

WARNING FOR BUSINESSES: COMPANIES CAN BE LIABLE FOR TORT OF BRIBERY EVEN IF THEY DID NOT INTEND TO PAY OR RECEIVE A BRIBE

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In 2023, the Manitoba Court of Appeal released an important decision concerning the tort of bribery, which businesses should take note of.^[1]

The City of Winnipeg sued its former Chief Administrator, Phil Sheegl, for accepting bribes, among other things. Sheegl conceded that he accepted payments from third parties but argued that the payments were not intended to be inducements and he was not in fact induced. The Court found against Sheegl.

The Court held that the meaning of a bribe extends beyond its popular connotation of a corrupt payment, to include any payment or gift made as an inducement to an 'agent' and not disclosed to the 'principal'.^[2] Moreover, courts can simply presume that: (a) those who make these undisclosed payments do so as inducements; and (b) the agents who receive the payments are in fact influenced by them.^[3]

The Court also clarified that the tort of bribery is not reserved for public officials or even for situations where a fiduciary relationship exists. A plaintiff need only show that the recipient is under a "duty to provide information, advice or recommendation on an impartial or disinterested basis".^[4] Any individual or business under such a duty (including those who consider themselves upstanding and law-abiding citizens) should therefore pay close attention to this case.

Background

The City bought an old Canada Post building in downtown Winnipeg and funded a multi-million-dollar redevelopment project for the new headquarters of the Winnipeg Police Service (the "**Project**").^[5] The Project quickly became a scandal. It was significantly delayed, exceeded its budget and there were concerns as to the quality of the construction. The Project also became the subject of a lengthy criminal corruption investigation.^[6]

The investigation revealed that as Chief Administrative Officer, Mr. Sheegl, secretly received two payments – for CAD \$200,000 and for US \$127,200 – from Armik Babakhanians. At the time, Armik and his companies were

providing construction management services to the Project under contracts that Sheegl had used his influence to award. Sheegl never informed the City that he received the payments.^[7]

Sheegl at some point resigned amid the controversy and was paid severance by the City.^[8] In 2020, the City sued him alleging a multi-dimensional fraud scheme relating to the Project. As part of its lawsuit, the City claimed that the two payments from Armik to Sheegl constituted bribery entitling it to civil damages.

The Tort of Bribery and the Decision at First Instance

At trial, Sheegl did not deny receiving the two payments from Armik. He testified that he had received the payments as part of a “handshake deal” with Armik in relation to a good faith real estate transaction between the two unrelated to the Project or the City^[9].

The trial court set out the elements of the tort of bribery as follows:

- i. that the person making the payment makes it to the agent of the other person with whom [they are] dealing;
- ii. that [they] make it to that person knowing that that person is acting as the agent of the other person with whom [they are] dealing; and
- iii. that [they] fail to disclose to the other person with whom [they are] dealing that [they have] made that payment to the person whom [they] know to be the other person’s agent.^[10]

The trial court ultimately found in favor of the City rejecting Sheegl’s handshake deal explanation, calling it “incredible” and “fictional” given there was no documentation for same.^[11] It held that the true character of the transaction and whether it was corruption was entirely academic because even if Sheegl’s explanation had been true it would not have provided any relief as far as the tort of bribery was concerned.^[12] “Once the elements of the tort of bribery [were] established, the motives behind that payment [were] irrelevant”.^[13]

The trial court went further adding that it would be a “preposterous message” if “high-ranking public officials [could] do business in secret with persons [who, at the same time, were] seeking contracts from the very public bodies for whom [the] public officials [worked].” “Neither the law nor common sense [supported] or [justified] such a dubious conclusion or message”.^[14]

Sheegl was ordered to pay the City and the other defendants damages consisting of the amount of the bribe money, the amount of the City’s severance payment, and punitive damages of \$100,000.

