

**CITATION:** R v. Barra and Govindia, 2018 ONSC 57  
**COURT FILE NO.:** 16-20006  
**DATE:** 2019-01-11

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
HER MAJESTY THE QUEEN	)	
	)	Emma Beauchamp and Allyson Ratsoy, for
Applicant	)	the Federal Crown
	)	
<b>– and –</b>	)	
	)	
Robert Thomas Barra and Shailesh Hansraj	)	Seth P. Weinstein and Naomi M. Lutes for
Govindia	)	Mr. Barra
	)	
	)	Graeme A. Hamilton and Alannah
Respondents	)	Fotheringham for Mr. Govindia.
	)	
	)	
	)	
	)	
	)	<b>HEARD: completed on Oct. 6<sup>th</sup>, 2018</b>

**REASONS FOR DECISION**

**R. SMITH J**

[1] Robert Barra (“Barra”) and Shailesh Govindia (“Govindia”) are charged with committing an offence under s. 3(1) of the *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34 (“CFPOA” or “Act”). The indictment alleges that between 2005 and 2008, Barra and Govindia agreed to give a benefit (a bribe) to foreign public officials in order to obtain an advantage in the course of business, namely to allow Cryptometrics Canada to obtain the contract with Air India to install facial recognition software at various airport locations.

[2] The Crown alleges that there was an agreement or conspiracy among several individuals that involved two phases. The first phase involved Mr. Barra, Mr. Berini, Mr. Karigar and others agreeing to pay bribes totalling \$200,000 to various Air India employees in charge of the bidding

process and \$250,000 to the Indian Minister of Civil Aviation, Praful Patel, to allow Cryptometrics Canada to obtain the contract with Air India.

[3] The second phase of the alleged agreement or conspiracy involved an agreement between Mr. Barra, Mr. Berini, and Mr. Govindia to pay a bribe of \$500,000 (USD) to the Indian Minister, Praful Patel, in order to obtain the contract with Air India for Cryptometrics Canada. When the relationship with Mr. Karigar fell apart, the Crown alleges that Mr. Govindia replaced Mr. Karigar in a continuous conspiracy to bribe foreign public officials to obtain the contract.

[4] The accused make the following submissions:

- (a) that the co-conspirator's exception to the hearsay rule does not apply in this case;
- (b) that Mr. Berini was not a credible witness and all of his evidence should be disregarded;
- (c) That the Crown has failed to prove beyond a reasonable doubt that Barra was aware of or ever agreed to pay a bribe to a foreign public official, including Minister Patel, to obtain the contract with Air India for Cryptometrics Canada;
- (d) That there are other reasonable inferences other than bribery that can be made to explain why Barra paid the amounts of \$200,000 and \$250,000 to Mr. Karigar;
- (e) That the Crown has failed to prove the existence of a continuous conspiracy to bribe foreign public officials over a period of three years; rather, they allege that there were three discrete conspiracies, or at least two separate conspiracies. The first two conspiracies involved the first agent, Mr. Karigar, and they submit that there was a separate conspiracy involving the second agent, Mr. Govindia. The accused argue that they should both be acquitted because the Crown has failed to prove that they both participated in a single continuous conspiracy to bribe Indian public officials. The accused also submit that they both should be acquitted even if the Crown proves beyond a reasonable doubt that Barra and Berini agreed with Govindia to bribe the Indian Minister in the third phase of the alleged conspiracy;

- (f) Mr. Govindia's testimony that he never had any intention to bribe Minister Patel should be believed, notwithstanding that the tape recording of the meeting between Barra, Berini, and Govindia shows that he agreed to pay \$500,000 to the Indian Minister to obtain the contract. Alternatively, his evidence raises a reasonable doubt about whether they agreed to offer a bribe to Minister Patel; and,
- (g) Finally, that Mr. Govindia should be acquitted because he was not aware of the fact that the Canadian *Corruption of Foreign Public Officials Act* applied to him when he agreed to pay a bribe of \$500,000 to Minister Patel at the meeting with Barra and Berini in New York City on November 2, 2007.

### **Background and Findings of Fact**

[5] Cryptometrics Canada Inc. ("Cryptometrics Canada") is a Canadian company carrying on business in Kanata in Ottawa, Ontario. At the material time, Cryptometrics Canada was a wholly owned subsidiary of Cryptometrics Inc. ("Cryptometrics US"). The two entities are collectively referred to as Cryptometrics.

[6] Mr. Barra was a co-Chief Executive Officer (CEO) of Cryptometrics US, which he controlled. Cryptometrics US provided the required funding for Cryptometrics Canada's operations. Mr. Barra was also the controlling mind of Cryptometrics Canada as a result of being the controlling mind of Cryptometrics US.

[7] Mr. Berini was the Chief Operating Officer (COO), Senior Vice-President (SVP), and President of Global Sales of Cryptometrics US and Cryptometrics Canada. Mr. Berini reported directly to Mr. Barra. Mr. Berini, as the COO of Cryptometrics Canada, spent a substantial amount of his time working at Cryptometrics in Kanata or elsewhere working on Cryptometrics Canada's projects.

[8] Mr. Bell worked for Cryptometrics Canada in Kanata and reported directly to Mr. Berini. He was involved with the technical aspects and some of the financial aspects in bidding for the Air India contract.

[9] Between 2005 and the end of 2007, Cryptometrics Canada prepared a bid for a contract with Air India to supply it with facial recognition software. The parties involved with this bid for Cryptometrics were Berini, Barra, Bell, Karigar, and Shah. The relationship between Cryptometrics and Karigar broke down in 2007 and in late 2007 Mr. Govindia was contacted to assist in obtaining the Air India contract.

[10] Mr. Karigar contacted Mr. Bell in September of 2005 to discuss selling Cryptometrics Canada's facial recognition software to Air India. Mr. Karigar was the first agent retained by Cryptometrics to assist with obtaining the Air India contract. Mr. Karigar was convicted by Hackland J. of an offence under the Act, namely of agreeing to pay bribes of \$200,000 and \$250,000 to foreign public officials to obtain the contract with Air India for Cryptometrics Canada. The decision of Hackland J. was a separate trial and is not binding on these accused persons.

[11] Shailash Govindia was the CEO of Emerging Markets Groups Holdings Ltd. "(EMG)", and as such was a senior officer, as defined in s. 2 of the Criminal Code.

## **ISSUE #1**

### **Does the co-conspirators exception to the hearsay rule apply in this case?**

[12] The first phase of the alleged conspiracy involved an agreement between Barra, Berini, Bell, Karigar, and Shah to pay a bribe of \$200,000 to various Air India officials to down select Cryptometrics Canada's bid, and a further \$250,000 to Minister Patel to approve the contract with Air India.

