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*Understanding and Taming Public and Private Corruption in the 21st Century*

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# Understanding and Taming Public and Private Corruption in the Twenty-First Century

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Introduction



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## Understanding and Taming Public and Private Corruption in the Twenty-First Century

### Abstract

We are pleased to present these articles that were originally presented at a symposium held at Osgoode Hall Law School on 6–7 November 2014.<sup>1</sup> Our objective was to offer a symposium that looked at corruption from diverse perspectives, with a broad national and international focus on business, financial, governmental, private sector, and enforcement corruption. Both the Symposium and the compilation of this special issue of the Journal were unique. They required an interplay between contributions from professionals working on the ground in various countries around the world (such as practitioners working in the World Bank, the Inter-American Development Bank, and Transparency International Canada, as well as police policy analysts and investigators working with various non-governmental organizations, partners in law firms, and investigative journalists) and academics who submitted scholarly articles based on their research pertaining to the phenomenon of corruption. Four academic articles form the body of this special issue. In addition, several professionals share their experiences and knowledge of the lived impact of corruption around the world; their contributions are found in the section entitled Supplement: Practitioners' Perspectives. In this manner, we were able to incorporate not only scholarly peer-reviewed contributions but also, and of equal significance, the more practical knowledge and experiences of professionals working in the field.

### Keywords

Corruption--Law and legislation--Congresses

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## Introduction

# Understanding and Taming Public and Private Corruption in the Twenty-First Century

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WE ARE PLEASED TO PRESENT these articles that were originally presented at a symposium held at Osgoode Hall Law School on 6–7 November 2014.<sup>1</sup> Our objective was to offer a symposium that looked at corruption from diverse perspectives, with a broad national and international focus on business, financial, governmental, private sector, and enforcement corruption. Both the Symposium and the compilation of this special issue of the Journal were unique. They required an interplay between contributions from professionals working on the ground in various countries around the world (such as practitioners working in the World Bank, the Inter-American Development Bank, and Transparency International Canada, as well as police policy analysts and investigators working with various non-governmental organizations, partners in law firms, and investigative journalists) and academics who submitted scholarly articles based on their research pertaining to the phenomenon of corruption. Four academic

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1. Osgoode Hall Law Journal Symposium: Understanding and Taming Public and Private Corruption in the 21st Century, Toronto, Osgoode Hall Law School, 6-7 November 2014 [Symposium].

articles form the body of this special issue. In addition, several professionals share their experiences and knowledge of the lived impact of corruption around the world; their contributions are found in the section entitled Supplement: Practitioners' Perspectives. In this manner, we were able to incorporate not only scholarly peer-reviewed contributions but also, and of equal significance, the more practical knowledge and experiences of professionals working in the field.

Our conference attracted international experts who reflected on their experiences with and their attempts at solutions to corruption. Corruption is a critically important issue worldwide, and to emphasize this point, this special issue begins with the keynote address delivered by John Sandage,<sup>2</sup> who at the time of the Symposium was Director of the Division for Treaty Affairs at the United Nations Office on Drugs and Crime.<sup>3</sup> Sandage's address outlines the role of international institutions in building a broad international consensus around the idea that bribery and corruption are unacceptable. He outlined some of the consequences that flow from individual and collective corrupt regimes. For example, in terms of economic development, he quoted James Wolfensohn, the former President of the World Bank, who claimed that "corruption is the largest single inhibitor of equitable economic development."<sup>4</sup> In addition to the impact of corruption on growth and economic stability, Sandage emphasized that corruption is the enabler of many other criminal activities, such as virtually all forms of transnational organized crime including, of course, drug trafficking.

Leading up to the Symposium and during the preparation of this issue of the Journal, Canadians were provided with nightly updates on the Charbonneau inquiry into corruption in Quebec. The Charbonneau Commission<sup>5</sup> heard from 189 witnesses over a well-publicized two-and-a-half-year period. While the inquiry offered the public high drama in terms of the revelations of the wide range of partners who were allegedly complicit in the corruption schemes, no one imagined that the corruption was particular to Quebec or particular to

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2. "Global Corruption and the Universal Approach of the United Nations Convention Against Corruption" (Address delivered at the second Osgoode Hall Law Journal Symposium: Understanding and Taming Public and Private Corruption in the 21st Century, Toronto, Osgoode Hall Law School, 6 November 2014), (2015) 53:1 Osgoode Hall LJ [page 7]. Sandage was introduced at the Symposium by Alex Himelfarb, Director Emeritus of the Glendon School of Public and International Affairs at York University and Chair of the Canadian Alliance to End Homelessness and of the World Wildlife Fund Canada.
  3. In December 2014, Sandage became Deputy Director General of the Patents and Technology Sector at the World Intellectual Property Organization in Geneva.
  4. Sandage, *supra* note 2 at [page 12].
  5. The official name of the Charbonneau Commission is the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry.

