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**ETHICAL LEADERSHIP AND CORRUPT PRACTICES**

“I am the master of my fate  
I am the captain of my soul.”  
William Ernest Henley, “Invictus”

**Character Trumps Everything - The Imperative of Morale Leadership**

Corporations and other entities do not function as automatons, mechanically driven by an engine or installed silicon computer chip deciding their actions. Every act of a corporation is determined and undertaken by a human. People, not companies, make decisions. The values and underlying principles that individuals have determine how they assess issues, respond to internal and external developments, prepare strategic plans to deal with the future and implement day-to-day actions. Very importantly, personal standards determine the type of officers and employees that are hired in a corporation and, ultimately, the culture of the corporation, that is to say, the basic values, mores and principles by which individuals select choices in their lives and, in their working environment, make and execute corporate decisions.

Reflecting on issues affecting corporate culture, values and leadership, one may start with a short vignette from the life of one of the most significant individuals in the English-speaking world, certainly in the twentieth century: Winston Spencer Churchill. On August 5, 1943, during the dark days of World War II, Prime Minister Churchill sailed on the *Queen Mary* from a remote port on the river Clyde on the west coast of Scotland to Halifax, Nova Scotia, with an entourage of 250. For the first time in the war, Mrs. Clementine Churchill accompanied her husband on a trans-Atlantic crossing. Reaching Halifax on August 9, the Churchills travelled to Quebec City by train for another Anglo-American war strategy conference code named “Quadrant”. Officially hosted by the Prime Minister of Canada, William Lyon Mackenzie King, they welcomed the arrival of the President of the United States, Franklin Delano Roosevelt, and his staff. The Prime Minister and Mrs. Churchill returned to London on September 20, 1943.<sup>i</sup>

Prime Minister Churchill was clearly travelling on business and not as part of a personal holiday nor was he seeking a much needed respite from the tumult and toils of warfare in which he had been engaged for almost four years. As the principal protagonist who had spearheaded the western democracies' life and death fight for freedom and liberty against the Nazi regime of the Third Reich, the Prime Minister properly had at his disposal, with the full consent of his island nation, all necessary authorities and resources to lead his beleaguered country's defense, and, with the Allies, to ultimate victory. No one could deny or challenge that Churchill should have the comfort and companionship of his devoted wife on such a journey, the principal objective of which was to forge the preparations for the design of Operation "Overlord", the cross-Channel invasion of Europe, as the next stage of the war effort against Hitler. The ethical standards that governed his personal affairs resulted in Prime Minister Churchill insisting on paying for his wife's passage to and from Canada.<sup>ii</sup> The payment was equivalent to about \$4,800 Canadian dollars in 2005 purchasing power.

In September 1944, Prime Minister Churchill and President Roosevelt and their military and political staffs met again at Quebec City under the code name "Octagon" to organize strategic issues for World War II. With respect to Prime Minister Churchill's personal expenditures in Quebec, they were recorded in the usual meticulous fashion: a pair of gloves for \$5.20; three dozen white handkerchiefs at \$14.98; a tip of £5 to the steward on the *Queen Mary*; and other items, minus an October Octagon allowance in the sum of £6. 1s. 4d. The Prime Minister owed £14. 17s. 6d. He was asked to make his own cheque payable to the Her Majesty's Treasury, which he did at once.<sup>iii</sup>

There should be no doubt that Winston Churchill exhibited the highest qualities of leadership and that, had his family background, upbringing and personal interests lead him to a different life away from the political arena, he could have been a most capable and successful chief executive officer of any major international business. Instead, his extraordinary leadership abilities and qualities, honed over a lifetime of experiences, some of which resulted in failure, the vast majority of which in successful achievements and the most important in victory, infused and inspired the English speaking world as few men in history have influenced their generation and those to follow. There are respected and professional followers of Churchill's life who consider that "It is the moral rather than the intellectual content of his judgment that dominates."<sup>iv</sup> Churchill's basic aspects of good character that were central to his leadership are reflected in a speech he gave in Norway in 1948:<sup>v</sup>

"Human judgment may fail. You may act very wisely, you think, but it may turn out a great failure. On the other hand, one may do a foolish thing which may turn out well. I have seen many things happen, but the fact remains that human life is presented to us as a simple choice between right and wrong. If you obey that law you will find that that way is safer in the long run than all calculations which can ever be made. I want to say this to you because that is something my experience has taught me. But I certainly do not want you to understand me to say that I have always done the right thing – I should be ashamed to claim that. But I do have the feeling that one must act in accordance with what one feels and believes."