[13] The second phase of the conspiracy involved an alleged agreement between Barra, Berini, and Govindia to pay a bribe of \$500,000 to the Indian Minister Patel to obtain the contract with Air India for Cryptometrics. This alleged agreement was tape recorded by Barra and Berini when they met with Mr. Govindia in New York City on November 2, 2007. The Crown alleges that this was a continuation of the same conspiracy to bribe Indian public officials to obtain the contract with Air India for Cryptometrics, only one of the members has changed, namely Govindia replaced Karigar as a member of the conspiracy.

**Phase 1 of the conspiracy involving Karigar and others**

[14] In Mr. Karigar's trial, his email correspondence with Mr. Bell, Mr. Berini, and Mr. Barra was admissible against him as an admission against interest, as he was the accused in the proceeding. However, for the purposes of this trial, Karigar's email correspondence is hearsay evidence.

[15] In *R. v. Carter*, [1982] 1 S.C.R. 938, the Supreme Court set out the three steps involved to apply the "co-conspirators" or "co-actors" exception to the hearsay rule.

**Step #1 of the Carter Test**

[16] The first step is to decide whether the Crown has proven beyond a reasonable doubt that a conspiracy existed, namely was there an agreement to offer a benefit (a bribe) to Air India public officials and to Minister Patel. At this stage, all of the evidence is considered, including any hearsay statements made by any of the alleged conspirators or co-actors.

[17] A summary of the evidence supporting a finding that a conspiracy existed to bribe Air India officials and Minister Patel to obtain the contract during phase 1 is as follows:

- (a) In April 2006, Mr. Berini and Mr. Bell met with Mr. Karigar and Mr. Shah in India to discuss the Air India project. Shah or Karigar advised them that he would require money because officials would have to be paid in order to obtain the contract. Shortly after this meeting occurred, Mr. Berini prepared a spreadsheet that identified bribes to be paid to various officials. Mr. Berini, Mr. Bell, and Mr. Barra received copies of these spreadsheets showing the payment of the bribes.
- (b) On June 19, 2006, Karigar emailed Berini and Bell to request the \$200,000 for the "Captain" before he travelled to Italy to pick up his shares. The Captain is identified in the spreadsheet (filed as Exhibit #3 of these proceedings), starting at tab 2 through to tab 15. On the fifth page of tab 15, the spreadsheets state that the Captain and MMD were receiving \$200,000, and the Indian Ministers were receiving \$250,000, in addition to other ongoing payments as the contract evolved.

- (c) On July 18, 2006, Karigar advised Berini and Bell that MMD had problems with the valuation of the shares.
- (d) On August 3, 2006, Cryptometrics Canada was shortlisted along with IPCON for the Air India project. On the same date, Mr. Karigar advised Mr. Berini by email that CMD would be travelling to New York and wanted \$5,000 to spend and that both CMD and the Captain were pressuring him about receiving their shares.
- (e) On September 3, 2006, Mr. Berini emailed Mr. Bell a copy of the draft Air India/Cryptometrics Canada contract along with a copy of the latest version of a spreadsheet amortizing the bribes over a period of time to ensure the profitability of the contract.
- (f) Mr. Barra, on behalf of Cryptometrics US, and Mr. Karigar entered into an agreement dated March 6, 2007, whereby \$250,000 (USD) was to be transferred to Mr. Karigar in Mumbai to secure the Air India contract. The funds were transferred to Mr. Karigar's bank account on March 6, 2007.
- (g) On April 17, 2007, Barra inquired of Berini, "Are we finally going to receive a letter today from A.I. It has been over six weeks. I cannot understand these delays on a continuous basis". This time period is almost exactly six weeks from the time the transfer of \$250,000 was made to Karigar on March 6, 2007.
- (h) On April 19, 2007, Mr. Berini objected to Mr. Karigar transferring the \$250,000 to Mr. Dhoble. Mr. Berini demanded the funds be returned. Karigar responded that he put the money in "escrow" with "Dhoble" to prevent his wife from dipping into the funds to pay for school fees. Mr. Karigar further wrote that he would recover the funds from Dhoble but "I don't think Dhoble will react favourably to that. Please be advised that I have alerted you to this fact and the consequences are not my responsibility". Mr. Karigar sent an email on April 20, 2007, stating that he had met Praful Patel and had discussed "increments and that the project would be cleared right away".

- (i) On May 15, 2007, Ms. Dubé, the Trade Commissioner for Canada in Mumbai, testified that she met with Karigar and Berini. During the meeting Mr. Karigar stated that Cryptometrics had paid a bribe to Praful Patel, the Minister of Civil Aviation in India, through an agent in order to clear the process and obtain the Air India contract. Karigar confirmed that the bribe money had been received by Patel. Ms. Dubé testified that she was shocked and advised them that they could be prosecuted for this action.
- (j) On July 12, 2007, Karigar emailed Berini stating, “after P.P. took the money, I thought all was done and went ahead”. Karigar continued, “I guess by now you know why Patel has the Cryptometrics project on hold!”
- (k) On July 28, 2007, Mr. Karigar emailed Mr. Bell asking him to review a draft of an email he was going to send to Mr. Berini, who had cut off contact with him.
- (l) On August 13, 2007, someone called “Buddy” sent an email to the fraud section of the US Department of Justice advising that he had information about US citizens paying bribes to foreign officers.
- (m) On November 2, 2007, Mr. Berini and Mr. Barra met with Mr. Govindia at the Cryptometrics’ US office in New York City.
- (n) Both Mr. Berini and Mr. Barra tape recorded their meeting with Mr. Govindia where they agreed to initially transfer \$650,000 to Govindia, \$500,000 of which would be paid to Minister Patel in order to approve the contract between Air India and Cryptometrics. The remaining \$150,000 was for Govindia’s expenses. After the contract was approved, a further \$1.5 million was to be paid to Minister Patel and a further \$250,000 to Mr. Govindia. In addition, they discussed a deferred success fee of \$2 million for Minister Patel and \$1 million for Mr. Govindia.
- (o) Shortly after the November 2, 2007 meeting, Barra wired the sum of \$650,000 (USD) to Govindia and sent a Memorandum of Understanding (“MOU”) that was consistent with \$500,000 being paid to Minister Patel to approve the contract.

[18] Mr. Barra was the CEO and controlling mind of Cryptometrics US and authorized all of the payments.

[19] Mr. Berini testified that he kept Mr. Barra fully informed of all aspects, all discussions, and all email communication he had with Mr. Karigar. He also testified that he sent Barra copies of all the spreadsheets (Exhibit #3), which disclosed the bribes of \$200,000 to the Captain and to MMD and \$250,000 to Ministers. Mr. Berini also testified that he advised Mr. Barra by telephone after the meeting where Karigar or Shah told him and Mr. Bell that bribes would have to be paid to secure the contract. I accept Mr. Berini's evidence in this regard.

