"The Karrigar Sentence and the future of Anti-Corruption sentencing under the CFPOA",

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Casting the First Stone: The Karigar case[1] was the first real test of Canada's anti-corruption legislation. Nazir Karigar ("K") was convicted under a single count of offering a foreign bribe to a foreign official[2], contrary to s.3(1)(b) of the *Corruption of Foreign Public Officials Act*[3]. "It is important to note that the charge was "offering" because the entire scheme was an abject failure, and there was never any agreement to accept a bribe. K and his foreign superiors were singularly unsuccessful in bribing anyone, leaving K to suffer the consequences while his superiors avoided prosecution by fleeing to America. K is a singularly sympathetic figure. He is 67 years old who worked for a small local firm here in Ottawa's "Silicon Valley North' trying to win a contract to sell facial recognition software to Air India. He had no criminal record, there was a "high level of cooperation" on K's part with the prosecution and indeed K brought the whole scheme to the RCMP's attention. He was a go-between who admitted most of the constituent elements of the offence as well as volumes of documentary evidence, shortening the trial considerably. In fact the trial mainly involved legal argument about the vagaries of the CFPOA--- all of which went against the accused. So here we have the epitome of a respectable business person who got caught up in illegal scheme and upon realizing the error of his ways, did the right thing. So why sentence him to three years in prison?

The Need to Repair Canada's Reputation: K was in the wrong place at the wrong time in history. The court entertained witnesses giving evidence, and Crown submissions that (1) as a general proposition these were hard cases to prosecute, (2) Canada had a reputation of leniency, (3) that enhanced penalties made for a better business climate in Canada. While the court dismissed these submissions as largely irrelevant, they clearly played a role in the harshness of the sentence for someone who was the middle cog between more powerful actors who had not been extradited from the United States and a few underlings who had been able to negotiate immunity.

The American Comparable: K's timing was abysmal. The Court reviewed the three previous plea bargains under the CFPOA, noting in passing that American cases were of limited value given their use of grids, sentencing guidelines, culpability scores and advisory ranges. Nevertheless the judicial rhetoric of corruption as a "*pernicious disease*" that *"needs to be resisted by all citizens"* has an 'over the top' quality that is more attuned to the politics of our cousins south of the border than the more restrained judicial discourse we have become accustomed to here in Canada.

Corruption is Fraud: The court seemed to be on stronger ground when it looked for guidance in fraud cases like the Ontario Court of Appeal's fraud trilogy of *Dobis*[4], *Bogart*[5], and

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1 [2014] ONSC 3093

2 [2013] O.J. 3661 (Sup Ct)

3 SC 1998, c.34 ("CFPOA"). The recent amendments did not apply to this case

4 (2002) 58 O.R. (3d) 538 (CA)

5 (2002) 61 O.R. (3d) 75 (CA)

Drabinsky[6] as sources for the appropriate sentence, as bribing foreign officials is, indeed, a form of fraud. The difficulty, of course, was in finding an analogy between cases involving between employee embezzlement, a false billing scheme against OHIP, and a multi-million management fraud of a public company, and Karrigar, where the accused tried to bribe a foreign official with $450,000, which, according to the accused, was a common business practice in India. All the court could muster by way of guidance from these higher court decisions was the need to be strict in the face of serious fraud, as fraudsters are calculating characters who can, and will, be deterred by harsher sentences.

Corruption is Bribery: Having found little of assistance in the fraud cases, the court turned to several domestic bribery cases for guidance. Once again we are reminded of the serious nature of bribing public officials.

The Court's conclusion: Because K played "*a leading role in a conspiracy to bribe Air India officials ... Canada's Treaty Obligations [caps in original] as well as the domestic case law from our Court of Appeal requires... that a sentence be pronounced that reflects the principles of deterrence and denunciation of your conduct. Any person who proposes to enter into a sophisticated scheme to bribe foreign officials... must appreciate that they will face a significant sentence of incarceration in a federal penitentiary.*"

The Take-Away: Clearly the Bench is sensitive to the fact that anti-corruption is the international cause de jour. While paying lip service to the fact that the popular perception that Canada is "soft" on corruption, and that American guidelines are both supposed to be irrelevant, there is simply no avoiding the conclusion that both of these elements in the political ether coloured the verdict in this case, and will likely continue to do so for the foreseeable future.

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6 (2011) 107 O.R. (3d) 595 (CA)