The author of this work on Churchill's leadership qualities goes on to write that his "largeness of soul not only comprised his deep attachment to moral purpose, but also his kindness, regard, and sense of fair play toward his colleagues, subordinates, and fellow citizens. It explains the moral he attached to his books on World War II: "In War: Resolution; In Defeat: Defiance; In Victory: Magnanimity; In Peace: Goodwill."<sup>vi</sup>

Teachings from leadership in politics and war are not irrelevant to an analysis of the critical effect of leadership on corporate culture. How corporate leaders lead is the key to the foundation from which decisive cultural messages are communicated throughout the business organization. The impact of corporate leaders on their companies is reflected in a variety of different ways. The North American corporate environment of the first decade of the 21<sup>st</sup> century provides, in the view of many, excessive executive compensation, irrespective of corporate performance and an increase in shareholder wealth. The uncomplicated and straightforward way corporate managers and boards approached and considered compensation for executive management in the years following the World War II is reflected, by example, in George Romney's decision, as the President of American Motors Corporation, to decline a bonus in the amount of \$100,000 in 1959. In its fiscal year ended September 30, 1959, American Motors reported record earnings of \$60.4 million, up from \$26 million in fiscal 1958 and a net loss of nearly \$12 million the year earlier. Romney's base salary as CEO was \$150,000 per year and the board of directors accepted his recommendation to limit the aggregate remuneration of all executives of the company to \$225,000. Romney was the only executive affected by this upper limitation on compensation. Under the original bonus plan, Romney was entitled to a bonus of \$175,000, and, by so limiting his remuneration to \$225,000; he reduced his own bonus by \$100,000 to \$75,000.<sup>vii</sup>

As one contrasts various corporate cultures created by CEO leadership styles, it is not inappropriate to refer to the *Report of the Investigation of the Special Committee of the Board of Directors of Hollinger International Inc.* to the U.S. Securities and Exchange Commission and the United States District Court for the Northern District of Illinois in relation to allegations of fiduciary duty violations and other misconduct at Hollinger International Inc. that were first publicly raised by shareholders of that company.<sup>viii</sup> The Report of the Hollinger International Special Committee reviewed, among other things, the payment of personal expenses for senior officers of Hollinger International. After alleging that Conrad Black and his wife purchased Hollinger's apartment on Park Avenue in New York City for US \$2.5 million below its value "due to the rigged appreciation assumed in the deal", the Report of the Hollinger International Special Committee made the following claims:

"Apartments weren't the only deal the Blacks cut for themselves in living expenses. Food, cell phones, perfume, and other routine living expenses, including tips by Mrs. Black while on shopping trips, were expensed to Hollinger. Black's corporate expense reports charged the company for items such as 'handbags for Mrs. BB' (\$2,463), 'jogging attire for Mrs. BB' (\$140), 'exercise equipment' (\$2,083), 'T. Anthony Ltd. Leather Briefcase' (\$2,057), opera tickets for "C&BB" (\$2,785), stereo equipment for the New York apartment (\$828), 'silverware for Black's corporate jet' (\$3,530), 'summer drinks' (\$24,950), 'a Happy Birthday, Barbara' dinner party at New York's La Grenouille restaurant

(\$42,870), and \$90,000 to refurbish a Rolls Royce owned by Ravelston for Black's personal transportation."<sup>ix</sup>

Conrad Black chastised the Special Committee report as "a bombshell of misinformation and error with the appearance of being fully researched and notated." He denied the Special Committee's allegations that he and his wife enjoyed a profligate lifestyle at the expense of shareholders. He commented that the \$140 jogging suit was never found by the Blacks "and never would have been charged to the company in the first place even if it existed." Black declared that the assertions that he "was reduced to stealing from the company to meet her [Barbara Amiel Black's] endless demands" were "bunk". Black was correct in his statement that the thrust of the Special Committee report was that he would never return to Hollinger "and I was to go to prison. If Breeden could not generate indictments and convictions from his report, he would fail."<sup>x</sup> Breeden did not fail.