### **Credibility of Mr. Berini**

[20] The accused made a strong attack on Mr. Berini's credibility. Berini testified that the agreement to make the payment of the \$200,000 to Air India officials for the down select of Cryptometrics Canada was made before he became involved with Cryptometrics. He also testified that he believed that the payment of the \$200,000 was made before the funds were wired to Karigar on June 21, 2006. He testified that he was advised by Karigar after the funds were wired that the money was used to bribe Air India officials for the down select.

[21] I can accept some, all, or none of Mr. Berini's evidence. I note that Mr. Berini has also been charged with the same offence and will face trial in the coming year and is hoping for lenient treatment as a result of cooperating with the prosecution. As a result, his evidence requires special caution. It would be dangerous to convict only on Mr. Berini's uncorroborated evidence. I must also look for other independent evidence confirming material parts of his evidence.

[22] Mr. Berini testified voluntarily on behalf of the Crown over several days and was presented with many documents and correspondence that were mostly prepared in 2006 and 2007, over 10 years ago. I do not accept his evidence that he was willing to testify in the Karigar trial but was never asked to give evidence. In the Karigar case, the Crown had advised the court in an agreed statement of facts that Berini's lawyer had advised that he would exercise his Fifth Amendment rights if called to testify in Karigar's trial. Mr. Berini also admitted that he had lied to the FBI and the Department of Justice prosecutors agents when initially questioned, as he



denied any involvement in bribing Air India officials. He testified that he was deflecting, but ultimately agreed that he had lied to the Department of Justice agents.

[23] I accept Ms. Dubé's evidence that Karigar told her that he had paid \$250,000 to Minister Patel and that she advised Mr. Berini and Mr. Karigar that this was illegal. I find that Mr. Berini tried to minimize his involvement in the payments of the \$200,000 and \$250,000 the latter as a bribe to Minister Patel.

[24] I also find it unlikely that Berini told Cryptometrics' lawyer in 2008 that they should come clean and "get out from under it".

[25] However, I also find that Mr. Berini did not show any animus towards Mr. Barra or seek to blame Barra for agreeing to pay bribes to Air India public officials and the Minister. He seemed to view the payment of bribes as part of doing business in India and it was up to Mr. Barra to decide if he wanted to make these payments to obtain the contract. I also accept Mr. Berini's evidence that he kept Mr. Barra fully informed, often by telephone, as to all aspects of the Air India project as it progressed. Mr. Barra was the controlling mind of Cryptometrics and Berini always followed Barra's instructions. There was no evidence that Berini ever misled Mr. Barra on anything. Berini suggested tape recording the meeting with Mr. Govindia, which was not a smart idea, but he did not hide anything from Mr. Barra. In fact Barra asked Berini to get recording equipment for him as well, which he did.

[26] This was a very important contract for Cryptometrics and Mr. Barra controlled all spending very closely. Mr. Barra and his investors planned to take Cryptometrics public if the Air India contract was obtained. Mr. Barra had a lot to gain whereas Mr. Bernini and Mr. Bell were just senior employees and did not have any authority to decide to pay the bribes. Mr. Barra had this sole authority.

[27] The spreadsheets sent to Mr. Barra clearly show the payment of some initial amounts followed by the payment of millions of dollars in bribes to Indian public officials. These spreadsheets confirm Barra's knowledge that the purpose of the payments of the \$200,000 and the \$250,000 were to confer a benefit on Indian public officials to obtain the contract for

Cryptometrics. They corroborate Mr. Berini's evidence that he kept Mr. Barra fully informed of all aspects of the Air India project, especially any aspect involving the payment of money.

[28] The tape recorded meeting with Govindia in New York also confirms Berini's evidence and confirms that Barra was fully aware that \$500,000 of the \$650,000 sent to Mr. Govindia, was to bribe Indian Minister Patel in order to obtain approval of the contract between Air India and Cryptometrics Canada.

[29] Notwithstanding some memory problems which would be expected when testifying about matters that occurred 10 years ago, and his untruthful statements to the FBI, and his attempts to minimize his involvement in the payment of bribes to Karigar, I found Berini to be otherwise a credible witness who had voluntarily decided to testify on behalf of the prosecution without any immunity deal in place.

#### **Disposition of Step #1 of Carter Test**

[30] After considering all of the evidence, I am satisfied that the Crown has proven beyond a reasonable doubt that a conspiracy existed. Namely, there was an agreement between Barra, Berini, Karigar, and others to offer a bribe to Air India officials and to Minister Patel, and then between Barra, Berini, and Govindia to offer a bribe to Minister Patel. All of the payments to foreign public officials had the same objective, namely securing the contract with Air India for Cryptometrics Canada.

#### **Step #2 of Carter Test**

[31] I am satisfied on a balance of probabilities that Mr. Barra was part of the conspiracy with Mr. Berini, Mr. Karigar, and Mr. Shah to pay bribes of \$200,000 and \$250,000 to Air India officials and to Minister Patel in order to obtain the Air India contract for Cryptometrics Canada. Mr. Barra received a copy of the spreadsheets showing that bribes were being paid to various Air India officials. With this knowledge, Barra made the payments to Karigar knowing the funds would be paid to the Indian officials to obtain the contract. Mr. Berini testified, and I accept his evidence, that he informed Barra that either Karigar or Shah told him that they would have to pay bribes to people in order to obtain the contract.

[32] Both Mr. Bell and Mr. Berini testified that Mr. Barra was the Co-CEO and controlling mind of Cryptometrics and that he approved all decisions that involved any spending of money. Mr. Vitale (the other co-CEO) was not active in the management of Cryptometrics. Mr. Bell testified that Mr. Barra approved all expenditures of money for the Air India project, including amounts as small as \$2,000, \$4,000 or \$5,000 for any international travel. Each expenditure was approved separately by Barra. If Mr. Barra scrutinized and approved expenditures as small as \$2,000, then I infer that he would have known the exact purpose of the expenditures of \$200,000 and \$250,000 when they were made.

[33] Finally, Mr. Barra was a key part of the agreement to pay bribes to Air India officials and Minister Patel because he controlled the payment of all monies and he made the payments with knowledge of their purpose, as shown on the cash flow spreadsheets.

### **Step #3 of the Carter Test**

[34] The final step is to decide if each accused is guilty beyond a reasonable doubt by examining the co-conspirators' statements that were "in furtherance" of the unlawful conspiracy. The statements made in the emails from Karigar are linked in time to the payments of \$200,000 and \$250,000 paid to Karigar by Cryptometrics US, and authorized by Mr. Barra. I am satisfied that the statements made by Karigar in his emails and in his utterances before the Trade Commissioner were in furtherance of the agreement or conspiracy to bribe Air India officials and the Minister to obtain the contract on behalf of Cryptometrics. While they were made after the money was sent to Karigar, they were still made while pursuing the objective of obtaining the Air India contract by paying bribes.

