

**“WITH GIFTS COME OBLIGATIONS”
GUARDING THE PUBLIC TRUST IN POLITICAL
INSTITUTIONS**

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**Part 1: Why precise definitions are needed for
successful prosecution of corruption**
**Part 2: The culture of an organization or entity
has a profound influence on conduct.**

Definitions

- *quid pro quo*, a latin term for "something for something". It is essential to identify and prove what "consideration" each party to the agreement expects in return from the other.
- OR
- "the misuse of public power for private benefit".

A fundamental principle in criminal law

- a fundamental principle in criminal law is that the elements of an offence must be knowable. In other words, all persons must know what misconduct can result in criminal liability and carry penal consequences.
- In Canada, criminal offences are all statutory, with the exception of contempt, so there is no possibility of jail or other penalty unless the offence is one known in law.

Defining the offence

- Many kinds of misconduct fall under the general definition of abuse of public power for private gain. Canada does not treat corruption as one offence; instead, a number of separate offences deal with corrupt behaviour.
- Some offences apply to all persons, not just those who are in positions of public power. Examples are theft, embezzlement, fraud, and extortion.
- Other offences have been enacted to deal specifically with the corrupt behaviour of public officials in respect to their public functions.
- Bribery is the asking or taking by a public official of a benefit or advantage for private gain in exchange for a misuse of the official's entrusted powers. Bribery is defined so that it criminalizes the conduct of both the public official and the conduct of the briber who has offered, given or agreed to give a bribe to a public official.
- Buying or selling a public office or exercising or promising to exercise improper influence on an appointment to a public office is also a specific corruption offence.

Drawbacks to prosecution of corruption offences.

- As a means of reducing the incidence of corruption, prosecution is generally not held in high regard as a practical matter although it is also cast as a matter of policy.
- The costs of investigation and trial are often very high and, for that reason, they may be viewed as an inefficient use of police time and court resources.

The culture of an organization has a profound influence on conduct.

- Should public servants or elected officials accept gifts?
- What is acceptable in the private sector is not necessarily so in the public sector.
- People do not start out with the intention of being corrupt. The insidious cross-over comes when elected officials and public servants in municipalities begin to see contractors and developers as clients and forget that they are working for the people of the municipality and are handling the public's money.

The escalation of small gift-giving

- The relationship between public officials and private sector participants becomes, with gift-giving and association, a close one and those relationships increasingly lean toward giving favourable treatment of the gift-bestowers. It is difficult to say "no" to someone who has become a friend.

Public perception and public trust

- When the public observes and the press reports that public servants are taking the benefit of a contractor's or developer's or a union's largesse, it is little wonder that public trust diminishes and public speculation about the effect of corruption flourishes.
- The effects of gift-giving and the need to change the culture merits careful consideration.
- The need to consider legislation regarding gift-giving to public officials and public servants also merits consideration.

RECOGNIZING POINTS OF VULNERABILITY FOR UNETHICAL AND ILLEGAL CONDUCT

LGMA Conference

June 23, 2016

Maegen Giltrow, Lidstone & Company

Overview: Legal standards

- **Statutory (*Community Charter*):** apply to elected officials
- **Common law conflict of interest rules:** apply to elected officials and staff
- ***Criminal Code*:** Offences Against Administration of Law and Justice apply to "officers and office holders"
- **Equity:** Fiduciary Duties applicable to First Nations elected officials and to Directors

Conflict of Interest Exceptions Regulation (April 2016)

- Response to *Schlenker v. Torgrimson* BCCA 2013
- Local Governments may now appoint elected representatives to boards of:
 - Societies (inherently not for profit)
 - Corporations incorporated by a public authority that provides a service to the local government
- The member may:
 - Attend meetings, discuss and vote on "specified interests" "to or on behalf of" the society or corporation:
 - a) Expenditures of public funds,
 - b) Conferral of advantage, benefit, grant or assistance,
 - c) Acquisition or disposition of interest or right in property that confers advantage, benefit or disadvantage
 - d) Agreements respecting any of the above



Serving public v. private interest

- Lessons from Charboneau Commission
- Culture and Individual
 - Key shift into the service of private v. public interest
- Case examples:
 - Staff Engineer A: Building the tenders and estimates
 - Beginning: Threat
 - Isolated professional in municipal department
 - Key turning point: Public disclosure of "The List"—through FOI (!)
 - Staff Engineer B: Overseeing construction and payment
 - Beginning: No threat—instead, appreciative gift
 - Significant staff cuts
 - High discretion at a strategic point in system

Forensic Audit: Fraud Triangle

- Cressey's fraud triangle posits that fraud arises where three conditions exist:
 - (1) Pressure
 - (2) Rationalization
 - (3) Opportunity
- Opportunity often arises due to a lack of controls. This is the element of the fraud triangle over which the local government has the greatest influence.