that specific period under investigation. The testimony from the Commission revealed that when businesses or government officials become involved in corrupt schemes, they may well be active partners in the criminal associations and should be seen (and prosecuted) as such rather than as naïve or duped victims of organized criminals. What was further revealed was a pattern of intermingling of known criminals and supposedly respectable citizens holding influential positions in society. These alleged conspirators included senior bureaucrats, politicians, heads of construction companies, and union officials, together with Rizzuto crime family members and the Hells Angels. If this was Canada's sole corruption scandal, we may suppose that corruption was only an issue elsewhere, possibly in lesser developed countries. That, of course, is not the case. Canada is not alone in falling victim to diverse corruption schemes and not alone in looking for answers.

Sandage noted that the *United Nations Convention against Corruption* (“*UNCAC*”) is the only universal legal anti-corruption instrument but acknowledged that the strength of *UNCAC* relies on the various state parties who sign on to the Convention to then put in place a comprehensive legal framework “to give practical effect to the relevant provisions”<sup>6</sup> in the Convention.<sup>7</sup> In terms of the establishment of these legal frameworks, three contributions to the Journal looked in depth at the US *Foreign Corrupt Practices Act* (“*FCPA*”) and Canada’s *Corruption of Foreign Public Officials Act* (“*CFPOA*”). Poonam Puri and Andrew Nichol’s article, entitled “The Role of Corporate Governance in Curbing Foreign Corrupt Business Practices,” provides a thorough comparative analysis.<sup>8</sup> The article compares the *CFPOA*, first, to Canadian domestic corruption legislation and, second, to the *FCPA* and the UK *Bribery Act 2010*. The article then evaluates the enforcement framework for the *CFPOA* and provides an analysis of the existing jurisprudence. A second article that examines the legal frameworks that aim to counter corruption was contributed by Ellen Gutterman and is entitled “Banning Bribes Abroad: US Enforcement of the *Foreign Corrupt Practices Act*.”<sup>9</sup> This important article moves beyond an examination of the *FCPA* to examine the implications and impacts of the increasing US enforcement together with the expansive reach of the extraterritorial jurisdiction in the enforcement of

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6. *Supra* note 2 at [page 29].

7. Canada signed the *UNCAC* on 21 May 2004 and ratified it on 2 October 2007. As of 1 April 2015, 140 signatories and 177 parties have signed and ratified the *UNCAC*. See United Nations Office on Drugs and Crime, “United Nations Convention against Corruption Signature and Ratification Status as of 1 April 2015,” online: <[www.unodc.org/unodc/en/treaties/CAC/signatories.html](http://www.unodc.org/unodc/en/treaties/CAC/signatories.html)>.

8. (2015) 53:1 Osgoode Hall LJ [page 164].

9. (2015) 53:1 Osgoode Hall LJ [page 31].

the *FCPA*. The author examines the politics and economic implications of the negotiations surrounding the signing of the binding international treaty at the Organisation for Economic Co-operation and Development (“OECD”) to criminalize transnational bribery—described by the author as a “prisoner’s dilemma”<sup>10</sup>—as each country strove to ensure that if it changed its own laws to prohibit the paying of bribes, other countries as competitors in international business would be likewise prohibited via a binding agreement.

The final article under this theme is “Corruption and Development: The Need for International Investigations with a Multijurisdictional Approach Involving Multilateral Development Banks and National Authorities” by Juan G. Ronderos, Michelle Ratpan, and Andrea Osorio Rincon.<sup>11</sup> This article is included in Supplement: Practitioners’ Perspectives and benefits from the authors’ experience working within two of the major players in the fight against international corruption. The article looks at the different mandates and objectives of multilateral development banks versus the bodies that carry out international treaties and various agreements to counter corruption (such as the United Nations, the OECD, and the Organization of American States). The article also examines the application of *FCPA* and *CFPOA* legislation. A key distinction is the enforcement tools available under each. The article is rich with examples and knowledge that only comes from working inside both sides of these initiatives against corruption.