### **Credibility of Robert Bell**

[35] I found Mr. Bell to be a credible witness and I accept his evidence. I do however find that he, like Mr. Berini, tried to minimize his involvement and did not wish to be involved in the payment of bribes as he was only a salaried employee. He agreed that he had an immunity agreement with the prosecution. He testified in a straightforward manner and explained the various spreadsheets that he prepared or received which showed substantial bribery payments to Air India officials and the Indian Minister. The documentary evidence also corroborated Mr.

Bell's testimony. He was involved in preparing the spreadsheets showing the cash flow projections for the proposed bid, which showed the payment of bribes to Indian public officials, and with some technical parts but testified the main decisions were made by Mr. Berini and Mr. Barra. Any decisions involving the payment of money were made only by Mr. Barra.

[36] Mr. Bell was aware that bribes would be paid to government officials to obtain the contract because the payment of bribes to public officials was discussed at the meeting on April 6, 2006, in the presence of both Mr. Bell and Mr. Berini, before Mr. Bell allegedly walked out of the meeting. Subsequent to this meeting, spreadsheets were sent to Bell by Berini; Bell and Berini both reviewed and worked on these spreadsheets, which showed substantial bribes being paid to foreign public officials, including amounts of \$200,000 to the Captain and MMD and \$250,000 to the Indian Minister, as well as further payments to the Minister at a later date.

#### **Disposition of Issue #1**

[37] For the above reasons, I am satisfied that the co-conspirators exception to the hearsay rule applies in this case applying the *Carter* criteria and I will consider all of the co-conspirators statements made in furtherance of the conspiracy when making my decision.

#### **ISSUE #2**

**Has the Crown proven beyond a reasonable doubt that Barra knew that the \$200,000 sent to Karigar was to bribe Captain Mascarenhas and MMD so that Cryptometrics Canada's bid would be down selected?**

[38] On June 19, 2006, Karigar emailed Berini and Bell stating that they had to get the \$200,000 for "the Captain" before he went to Italy to pick up his shares. The spreadsheet at Exhibit #3, Tab 5, p. 3 refers to "upfront shares" for the Captain having a value of \$500,000.

[39] Barra forwarded \$200,000 to Karigar on June 21, 2006, after Karigar emailed on June 16, 2006, requesting funds in regards to the selection of the two companies. Karigar emailed Berini again on June 21, 2006, stating that the Captain and MMD "need to see the money"; Barra sent the funds the same day.

[40] Mr. Berini testified that the amount of \$250,000 was approved by his predecessor and he believed it was for infrastructure and equipment costs. The spreadsheet at Exhibit #3, Tab 15 (fifth page from the front) contained an amount of \$200,000 for Captain Mascarenhas and \$250,000 for “Ministers”. The email to Barra from Berini containing this spreadsheet was dated April 25, 2007. Barra replied to Berini by email and attached the same spreadsheet, however, on the fifth page the names of the Captain and MMD were removed from the chart.

[41] Mr. Berini was present at the meeting in April 2006, where Karigar or Shah advised them that they would have to pay money to public officials to obtain the contract with Air India. Mr. Barra received the spreadsheets, which indicated that substantial bribes would be paid to foreign public officials in the amounts of \$200,000 for the Captain and MMD.

### **Disposition of Issue #2**

[42] I find that the above evidence supports a finding beyond a reasonable doubt that Barra was aware that the \$200,000 was a bribe for the Captain and MMD to down-select the Cryptometrics bid.

### **ISSUE #3**

#### **Has the Crown proven beyond a reasonable doubt that Barra knew that the Captain or MMD were Foreign Public Officials?**

[43] Bribery is a specific intent offence and I find that the offence under s. 3(1) of the CFPOA is also a specific intent offence.

[44] In *Rex v. Smith* (1921), 67 D.L.R. 273 (Ont. C.A.) at p. 275, the Court of Appeal dismissed the charge of bribery of a peace officer and held that the *mens rea* required that the accused must know that the person receiving the bribe was a peace officer. The Court of Appeal stated the following at p. 275: “Knowledge by the accused of the official character of the person to whom the bribe is offered is an essential element of the bribery.”

[45] The evidence does not prove beyond a reasonable doubt that Barra or Berini knew that Captain Macarenhas or MMD or any of the other employees of Air India who received bribes were foreign public officials as defined in the Act. Mr. Bell and Mr. Berini both testified that

they believed that the Captain and MMD were employees of Air India which they believed was a Crown Corporation. They were not aware that these employees of Air India were foreign public officials. This was a reasonable inference to make in the circumstances. Air India is not a Crown Corporation and is owned directly by the Indian government, which made the Captain and MMD foreign public officials as defined under the Act.

### **Disposition of Issue #3**

[46] I therefore find that the Crown has failed to prove beyond a reasonable doubt that Mr. Barra had the required *mens rea* to agree to give a benefit, namely a bribe, to Captain Macarenhas and the other Air India employees, in order to guarantee that the Cryptometrics bid would be down-selected, because he was not aware that they were foreign public officials as defined under the Act.

### **ISSUE #4**

#### **Has the Crown proven beyond a reasonable doubt that Barra knew that the \$250,000 was paid to Minister Patel to obtain the contract for Cryptometrics?**

[47] There is no question, nor did defence argue, that Barra did not know that Praful Patel, the Indian Minister of Civil Aviation, was a foreign public official.

[48] The evidence which supports an inference, beyond a reasonable doubt, that Barra agreed with Berini and Karigar to pay \$250,000 to Praful Patel to obtain the contract with Air India includes the evidence referred to under **Issue #2** and the following:

- (a) Mr. Berini and Mr. Bell both testified that they attended a meeting in Mr. Berini's hotel room in April 2006 with Karigar and Shah, where they were told that Karigar or Shah would be paying bribes to various individuals, "including the Minister", to obtain the contract with Air India.
- (b) Mr. Berini testified that he telephoned Barra and reported what he had been told by Karigar and Shah shortly after this meeting. There are numerous emails from Berini to Barra that support Berini's claim that he consistently reported back to Mr. Barra.

