itself. Such jurisprudence is minimal. The present case appears to be the first prosecution which has proceeded to trial. There appear to be only three other prosecutions initiated under the Act that have come before the court. These cases involved corporate accused and were resolved by way of guilty pleas.

[14] In *R. v. Griffiths Energy International*, [2013] A.J. No. 412 (Alta. Q.B.), Griffiths Energy pled guilty under s. 3(1) of the *CFPOA* for the payment of a $ 2 million bribe and shares to a corporate entity owned by the wife of a foreign ambassador. In this case, a new management team at Griffiths discovered that the bribe had been paid by their predecessors. Management then acted quickly to fully investigate the matter and self-reported the crime to authorities. Griffiths then fully cooperated with the authorities saving the cost of a lengthy and complex prosecution. Crown counsel and Griffiths made a joint submission as to penalty ($10.35 million) which the court accepted.

[15] In balancing the aggravating and mitigating factors, the court placed considerable emphasis on Griffiths' cooperation with the prosecution. As a countervailing factor, the court, at paras. 8-9, explained the seriousness of such an offence as follows:

> The bribing of a foreign official by a Canadian company is a serious matter… such bribes, besides being an embarrassment to all Canadians, prejudice Canada's efforts to foster and promote effective governmental and commercial relations with other countries; and where, as here, the bribe is to an official of a developing nation, it undermines the bureaucratic or governmental infrastructure for which the bribed officials works.
>
> Accordingly, the penalty imposed must be sufficient to show the Court's denunciation of such conduct as well as provide deterrence to other potential offenders.

[16] In *Griffiths*, the court noted that the American cases provided as precedents of prosecutions for cases of bribery of foreign officials are of limited assistance given that the sentencing regime in the United States is significantly different and involves grids, offence levels, culpability scores and advisory ranges (at para. 23). As noted, in this case I have also

been referred to a variety of American cases and sentencing guidelines and similarly, I do not view those cases as particularly helpful.

[17] In *R. v. Niko Resources Ltd.* (2011), 101 W.C.B. (2d) 118 (Alta. Q.B.), Niko Resources pled guilty to providing improper benefits (in the amount of $195,984.00) to a foreign public official in Bangladesh in order to further business objectives contrary to the *CFPOA*. The court accepted the parties' joint submission on penalty which involved a fine in the amount of $9.49 million. In considering the appropriateness of the fine, the court considered the seriousness of the crime and the principle sentencing objective of denunciation and deterrence as well as factors such as: that there was no proof that influence was actually obtained as a result of the crime, that the fine would not impact the continued economic viability of the corporation, that the corporation took no steps to conceal assets to avoid a fine, that the corporation had already taken steps to reduce the likelihood of reoffending, that once the corporation became aware it was under investigation it cooperated fully with authorities, and that the corporation entered a guilty plea prior to charges being formally laid without the need for a preliminary hearing or a trial.

[18] Finally, in *R. v. Watts* [*Hydro Kleen*], [2005] A.J. No. 568 (Alta. Q.B.) the corporation Hydro Kleen pled guilty to bribing a foreign official contrary to the *CFPOA*. Hydro Kleen operated in Canada and the United States and its employees traveled between the two countries for work. At times Hydro Kleen's employees experienced difficulties entering the United States. Hydro Kleen hired a United States immigration officer as a "consultant" and paid him the sum of $28,299.88 to facilitate the passage of Hydro Kleen's employees into the United States. Unbeknownst to Hydro Kleen the immigration officer also made it more difficult for the employees of Hydro Kleen's competitors to enter the United States. Like the other two cases, a joint submission with respect to sentence was made and the court accepted the imposition of a fine of $25,000. In coming to this conclusion the court considered the fact that a guilty plea was entered and that the individual responsible had taken responsibility. Furthermore, the court noted that the relevant sentencing principles to be considered under the *CFPOA* are akin to those under section 426 of the *Criminal Code* (secret commissions), namely specific and general deterrence. Finally, the court offered some words of explanation highlighting the seriousness of such an offence stating at para. 125 that "corruption distorts markets and harms overall

economic, social, and political development. It is a pernicious disease and needs to be resisted by all citizens".

[19] In light of these decisions, it is clear that the bribery of foreign officials must be viewed as a serious crime and the primary objectives of sentencing must be denunciation and deterrence. The more recent cases, *Griffiths Energy* and *Niko Resources* clearly demonstrate that a substantial penalty is to be imposed by the courts even in circumstances where a guilty plea was entered and the accused has cooperated with authorities.

Cases of fraud under s. 380 of the *Criminal Code*

[20] In *R. v. Dobis* (2002), 58 O.R. (3d) 536 (C.A.), MacPherson J.A. writing for the Court of Appeal found that in cases of serious fraud, a penitentiary sentence in the range of three to five years is generally required. The Court of Appeal overturned the trial judge's sentence of a conditional sentence of two years less a day. Ultimately, the court imposed a three year penitentiary sentence.