Key types of fraud

- Key types of fraudulent schemes include the following:
 - (1) Procurement fraud
 - (2) Performance fraud
 - (3) False/ghost vendors
 - (4) Program, grant, or benefit fraud
 - (5) Cash and cheque fraud
 - (6) Payroll-related fraud
 - (7) Expense claims
- Vulnerable juncture where fraud can arise: incompatible systems within/between organizations and transitions between systems (e.g., having to make entries manually).

Vulnerability around Large Projects

- For large projects in particular, the key challenges are: (1) regulatory compliance, (2) lack of purchasing expertise, (3) tight timeframes and deadlines, (4) cost escalation (e.g., changes in the market price of inputs), and (5) managing stakeholder communications
- engage in pre-planning and business case development
- Internal estimates before call for tenders
 - Necessary safeguard
 - Beware vulnerability of internal estimates (e.g. Montreal)
 - Beware "management over-ride"
 - Beware "lowest-bid" as sole criteria

Lessons from forensic audits

- Trust is not a control
- Significant change requires risk reassessment
- Subject contracts over \$25,000 to RFP process (beware breaking up of contracts).
- Segregation of duties: e.g. for vendor fraud between (a) the person setting up the vendors and (b) the person processing the payments.
- Mandatory vacation policy: e.g. cash and cheque fraud
- The three top fraud detection methods are: (1) tips (from employees or third parties)—this accounts for nearly 70% of the cases in which fraud is uncovered, (2) management review, and (3) internal audits.

Codes of ethics

Necessary...

- Establish standard of conduct & norms
- Overt and transparent
- Can set the legal standard

...but not sufficient

- Public workplace discussion: culture
- Leadership
- Continual re-evaluation for points of risk and vulnerability



Local Government Case Studies

- **Inside knowledge:** Mayor McKitka, Surrey, 1975-7
- Misuse of office investigation
- Convicted of breach of trust – prison sentence
- *Criminal Code:*

122 Every official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person.
- *Community Charter*

108 (1) A council member or former council member must not use information or a record that

 - (a) was obtained in the performance of the member's office, and
 - (b) is not available to the general public,

for the purpose of gaining or furthering a direct or indirect pecuniary interest of the council member or former council member.

Local Case Studies (continued)

- **Integrity:** Mayor Rick Green, Langley, 2008-11
- Investigated for misrepresenting facts to Council, staff, lawyers
- Investigation report leaked to media
- Refused to resign, but came last in ensuing election

Local Case Studies (continued)

- **Powell River Council, 2013**
- Loaned money to a municipal subsidiary without a partnering agreement or public notice
- Exonerated by Court because relied on erroneous legal advice and paid money back before trial
- Section 191 *Community Charter*:
 - Personal liability
 - Joint and several
 - Disqualification for 4 years after the vote

Local Case Studies (continued)

- Treasurer addicted to gambling and alcohol
- Mayor and City Manager aware, wilful blindness
- Over \$1M missing over time
- Citizen sued
- Case settled:
 - Treasurer bankrupt
 - City Manager personally liable

Local Case Studies (continued)

- Other examples:
- Revising a bylaw by retyping a page or adding a different schedule for the version in the vault, without an amendment or a Revision Bylaw
- Leaking personal information – s. 30 *FOIPOP*
- Making up evidence for a consultant to skew the results
- Failure to disclose *Fisheries Act* offence
- Stealing items piece by piece over years – fire department and public works

Local Case Studies (continued)

- Other examples (continued):
- Misrepresenting history on CV
- Setting up phony reference
- Giving Council an agreement to approve then signing different content
- Moving money between subsidiary and municipality without statutory documentation
- Using loan authorization monies or LSA monies for different purpose
- Porn on LG computer

LGMA Code of Ethics

- Confidential info for personal gain
- Property transaction or rezoning disclosure
- Interest in entity contracting with LG
- Report potential conflict
- Unlawful activity
- Whistle blower

Complaint Procedure

- Letter to Executive Director
- Signed by Mayor or Chair, or complainant
- Disclosure of complaint to member-see response
- Complainant written reply
- Ethics Committee report
- If breach, Board can:
 - Reprimand
 - Impose conditions
 - Suspend
 - Expell
- Complainant indemnity