- (c) Shortly after the April 2006 meeting, Mr. Bell received an updated spreadsheet with a pricing structure showing bribes to Air India officials and “Ministers”. Barra acknowledged receipt of the spreadsheets showing the payment of bribes to the “Ministers” but submits that he didn’t notice the bribes on the spreadsheet. I reject this submission and find that Barra carefully scrutinized all documents that involved the payment of money by Cryptometrics. I also find that Barra had knowledge from Mr. Berini and from having received a copy of the spreadsheets that showed the payments of bribes to the Indian Ministers. This evidence corroborates that Barra agreed with Karigar and Berini, who were involved in preparing the spreadsheets, to pay a bribe of \$250,000 to Minister Patel to obtain the Air India contract.
- (d) Karigar had demonstrated that he had influence with Air India by obtaining inside information on the bidding and by having Cryptometrics down-selected. Karigar convinced Barra, Berini, and Bell that they had to do what he said was necessary to obtain the contract.
- (e) There was an exchange of emails between Karigar, Berini, and Barra which included threats of “deals being blown” if the funds were not transferred which is evidence of an agreement having been reached.
- (f) The evidence of Ms. Dubé that Karigar told her in the presence of Mr. Berini that he had paid \$250,000 to Minister Patel is conduct after the fact, which is consistent with his having been part of an agreement with Berini and Barra, to pay the sum of \$250,000 to the Minister to approve the contract.
- (g) In addition, Barra prepared an agreement with Karigar for the \$250,000, essentially stating that he would return the funds if a signed letter of intent for Air India Tender #42018 was not signed and sent to Cryptometrics. I draw the inference that Barra knew that the \$250,000 was intended to be used to pay Minister Patel in order to obtain a signed contract between Air India and Cryptometrics.

- (h) In March 2007, Barra transferred \$250,000 to Karigar, fulfilling his part of the agreement to pay a bribe to Minister Patel.

**Disposition of Issue #4**

[49] Based on all of the above evidence, I am satisfied that the Crown has proven beyond a reasonable doubt that Mr. Barra knew and agreed to pay \$250,000 to Minister Patel as shown on the spreadsheets, including Exhibit #3, and that he agreed with Karigar and Berini to pay a bribe of \$250,000 to Minister Patel to obtain the contract with Air India on behalf of Cryptometrics Canada. The meeting with Ms. Dubé was in furtherance of the ongoing conspiracy, because it occurred while they were seeking the assistance of Ms. Dubé to get Minister Patel to approve the contract.

**ISSUE #5**

**Did Barra and Govindia agree to pay a bribe of \$500,000 to Indian Minister Patel to obtain the contract with Air India?**

[50] Mr. Berini did not advise Mr. Govindia that there had been a previous attempt to bribe Minister Patel through Mr. Karigar. The documents exchanged between Berini, Barra and Govindia, and between Cryptometrics and EMG (Mr. Govindia's company) more generally, do not indicate that Cryptometrics had previously attempted to secure the Air India contract using illegitimate means. When providing EMG with background information shortly after being introduced, Mr. Berini declared in an email that Cryptometrics' "entire dealing with Air India has been through a formal Tender, and Air India's specific Tender policies and procedures process that dictate the rules of engagement without any deviations. Attached to that email was a detailed summary of Cryptometrics' involvement in the Air India project, which made no mention of any bribes being requested or paid, or any other unlawful activities.

[51] Moreover, when Mr. Govindia explicitly asked Mr. Berini if Cryptometrics worked with any "influencers" during a telephone call, the week prior to the recorded meeting on November 2, 2007, Mr. Berini categorically denied this in an email response. Similarly, having been asked by Mr. Govindia for the names of the other companies who bid the Tender, Mr. Berini denied



knowing who they were, not revealing that Cryptometrics had acquired this inside information from Mr. Karigar in May 2006. Mr. Berini also made no mention of the IPCON bid.

[52] The main evidence supporting the Crown's allegation that there was an agreement to pay \$500,000 to Minister Patel to obtain the contract is a tape recording of the meeting between Barra, Govindia, and Berini on November 2, 2007, in New York City in Cryptometrics' US boardroom. A transcript of the tape recording of the meeting shows that Mr. Govindia proposed an agreement to Mr. Barra and Mr. Berini, whereby he would pay \$500,000 to Minister Patel and keep \$150,000 for his expenses, as set out on pp. 7 and 10 of the transcript. At p. 7 of the transcript, Govindia tells Mr. Barra that Minister Patel agreed with his proposal. Barra asked, "but Patel agrees with this?" and Govindia replied, "yes". At the bottom of p. 7 Mr. Barra stated, "Oh so it's \$500,000.00 for Patel and \$150,000.00 for you?" and Govindia responded, "yeah".

[53] At p. 9 of the transcript Mr. Govindia said, "Uh, you know if it's due upon the, the release of the 'inaudible'. And then I'm, I'm basically your, your custodian". Mr. Barra replied, "Okay" and Mr. Govindia said, "Effectively I am acting as on both sides. That I am the guarantor on both sides to be honest on this right. I mean if I tell you it's done. If I tell him it's done. Both parties have a win win on this".

[54] At p. 10 of the transcript, Mr. Barra stated:

Now is this when we sign the contract that Patel gets paid? Or is this prior? Because I know immediately it is \$500,000.00 and then, [background noise] so you already got five hundred (500) without anything. And now it's now (100) one point five million (1,500,000). How does that work?

[55] I am satisfied beyond a reasonable doubt that Mr. Barra and Mr. Berini agreed with Mr. Govindia to pay an initial bribe of \$500,000 to Minister Patel to obtain the contract with Air India for Cryptometrics. The evidence also supports the finding that Mr. Barra, Mr. Berini, and Mr. Govindia were all members of a continuous conspiracy to pay bribes to Minister Patel in order to obtain the desired object; namely, a signed contract between Air India and Cryptometrics.

[56] I also find beyond a reasonable doubt that Mr. Barra acted in furtherance of that conspiracy by agreeing to pay the bribe at the meeting in New York City on November 2, 2007, and by forwarding the \$650,000 pursuant to the agreement reached sometime between November 2, 2007, and the date the funds were forwarded. Barra and Berini agreed with Govindia to pay the bribe of \$500,000 to Minister Patel in order to obtain an advantage in the course of business; namely, to obtain the Minister's approval of the contract between Air India and Cryptometrics.

[57] Mr. Govindia testified that during the tape recorded meeting on November 2, 2007, he agreed to pay a \$500,000 bribe to Minister Patel to obtain the Air India contract, but that his agreement recorded in the transcript was a façade and that he never intended to pay a bribe of \$500,000 to Minister Patel. Govindia testified that Mr. Berini suggested that he propose to pay a bribe to Minister Patel because Barra was expecting a bribe to be paid and he would be more likely to obtain the consulting contract if he proposed to bribe the Minister.

[58] Mr. Govindia went further and explained that it was a serious error of professional judgment to have pretended to agree to bribe Minister Patel. He testified that on the following morning at breakfast, he confessed to Mr. Barra that he was not going to pay \$500,000 to Minister Patel in order to obtain the contract, but that in fact the \$500,000, in addition to the \$150,000, would be paid only to him as his consulting fee. He further testified that Mr. Barra was so impressed with his honesty that he told him to keep the extra \$500,000 for himself and that they proceeded on this basis.