Two articles look specifically at the relationship between corruption and development. The first, by Mariana Prado, Lindsey Carson, and Izabela Correa, entitled “The Brazilian *Clean Company Act*: Using Institutional Multiplicity for Effective Punishment,”<sup>12</sup> acknowledges the negative impact of corruption in Brazil, where corruption is said to be entrenched in the political system. Their article attempts to understand Brazil’s lack of success in holding corrupt actors legally accountable for their actions. The authors examine whether institutional multiplicity in both oversight and investigations has contributed to this failure or whether it has been an advantage. Three types of legal punishments—administrative, civil, and criminal—can be imposed on individuals engaged in corrupt practices, and each of these operates independently from one another. The research suggests that while there has been an increase in investigations and operations, the number of both public servants and police who have been imprisoned has not increased.

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10. *Ibid* at [page 40].

11. (2015) 53:1 Osgoode Hall LJ [page 334].

12. (2015) 53:1 Osgoode Hall LJ [page 107].

The second article that looks at corruption and development, by Tonita Murray, is entitled “Corruption in Developing Countries: What Keeping It in the Family Means for Everyone Else.”<sup>13</sup> This article can be found in Supplement: Practitioners’ Perspectives. This article is unique in that the author has spent fifteen years working in two countries—Afghanistan and Kenya—that have been the recipients of much international aid and of much criticism for massive corruption. The article’s essential point is that while articulation of clear definitions of corruption by international organizations such as the World Bank, the OECD, and the International Monetary Fund is of value, that value is lost when the same definitions are not commonly understood by the receiving countries. The author compares “petty corruption,” where money is spent locally and contributes to the economy, to “grand corruption,” where funds are usually obtained directly or indirectly from international aid agencies and more often leave the country and benefit only the privileged (both inside and outside of the region).

A final theme looks at corrupt interactions between businesses and government and corruption within government institutions. Three articles are relevant to this area of concern. The first article, by Denis Saint-Martin, is entitled “Systemic Corruption in an Advanced Welfare State: Lessons from the Quebec Charbonneau Inquiry.”<sup>14</sup> The article begins by presenting contrasting perceptions of Quebec as both the “most corrupt province in Canada” and “the little Sweden of North America.”<sup>15</sup> The author begins with a discussion of corruption theory and then moves to a dissection of Quebec’s path to social justice and better government, outlining the growth in the size of Quebec’s public sector, ownership of Quebec economy, average years of schooling for Quebec’s population aged twenty-five to thirty-four, public spending as percentage of gross domestic product, inequality of income in selected OECD countries and Quebec, and total unionization rate as a percentage of employment. The author examines the legacies of past institutional arrangements, focusing on the engineering sector as a national champion; the firms obtaining most of Quebec’s Ministry of Transport’s contracts for engineering services are identified, and the finger is pointed at the underdeveloped nature of local public administration. Also singled out was Quebec businesses’ dependence on the Liberal Party for political stability. The conclusion of the article ends with a warning: Citizens’ outrage over the violation of this public trust may encourage politicians to combat corruption by

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13. (2015) 53:1 Osgoode Hall LJ [page 268].

14. (2015) 53:1 Osgoode Hall LJ [page 66].

15. *Ibid* at [page 75].

reducing the size of government. The author emphasizes, however, that it is the quality of government that is the problem, not its quantity.

Two additional articles can be found in Supplement: Practitioners' Perspectives. The first is "Corruption at the Intersection of Business and Government: The *OECD Convention*, Supply-Side Corruption and Canada's Anti-Corruption Efforts to Date" by Milos Barutciski and Sabrina Bandali.<sup>16</sup> This article is a valuable resource for any Canadian lawyer, regulator, or investigator seriously concerned with corporate conduct involving bribery. The first part explains the origins of the international focus on the supply side of bribery transactions, memorialized in the *OECD Anti-Bribery Convention* and the subsequent *UNCAC*. The second part presents an overview of Canada's record to date in implementing those obligations, including the adoption of the *CFPOA*, subsequent legislative changes to the *CFPOA* in 2013, and the evolution of Canadian law enforcement efforts.

The final contribution is "Have We Legalized Corruption? The Impacts of Expanding Municipal Authority without Safeguards in Toronto and Ontario" by Stanley M. Makuch and Matthew Schuman.<sup>17</sup> This article focuses on the greatly expanded powers of Canadian municipalities and carefully traces changes brought about through a series of judicial decisions, provincial legislative amendments, and municipal initiatives. The authors argue that as a result of these developments, there are few political or procedural safeguards to ensure that broad municipal powers are not abused.

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16. (2015) 53:1 Osgoode Hall LJ [page 231].

17. (2015) 53:1 Osgoode Hall LJ [page 301].