### **Canada's Perceptions and Recent Experiences**

Canadians may assume that corruption and bribery are prevalent predominantly in foreign countries, often the emerging, undeveloped and poor, where democracy, the rule of law, English liberalism and a market economy have not been established as the foundations of enlightened civil society and rational commercial pursuits. That is not the case. Corporate corruption and bribery are widespread throughout the world. Transparency International's Global Corruption Barometer 2013, which tracks worldwide public opinion on corruption, surveyed 1,000 people from 107 countries and reported that 27 per cent admitted to having paid a bribe in the last 12 months. One should be startled, moreover, that one surprising survey found that Canada, the land of the outwardly respectfully, polite and the mild, may be one of the countries that could be among those environments which exhibit the highest levels of fraud.

"In its survey of 3,000 companies in 54 countries, PricewaterhouseCoopers (PWC) found that the four countries having the highest levels of fraud (in descending order) were Russia, South Africa, Kenya and Canada. Other high-fraud countries, after Canada, were Mexico, Ukraine, the UK, New Zealand, and Australia. Low levels of fraud were found in Japan, Hong Kong, Turkey, Netherlands, Romania, Finland, and Switzerland (PricewaterhouseCoopers, 2009, p. 10)."<sup>xi</sup>

In the more recent and widely respected survey, the 2013 Corruption Perception Index by Transparency International, which measures the "perceived levels of public sector corruption" in 177 countries worldwide, Canada ranked in the 'very clean' spectrum. Out of a perfect score of 100, 69 per cent of the 177 countries received a rating of below 50, a very troubling picture. The highest rated and 'cleanest' countries were Denmark and New Zealand (91), Finland and Sweden (89), Norway and Singapore (86), Switzerland (85), Netherlands (83) and Australia and Canada tied for ninth place out of the 177 with scores of 81 each. The other countries that were reported by PricewaterhouseCoopers in 2009 to have the highest levels of fraud, Russia, South Africa and Kenya, received the unimpressive scores in the 2013 Transparency International results: Russia: 28 (127/177); South Africa: 42 (72/177); and Kenya: 27 (136/177).

While Canada is generally perceived to be among the countries with lower levels of public sector and corporate corruption, disturbing evidence has emerged recently.

- the sworn testimony of witnesses before the Province of Quebec's Charbonneau Commission (officially the "*Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry*")<sup>xii</sup> that revealed widespread bribery and corruption in Quebec;
- The disclosures and RCMP investigations of allegations (not proven in court) of improper systematic payments to government and public officials and others to win business locally and internationally by SNC-Lavalin of Montreal, Canada's largest international engineering firm;
- the inglorious scandal in the federal Senate of Canada relating to hundreds of thousands of dollars of inappropriate expense claims made by four disgraced, resigned and suspended Senators;
- the investigation by the RCMP into allegations (not proven in court) of bribery, frauds and breach of trust by Michael Duffy, relating to his role as a Canadian Senator, and by Nigel Wright, relating to his role as former Chief of Staff to the Prime Minister Stephen Harper, in connection with the payment of \$90,172.24 by Wright to or for the benefit of Duffy;<sup>xiii</sup>
- the bullying effrontery and bold defense to unacceptable public and private behaviour by the Mayor of Toronto, and the results of the 'Project Traveller' wiretap project conducted by Toronto Police Service's Organized Crime Enforcement Unit, Special Projects Section, resulting in allegations (not proven in court) of offences under the *Controlled Drugs and Substances Act* (Canada) involving Alexander Lisi, a friend and frequent acquaintance of Mayor Rob Ford.<sup>xiv</sup>

There have been several inquiries into misfeasance by the Government of Canada. We remember the Commission of Inquiry headed by the Hon. Mr. Justice John Gomery of the Superior Court of Quebec that was mandated by the federal Government on February 19, 2004 to investigate, among other matters, the distasteful results and highly critical conclusions of the Report of the Auditor General of Canada in November 2003 regarding the sponsorship program and advertising activities of the Government of Canada. The sponsorship program began in 1994-1995 under the administration of Prime Minister Jean Chretien and was initially administered, at the request of the Prime Minister, by Jean Pelletier, his Chief of Staff, with the assistance of the Privy Council Office.