**R. v. W. (D.) Test**

[59] In *R. v. W. (D.)*, [1991] 1 S.C.R. 742 at p. 758, the Supreme Court held that I must instruct myself as follows:

- (a) First, if I believe evidence that raises a defence, I must acquit;
- (a) Second, if I do not believe evidence that raises a defence, but I am left in reasonable doubt, I must acquit;

- (b) Third, even if I am not left in doubt by evidence raising a defence, I must ask myself whether, on the basis of evidence I accept, I am convinced beyond a reasonable doubt by that evidence of the accused's guilt.

[60] I do not believe Mr. Govindia's evidence that he was only pretending to agree to pay a bribe to the Minister. I find his evidence, that he confessed to Mr. Barra the following morning at breakfast that the money was all for him and that he was only pretending to agree to pay the bribe of \$500,000 to the Indian Minister during their tape recorded meeting, to be completely unbelievable. Mr. Govindia blamed Mr. Berini and testified that Mr. Berini suggested that Mr. Barra was comfortable and would more likely approve his retainer if he presented it as involving bribing of the Indian Minister. Mr. Berini contradicted Mr. Govindia's evidence and I accept Mr. Berini's evidence that he never made any such suggestion to Govindia. I find Mr. Govindia's evidence to be completely unbelievable and his evidence that Barra was so impressed with his honesty that he told him to keep the \$500,000 for himself and retained him as a consultant for the full \$650,000 is not in harmony with the preponderance of probabilities of a practical and informed person. Mr. Govindia was unknown to Mr. Barra before this meeting and it is highly unlikely that Mr. Barra would have made a \$500,000 gift to an unknown person. The Memorandum of Understanding required the return of the \$500,000 if the contract was not approved in a very short time. This is inconsistent with a gift or payment for a consulting agreement.

[61] I also find that Mr. Govindia's evidence does not raise a reasonable doubt because I find his evidence to have been totally unbelievable. In fact, in his proposed agreement, as recorded in the transcript of the meeting on November 2, 2007 (filed as Exhibit #8), Mr. Govindia proposed additional payments of \$1.5 million for Minister Patel and a further \$250,000 to be paid to himself as a consulting fee once the contract was approved. This indicates that Mr. Govindia intended and agreed to make further bribery payments to Minister Patel, in addition to the initial \$500,000. Barra and Govindia exchanged emails about their agreement to bribe Minister Patel and it was reduced to a memorandum of understanding which was not inconsistent with Govindia's tape recorded proposal to pay a bribe of \$500,000 to Minister Patel to approve the contract.

[62] On November 9, 2007, after an exchange of various proposals, Barra attached the MOU and stated that based on this agreement, "Cryptometrics is wiring \$650,000.00 today in accordance with this MOU. A Confirmation will be forwarded please. It is acknowledged that the receipt of these funds is pursuant to this MOU".

[63] The first paragraph of the MOU, which is document 2438 in Exhibit #2, states as follows:

Cash fee Cryptometrics will make a fee payment of USD \$2.5 million to EMG1. With respect to the cash fee, Cryptometrics agrees to wire initially to EMG \$650,000.00; Such funds will be released when Cryptometrics receives a letter of contract award from Air India. Funds will be deposited in an interest bearing account. The balance in funds plus interest is to be returned to Cryptometrics if the letter of contract is not received by Cryptometrics no later than November 23, 2007. The balance of the \$2.5 million, (\$1,850,000.00) will be wired and paid when the agreement is entered into by Air India and Cryptometrics and any and all other parties to it. There are further clauses about the first cash payments and a convertible debenture and an ongoing monthly retainer fee of \$20,000.00 per month in the MOU.

[64] The initial terms of this MOU, including sending \$650,000 to EMG, are consistent with the agreement recorded on November 2, 2007, between Mr. Barra, Mr. Berini, and Mr. Govindia, wherein Barra and Berini agreed to pay \$650,000 to Govindia, from which he would pay \$500,000 to Minister Patel to approve the Air India contract with Cryptometrics.

[65] During his evidence, Mr. Govindia referred to a copy of an "Engagement Letter for Advisory Services" dated November 8, 2007, filed as Exhibit 11(R). The engagement letter was addressed to Robert Barra but there is no evidence that it was ever sent to Mr. Barra. Mr. Govindia testified that he found this copy in his file in London, England. The document has a photocopied copy of Mr. Berini's signature, which is suspicious because this engagement letter was addressed to Robert Barra and it states that it was "to the attention of Robert Barra" and so it is surprising that it would contain a copy of Mr. Berini's signature.

[66] There is no evidence that this engagement letter was ever sent to Mr. Barra or to Mr. Berini and it contains different terms from the Memorandum of Understanding that was negotiated with counsel for Cryptometrics and on which emails were exchanged, following

which the \$650,000 was wired to Mr. Govindia pursuant to the terms of the MOU. The MOU was consistent with the agreement discussed and tape recorded on November 2, 2007. The terms of Exhibit 11(R) are inconsistent with the tape recorded terms of the agreement and the written MOU. As such, I find that it was created by Mr. Govindia to attempt to legitimize and hide the true purpose of the payment of the \$650,000 to EMG and Govindia, which was to fulfill the agreement to pay \$500,000 of the funds as a bribe to Indian Minister Patel to obtain the Air India contract for Cryptometrics.

[67] Mr. Berini agreed, when presented with Exhibit 11(R), that it was his signature on the document and that he must have signed it. However he was not asked if he or Cryptometrics had agreed to retain EMG or Mr. Govindia on the terms set out in Exhibit 11(R). I find that Exhibit 11(R), did not reflect the true nature of their agreement and was an attempt by Govindia to legitimize the payment of \$650,000 to him, to hide the fact that \$500,000 was to be given to Praful Patel as a bribe to approve the contract.

[68] When Mr. Govindia's evidence is considered in relation to the evidence against Mr. Barra, I find that Govindia's evidence does not raise a reasonable doubt about Barra's guilt, as his evidence was completely unbelievable. Govindia's evidence also does not raise a reasonable doubt and I am satisfied beyond a reasonable doubt that on the evidence that I do accept, including the tape recording of the November 2, 2007 meeting, Mr. Berini's evidence, and the fact that Barra sent the \$650,000 to Govindia as proposed in the recorded meeting, that Robert Barra agreed with Mr. Berini and with Mr. Govindia to pay a bribe of \$500,000 to Minister Patel in order to obtain his approval of the contract between Air India and Cryptometrics Canada.

#### **Disposition of Issue #5**

[69] On the basis of all of the evidence that I have accepted, I find that the Crown has proven beyond a reasonable doubt that Mr. Barra and Mr. Berini agreed with Mr. Govindia to pay a benefit, or in this case a bribe, of \$500,000 to Indian Minister Praful Patel to approve the Air India contract with Cryptometrics Canada.