Appeal Court Upholds Decision, Clarifies Tort

Sheegl appealed the trial decision where the Manitoba Court of Appeal took the opportunity to clarify aspects of the tort of bribery:

1. **Criminal and Civil Liability for Bribery:** In Canada, a person can be charged with bribery under the Criminal Code which creates several offences to address different forms of domestic bribery and corruption.^[15] Apart from being charged under the Criminal Code, a person can also be sued in civil court for the tort of bribery.
2. **Key Elements of the Tort:** A person will be liable for the tort of bribery where:
 - a. the person makes a payment to the agent of a principal with whom they are dealing;
 - b. the person makes that payment knowing the agent is acting as the principal's agent; and
 - c. the person fails to disclose to the principal that they made the payment to their agent.
3. **Payer and Payee Both Can Be Liable:** A person can be sued for the tort of bribery whether they are the payer or payee of the bribe. The law will not distinguish between bribery schemes of "inducement" where the payer is seeking favour, or those of "graft", where the payee is demanding a bribe.^[16]
4. **Motive Irrelevant:** The payer's motives in making the payment are irrelevant. The tort does not require that either the payer or the payee act with a corrupt motive or otherwise in bad faith.^[17]
5. **Improper influence To Be Assumed:** For the purpose of determining whether the tort was committed, the court will assume that the payee was influenced by the payment.
6. **A 'Bribe' Can Be Any Payment That Creates a Realistic Prospect of a Conflict of Interest:** A bribe includes *any payment, gift, promise, or other benefit made as an inducement to an agent and not disclosed to the principal*.^[18] The vice involved in the payment of a bribe is that it may induce the agent to depart, consciously or otherwise, from the duty owed to his or her principal. Whether the payment, other benefit or promise will amount to a bribe will therefore turn on whether it creates "the realistic prospect of a conflict of interest between the agent and their principal".^[19]
7. **Bribery Not Reserved for Public Officials:** Finally, the tort of bribery is not reserved for situations, like the one in *Sheegl*, where a special or fiduciary relationship exists between the payee and his or her principal by virtue of the nature of the position. All that must be shown by a plaintiff is that the recipient of the payment is under a "duty to provide information, advice or recommendation on an impartial or disinterested basis". This applies to a very wide range of positions at all levels within many different types of organizations. If that duty exists, the mere payment of money in the nature of a bribes or secret commissions will expose the payer and the payee to civil remedies without the necessity of any further enquiry as to the legal nature of their relationship.^[20]

Takeaways

The Court of Appeal's decision suggests that Canadian courts are taking civil bribery matters much more

seriously. Although the bribery in the case related to an “ethically bankrupt” public official, the decision should serve as a warning to all individuals and companies (in particular those under a duty to provide information, advice or recommendations on an impartial or disinterested basis) to take the necessary steps to ensure that any payments they make are not at risk of later being interpreted as bribes.

[1] *Winnipeg (City) v. Sheegl et al.*, 2023 MBCA 63.

[2] *Ibid* at para. 33.

[3] *Ibid* at para. 37.

[4] *Ibid* at para. 39.

[5] *Ibid* at para. 2.

[6] *Ibid* at para. 3.

[7] *Ibid* at para. 4.

[8] *Ibid* at para. 5.

[9] *Ibid* at para. 11.

[10] *Ibid* at para 34.

[11] *Ibid* at para. 233.

[12] *Ibid* at para. 220.

[13] *Ibid* at para. 233.

[14] *Ibid* at para. 264.

[15] *Criminal Code*, RSC 1985, c. C-46, ss. 119-125, 426.

[16] *Winnipeg (City) v. Sheegl*, 2023 MBCA 63, at para. 30; *Salford (Mayor of) v. Lever* (1890), [1891] 1 QB 168 (CA (Eng))

[17] *Ibid* at para. 102.

[18] Interestingly, even in the criminal law, bribery is not restricted to cases where an offender’s mindset is “corruption in [its] crassest [form]” (see *R. v. Greenwood*, 1991 ONCA 2730); rather, the prohibitions in the Code criminalize not just *quid pro quo* arrangements, but also “more subtle forms of potential corruption”.

[19] *Ibid* at paras. 1 and 36.

[20] *Winnipeg (City) v. Sheegl*, 2023 MBCA 63, at para. 39.

by [Ralph Cuervo-Lorens](#), [Jamie Virgin](#), [Reuben Rothstein](#), [Fernanda Martins](#) (Articling Student)

A Cautionary Note

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