[21] In *Dobis*, the accused pled guilty to theft and fraud over $5,000 for his conduct while working as a senior and trusted employee of a mid-size family company. The total amount stolen by the accused directly was $286,636.50 however the accused also contributed to company losses in the amount of $1.9 million through his reckless involvement in a Nigerian fraud scheme. The company was financially crippled as a result of the Dobis' actions. Ultimately, Dobis admitted to the crime prior to being discovered and pled guilty to the charges. The court noted that Mr. Dobis' personal circumstances were sympathetic; he was a university educated person, with a partner, and his mother depended greatly on him. These were his first criminal offences. Nonetheless, the court noted that these are not "important mitigating or differentiating" factors that warrant a reformatory sentence (at para. 37). In particular, the court held at para. 42:

> The serious nature and consequences of the offences committed by the respondent required the imposition of a penitentiary sentence. There is a real need to emphasize denunciation and, especially, general deterrence in the realm of large

> scale frauds committed by persons in positions of trust with devastating consequences for their victims…

[22] MacPherson J.A. also noted that in addition to the devastating consequences the criminal act had on the company and its employees, Dobis' actions, had they come to fruition, had a second victim: the government and people of Nigeria. The court explained that had the scheme been a real one, $35 million would have been removed from Nigerian citizens.

[23] The decision in *Dobis* was followed in *R. v. Bogart* (2002), 61 O.R. (3d) 75 leave to appeal to S.C.C. refused [2002] S.C.C.A. 398. In *Bogart*, the accused was a 45 year old physician with no previous criminal record who, for seven years, submitted false billings to OHIP defrauding the plan of nearly $1 million. After a preliminary inquiry the accused plead guilty and was given a conditional sentence of two years less a day. The Court of Appeal found the sentence to be demonstrably unfit and imposed a sentence of 18 months incarceration even in the presence of significant mitigating circumstances such as the appellant's illness, childhood abuse, and extensive involvement with and commitment to vulnerable community members suffering from AIDS.

[24] In discussing the principles of general deterrence the court noted that a fraud against a government agency is not a victimless crime as it results in a reduction in resources available to people who rely on government services. Moreover, citing *R. v. Proulx*, the court noted that where the need for general deterrence is "particularly pressing", incarceration will normally be the preferable option (at para. 33) and that "to be effective, usually a conditional sentence must be punitive" (at para. 40). In assessing the punitive nature of the conditional sentence, the court deemed the continued ability for the accused to work from home to be an insufficient restriction on his liberty. Of further note is that the court also highlighted the fact that detecting and investigating large-scale fraud is often very difficult and as such, is a factor that further justifies the need for a term of imprisonment to give effect to the principle of general deterrence.

[25] In the recent Court of Appeal case of *R. v. Drabinsky*, 2011 ONCA 582, 107 O.R. (3d) 595, the accused were the directing minds of a successful entertainment company. The company had raised hundreds of millions of dollars through various public offerings however the accused

had falsified their accounting records to create a misleadingly favourable financial picture. Ultimately, the company went into bankruptcy and the fraud came to light. The allegations were contested by the accused and the case proceeded to trial and the accused were convicted. On appeal, the Court of Appeal dismissed the conviction appeals but allowed the sentence appeals reducing the sentences imposed by the trial judge from 7 and 6 years to 5 and 4 years. Regarding the applicable sentencing principles, the court noted at para. 159 that:

> The deterrent value of any sentence is a matter of controversy and speculation. However, it would seem that if the prospect of a long jail sentence will deter anyone from planning and committing a crime, it would deter people like the appellants who are intelligent individuals, well aware of potential consequences, and accustomed to weighing potential future risks against potential benefits before taking action

[26] In *Drabinsky*, the court went on hold, in reference to the trial judge's finding that the appropriate range of sentence for large scale frauds is between five and eight years, that the trial judge was "correct in determining that crimes like those committed by the appellants must normally attract significant penitentiary terms well beyond the two-year limit applicable to conditional sentences" (at para. 164).

[27] Finally, of particular note, in *Drabinsky* the court held that in fraud cases, traditional mitigating factors such as the accused's prior good character and the personal consequences of the fraud cannot alone justify departure from the sentencing range (at para. 167). Such factors can only be considered in determining where in the range the sentence should fall. Other mitigating factors identified by counsel such as the accused's health problems, their contributions to the community, their strong family support, and the absence of criminal records also did not serve to justify a departure from the established range of sentence. With respect to what mitigating factors might justify a sentence below the applicable range, the court noted that a catalogue of such factors is impossible however one example would be an early guilty plea coupled with full cooperation and *bona fide* efforts to compensate those harmed (at para. 166). As previously noted, the Court ultimately reduced the sentences to 4 and 5 years for the respective accused. This reduction was in part due to the fact that the trial judge erred in attributing the company's ultimate bankruptcy almost entirely to the accused's actions.

Cases of bribery/corruption under the *Criminal Code*

[28] Similar to the fraud cases noted above, cases falling under ss. 119, 120, 121, 122, or 426 of the *Code* unanimously hold that due to the serious public nature of the offence, the overwhelming consideration in sentencing is that the sentence be a deterrent to others.