**ISSUE #6**

**Was there one continuing conspiracy or two or three separate conspiracies to pay bribes to foreign public officials to obtain the approval of the Air India contract with Cryptometrics?**

[70] The defence submit that the Crown has alleged a single continuous conspiracy starting with the agreement to pay \$200,000 to Mr. Karigar to be used to pay bribes to various Air India officials including the Captain and MMD for the down-select of Cryptometrics' bid, followed by a further agreement to pay \$250,000 to Karigar to pay Indian Minister Patel to approve the contract, and a third agreement or conspiracy between Mr. Berini, Mr. Barra, and Mr. Govindia in which the parties agreed to pay \$500,000 as a bribe to Minister Patel, who would then approve the contract with Air India.

[71] The Crown agrees that it is bound by its theory of the case, as outlined in its opening statement and again in its submissions on the motion for a directed verdict. The Crown described its theory as one continuous conspiracy involving two phases. The first phase involved the agreement between Barra, Berini, Bell, Shah, and Karigar to pay a bribe to Air India officials to obtain the down-select for the Cryptometrics bid and their agreement to pay \$250,000 to Indian Minister Patel to approve the contract. The second phase of the conspiracy involved the agreement between Barra, Berini, and Govindia to pay a benefit of an initial amount of \$500,000 to Indian Minister Patel, a foreign public official, to approve the contract between Air India and Cryptometrics.

[72] I agree with the defence submission that the Crown is bound by its theory of the case that it has presented within the terms of the wording of the indictment.

[73] In *R. v. Cotroni*, [1979] 2 S.C.R. 256 at pp. 276-277, the court stated as follows:

The agreement reached by the co-conspirators may contemplate a number of acts or offences. Any number of persons may be privy to it. Additional persons may join the ongoing scheme while others may drop out. So long as there is a continuing overall, dominant plan there may be changes in methods of operation, personnel, or victims, without bringing the conspiracy to an end. The important inquiry is not as to the acts done in pursuance of the agreement, but whether there

was, in fact, a common agreement to which the acts are referable and to which all of the alleged offenders were privy.

[74] In *R. v. Mauro*, [1993] 12 O.R. (3d) 522 (Gen. Div.), at p. 525, the court provided a succinct analysis of continuous conspiracies as follows:

However, it is not necessary that the conspirators know each other or know that each is part of the conspiracy. For example, if A and B conspire to pursue an unlawful object and B introduces C to the conspiracy without telling A, C is still guilty of conspiracy. Furthermore, although the offence is committed at the moment the agreement is reached, the conspiracy may continue to exist so long as the objects of the agreement are pursued. Thus it is not essential that the original conspirators remained in the conspiracy for it to continue or for it to remain at its original size. The number of conspirators may grow or shrink so long as the agreement to pursue the same object continues. In the example above, A may withdraw from the activities of the conspiracy, but the conspiracy will still continue to exist so long as B and C continue to pursue the objects of the original agreement. Moreover, D, E, and F may join that conspiracy whether A remains in it or withdraws. The original conspiracy will, nevertheless, continue to exist: *R. v. Cotroni; Papalia v. R.*, [1979] 2 S.C.R. 256, 45 C.C.C. (2d) 1.

[75] I find that the analysis of conspiracy contained in the above two cases involving an offence under the *Criminal Code*, R.S.C. 1985, c. C-46, would also apply to a conspiracy or agreement alleged pursuant to s. 3 of the CFPOA.

[76] The fact that Mr. Govindia did not know about the prior activities or the agreement between Mr. Barra, Mr. Berini, and Mr. Karigar to pay monies to Indian public officials to obtain the contract with Air India for Cryptometrics is not a defence for Mr. Govindia. It is not necessary for Govindia to have known that Karigar was previously engaged in attempting to bribe foreign public officials in India to obtain the approval of this same contract. His knowledge or lack thereof is irrelevant. Rather, so long as the same object of the conspiracy continued to be pursued, namely to obtain approval of the same contract between Cryptometrics and Air India by means of bribing a foreign public official, then the conspiracy continued to exist. The object of the conspiracy, as alleged by the Crown, was to bribe foreign public officials in India in order for Cryptometrics to secure the bid put out by Air India. Initially, Mr. Karigar was the individual

who agreed with Barra and Berini to pay bribes to the Indian public officials. When this plan failed, Barra and Berini agreed with Govindia to pay bribes to the Indian Minister, to approve the same contract. Mr. Govindia replaced Mr. Karigar, but the object of the conspiracy remained the same.

#### **Disposition of Issue #6**

[77] It does not matter that Govindia did not know of Karigar's prior involvement because the purpose and object of Barra and Berini's plan to bribe the Indian Minister to obtain the contract remained unchanged. As such, I am satisfied beyond a reasonable doubt that there was one continuous conspiracy.

#### **ISSUE #7**

##### **What if there were two distinct conspiracies as opposed to one continuous conspiracy?**

[78] If I am mistaken in finding that there was one continuous conspiracy as submitted by the Crown it does not change the result. The defence argued that the first conspiracy with Mr. Karigar was terminated as a result of the legal proceedings being commenced against Karigar when the relationship between Mr. Karigar and Cryptometrics broke down. If a new separate conspiracy was commenced between Mr. Barra, Mr. Berini, and Mr. Govindia, wherein they agreed to provide a benefit of \$500,000.00 to a foreign public official, Minister Patel, in return for a benefit, namely obtaining the contract with Air India for Cryptometrics, Barra and Govindia are still guilty of Count #1 as alleged in the indictment.

[79] The indictment against Barra and Govindia alleges that they agreed to offer a benefit (a bribe) to a foreign public official (Minister Patel) between 2005 and January 1, 2008.

[80] As noted by the Alberta Court of Queen's Bench in *R. v. Sandhu*, 2015 ABQB 827, at para. 50, there is a general rule that the Crown is not bound to prove its theory of the case, but only the essential elements of the offence charged, including particulars (citing *R. v. Groot* (1998), 41 O.R. (3d) 280 (C.A.), aff'd [1999] 3 S.C.R. 664).



[81] The Crown's theory of liability is distinguished from the actual furnishing of particulars as explained by Paciocco J. in *R. v Piotrowski*, 2011 ONCJ 561, at para. 29:

The case *R. v. Groot* ... holds that where particulars have not been given, and the count charged is capable of capturing alternative bases for conviction, a court will err in law by acquitting a person who is shown to be guilty on the evidence simply because the pathway to conviction differs from the one offered by the Crown. [Citations omitted].

[82] The court went on to say that this rule, however, is limited if the shifting of the Crown's case has prejudiced the accused's right to a fair trial as referenced in *R. v. Ranger* (2003), 67 O.R. (3d) 1 (C.A.), at paras. 134-135 and in *Sandhu*, at para. 53 where the court stated:

This can occur when the Crown explicitly seeks to obtain a conviction on a different basis than the one presented in its case in chief: *R. v. Khawaja*, 2010 ONCA 862 (Ont. C.A.) at para 150.

[83] In this case, the Crown has not changed its position or sought a conviction on any different basis from that presented in chief and I find that there has been no prejudice to the accused's right to a fair trial.