[29] For example, in *R. v. Cooper (No. 2*) (1977) 35 C.C.C. (2d) 35 (Ont. C.A.) the accused was charged under the *Criminal Code* (then s. 110(1)(b)) for conferring an improper benefit on a federal government employee when the accused's company was negotiating a grant from the employee's government department. The accused was ultimately sentenced to a term of imprisonment of 12 months in consideration of the length of time that had elapsed since the trial. In explaining the applicable sentencing principles, the court noted at para. 6:

> It has been urged by counsel for the Crown that the paramount consideration in this case is one of general deterrence. We agree with that submission. In our view, it is important for the business community to realize the seriousness of the offence which s. 110(1)(b) creates. It is equally important that the public at large should understand that the law stands ready to punish severely persons who breach the section…

[30] In a similar vein, in *R. v. Boudreau* (1978), 25 N.S.R. (2d) 63 at para.24 the Nova Scotia Supreme Court, Appeal Division noted with respect to an accused who was found guilty of conferring (cash) benefits on public officials:

> In cases like the present the paramount and overriding consideration must be deterrence – all other considerations must give way thereto. I say this because the very nature of the offence here involved. Those who would corrupt or pretend to have the ability to corrupt those in the government or public service must be given sentences strong enough to alert others who might have similar inclinations that the courts stand ready to punish severely such type of conduct.

[31] In *R. v. Woon*, [2005] Q.J. No. 22795, the accused plead guilty to four counts of giving a benefit to a public official and four counts of obstructing justice. The accused conspired with an Immigration and Refugee Board member in a scheme to exchange money for favorable immigration decisions. The accused was sentenced to three years imprisonment. With respect to the serious nature of the offences, the court noted that the "most" aggravating factor in such a situation is the harm done to Canadian society. At paras. 30-31 the court stated:

> it is clear that the public's perception of the administration of justice suffered a great deal and that the commission of these offences tarnished the reputation of the whole Immigration process… It is evident that these offences strike at the very foundation of Canadian democracy.

[32] Again, consistent with the fraud jurisprudence, the courts have considered whether the principles of sentencing in cases of corruption and bribing public officials can be met by the imposition of a conditional sentence or if a custodial term is required. In *R. v. Gyles*, [2003] O.J. No. 6249 at paras. 19-21 (Sup. Ct.), the court set out a useful list of cases where conditional sentences or penitentiary terms have been imposed. The court noted that each case turns on its own facts however with respect to cases where an accused received a conditional sentence, those were cases where there was a plea of guilty, where the offence was instigated by others or where the offender was following orders from senior officials. In contrast, in cases where a penitentiary term in the mid to upper range was imposed the cases were more serious involving repeated conduct, significant amounts of money, or a well-planned scheme.

[33] In *R v. Byrne* (2009), 286 Nfld & PEIR 191 (N.L.P.C.), the accused was charged with fraud as well as giving a reward to a government official in consideration for assistance in connection with a business transaction relating to the government. The sentence imposed for the offences was two years less a day and 18 months incarceration (concurrent) respectively. In commenting on the availability of a conditional sentence, the court stated at para. 42:

> In circumstances such as these, the need for denunciation is so pressing that incarceration in custody is the only suitable way to express society's condemnation of the offender's conduct. A message must be sent by the sentence imposed by this court that will help the public understand this conduct was highly reprehensible and that it carries with it serious criminal consequences.

[34] More recently, my colleague Aitken J. in *R. v. Serré*, 2013 ONSC 1732, 105 W.C.B. (2d) 769 reviewed the objectives of sentencing and the relevant case law in a case where a public official at the Ministry of Citizenship and Immigration was found guilty for having given special treatment to immigrants in exchange for secret payments. In explaining the paramount principles of deterrence and denunciation the court noted at para. 29: "All too frequently, white collar crime can appear to be harmless and victimless. However, it is anything but that. All Canadians, and our society as a whole, are victims when public officials breach the trust placed in them." The

accused sought a conditional sentence in the range of 18-24 months however on weighing of aggravating and mitigating factors, Aitken J. ultimately found that a reformatory sentence would not adequately address the sentencing objectives of denunciation and general deterrence and a four year term of imprisonment was ultimately imposed.

Disposition

[35] Mr. Karigar would you please stand.

[36] The evidence in this case discloses that you had a leading role in a conspiracy to bribe Air India officials in what was undoubtedly a sophisticated scheme to win a tender for a Canadian based company. Canada's Treaty Obligations as well as the domestic case law from our Court of Appeal requires, in my view, that a sentence be pronounced that reflects the principals of deterrence and denunciation of your conduct. Any person who proposes to enter into a sophisticated scheme to bribe foreign public officials to promote the commercial or other interests of a Canadian business abroad must appreciate that they will face a significant sentence of incarceration in a federal penitentiary.

[37] Mr. Karigar, I sentence you to be incarcerated for a period of three years in penitentiary.

"Hackland J."

Mr. Justice Charles T. Hackland

Released: May 23, 2014 (Orally)

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