[84] Mr. Govindia was put on notice by the Crown's theory of liability that this included Mr. Govindia's participation in a conspiracy; namely, that he made an agreement with Mr. Barra and Mr. Berini to pay a bribe of \$500,000 to foreign Minister Patel in order to gain the contract for the benefit of Cryptometrics.

[85] Whether the agreement or conspiracy alleged by the Crown was a continuous conspiracy with two phases or whether it involved two distinct conspiracies pursuing the same object does not alter the basis for conviction in a manner significantly different from the one stated in the Crown's theory. Whether there were two phases of one conspiracy or two separate conspiracies, the position of the accused is not affected. The accused have not been prejudiced if they are found guilty of the second conspiracy as they have had the opportunity to make full answer and defence to the indictment which makes this specific allegation and the Crown has not changed its position on liability.

[86] The more important principle is that the trial judge is not bound by the Crown's theory of liability. In the decision of *R. v. Pickton*, 2010 SCC 32, [2010] 2 S.C.R. 198, the trial judge placed theories of liability before the jury which were not advanced by either the Crown or the Defence. The jury, or in this case the judge, is not bound to accept the theory of one party or the other. Rather, it is open to the jury or to the judge, in considering the evidence as a whole, to come to its own conclusions as to theories of liability supported by the evidence.

[87] It is not necessary for me to conclude beyond a reasonable doubt that there was one continuous conspiracy in order to establish Mr. Govindia's guilt or Mr. Barra's guilt on phase two or the second separate agreement between Barra, Berini, and Govindia to pay a bribe to Minister Patel in order to obtain the Air India contract for Cryptometrics. I may find Mr. Barra and Mr. Govindia guilty of the offence set out in the indictment if I am satisfied based on all of the evidence that the essential elements of the offence alleged in the indictment have been proven beyond a reasonable doubt.

#### **Disposition of Issue #8**

[88] The indictment alleges that Barra and Govindia agreed, between 2005 and 2008, to provide an advantage or benefit, namely a bribe of \$500,000, to Indian Minister Patel in order to obtain the contract with Air India for Cryptometrics Canada. I find that all the essential elements of this charge have been proven beyond a reasonable doubt. Even if there were two separate conspiracies and not two phases of one conspiracy, whatever theory the Crown has advanced, I find that Mr. Barra and Mr. Berini agreed with Mr. Govindia to pay a bribe of \$500,000 to Minister Patel to obtain his approval of the contract and as a result are guilty of Count #1.

#### **ISSUE #9**

#### **Is it a mistake of fact or a mistake of law if Mr. Govindia was unaware that the CFPOA Act applied to him in New York City, when he agreed to pay a bribe of \$500,000 to Minister Patel to obtain the contract with Air India for Cryptometrics Canada?**

[89] The Ontario Court of Appeal has addressed the issue raised in circumstances where the accused did not know that a law applied to him or her. *R. v. Klundert* (2004), 242 D.L.R. (4th) 644 (Ont. C.A.), leave to appeal refused, [2004] S.C.C.A. No. 463 involved an accused charged

with tax evasion under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). At para. 59 of its decision, the Court of Appeal stated as follows:

A person's mistaken belief that a statute is invalid or is otherwise not applicable to that person's conduct is a mistake of law. It is, however, a mistake of law that is irrelevant to the existence of the fault requirement in s. 229(1)(d). Nor can that kind of mistake of law provide a freestanding excuse for the commission of a crime: *Criminal Code*, s. 19; *R. v. Jones* (1991), 66 C.C.C. (3d) 512 (S.C.C.), at 516-517; *R. v. Watson* (1999), 137 C.C.C. (3d) 422 (Nfld. C.A.), at 431-33.

[90] Mr. Govindia was aware that the contract with Air India was with a Canadian company, Cybermetrics Canada, because Mr. Berini sent background information about the bid for the contract to Mr. Govindia on October 20, 2007 from an address in Kanata, Ontario, Canada and Mr. Govindia testified that he did his own due diligence on the contract while he was in India in late October of 2007.

[91] At the meeting on November 2, 2007 in New York, Mr. Govindia met with Mr. Berini the COO of the Canadian company and with Mr. Barra, the controlling mind of the Canadian company that was to obtain the benefits of the Air India contract. He was meeting with a senior officer and the controlling mind of the Canadian company which constituted a substantial connection to Canada.

[92] Mr. Govindia has once again argued that he is not subject to the jurisdiction of the Canadian courts. While s. 5 of the CFPOA stipulates when a breach of s. 3 will be deemed to have occurred in Canada for the purposes of the Act, it does not limit the court's existing jurisdiction pursuant to the common law. Rather, this section buttresses the common law, rendering a common law analysis unnecessary where s. 5 circumstances exist. In dismissing Mr. Govindia's argument on this subject, I simply refer to my previous decision on this issue wherein I found that a Canadian court did have jurisdiction and that there was a substantial connection to Canada: see *R. v. Barra and Govindia*, 2018 ONSC 2659.

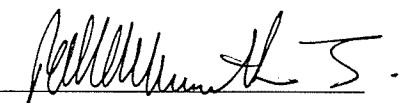
**Disposition of Issue #9**

[93] Mr. Govindia may not have been aware that the *Corruption of Foreign Public Officials Act* applied to him when he met with Mr. Barra and Mr. Berini in New York City and agreed to pay a bribe to Minister Patel in order to obtain the contract with Air India for Cryptometrics Canada, but he was mistaken. His mistake was however, one of law and not of fact. In the absence of officially induced error, a mistake of law is no defence.

**Final Disposition**

[94] For the reasons given above, I find that Mr. Barra agreed to pay a bribe of \$250,000 to a foreign public official, namely Mr. Praful Patel, the Minister of Civil Aviation in India, in order to obtain a benefit for Cryptometrics Canada, namely in order that Minister Patel would approve the contract with Air India. I find Mr. Barra guilty of Count #1.

[95] I am further satisfied that Mr. Barra and Mr. Govindia agreed in New York City, to pay a bribe of \$500,000 to Mr. Patel, the Indian Minister of Civil Aviation, between November 2, 2007 and November 9, 2007, in order to obtain an advantage in the course of business, namely to obtain Minister Patel's approval of the contract between Air India and Cryptometrics Canada. For the above reasons I find both Mr. Barra and Mr. Govindia guilty of Count #1.

  
Mr. Justice Robert J. Smith

**CITATION:** R v. Barra and Govindia, 2018 ONSC 57  
**COURT FILE NO.:** 16-20006  
**DATE:** 2019-01-11

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Her Majesty The Queen

- and -

Robert Thomas Barra and Shailesh Hansraj Govindia

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**REASONS FOR JUDGMENT**

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Mr. Justice Robert J. Smith

**Released:** January 11, 2019