After 136 days of hearings and 172 witnesses, the "*Commission of Inquiry into the Sponsorship Program and Advertising Activities*" reported in 2005. It determined that between 1994 and 2003, when the program was cancelled under the new government headed by Prime Minister Paul Martin, \$332 million was spent, of which \$147 million (44.4 per cent) was paid as fees and commissions to communications and advertising agencies. Commissioner Gomery concluded that there was clear evidence of political involvement accompanied by a veil

of secrecy in the administration of the program and an absence of transparency in the contracting process, gross overcharging and inflated commissions, kickbacks and illegal contributions to a political party, all embedded in a “culture of entitlement”. Commissioner Gomery also cited the “refusal of Ministers [of the Government of Canada], senior officials of the Prime Minister’s Office and public servants to acknowledge their responsibility for the problem of mismanagement that occurred.”<sup>xv</sup> Commissioner Gomery’s Summary included the statement:<sup>xvi</sup>

“All of the [advertising] agencies contributed to the financing of the Liberal Party of Canada. Whether legal or illicit, there was at least an implicit link between the contributions and the expectation that government contracts would be awarded. If the agency selection process had been open, transparent and competitive, public concern that such links existed would certainly have been diminished.”

The evidence adduced before the Gomery Commission resulted in several fraud convictions and guilty pleas to charges of defrauding the Government of Canada. Chuck Guite was convicted of five counts of fraud and sentenced to 42 months in prison; Jean Lafleur pleaded guilty to 28 counts of fraud and was sentenced to a 42 month prison term; Jean Brault pleaded guilty to five counts of fraud and was sentenced to 30 months; and Paul Coffin pleaded guilty to 15 counts of fraud and was sentenced to 18 months in prison. In December 2013, it was reported that the RCMP had laid charges of fraud, forgery and laundering proceeds of crime against Jacques Corriveau, arising out of the ‘Adscam’ scandal.<sup>xvii</sup>

Nor can Canadians be proud of the disclosures, evidence and conclusions reached by the Hon. Mr. Justice Jeffrey J. Oliphant, Commissioner<sup>xviii</sup>, in his report to the Governor General-in-Council submitted on May 31, 2010, the “*Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney*”.<sup>xix</sup> David L. Johnston was appointed by Prime Minister Stephen Harper to recommend the terms of reference for the Oliphant Inquiry.<sup>xx</sup> As a result of sworn testimony, including from Mulroney, and other evidence, Commissioner Oliphant reported that at two separate occasions in 1993 (the first of which was nine weeks after he left office as Prime Minister and while Mulroney was still an elected member of the House of Commons) and at a third meeting in 1994, Schreiber gave Mulroney envelopes containing cash aggregating at least \$225,000 in three equal installments denominated in \$1,000 bills in Canadian currency at meetings in hotels at Mirabel Airport and in Montreal and New York City.<sup>xxi</sup> There was no written record or evidence of their business arrangements. Mulroney placed the cash he received in Canada in the safe in his Montreal residence and, with respect to the cash he received in 1994 at the Pierre Hotel in New York City, in a safety deposit box he opened in that city. Mulroney did not deposit the funds in reportable accounts of banks or other financial institutions, and Mulroney did not declare the cash receipts as taxable income until after his 1999 tax year. “I am not able to find that any services were ever provided by Mr. Mulroney for the monies paid to him by Mr. Schreiber”, Commissioner Oliphant concluded.<sup>xxii</sup> The Commissioner summarized findings from the Inquiry as follows:

“The relationship [between Mulroney and Schreiber] spanned two decades and included a secret agreement between the two men made approximately two months after Mr. Mulroney left the office of prime minister and was sitting as a member of parliament. For many years Mr.

Mulroney concealed the fact that, on three separate occasions, in three different hotels in two countries, he had received thousands of dollars in cash, in envelopes, from Mr. Schreiber. There was no contemporary documentation, as is normally found in legitimate business dealings, for any of these transactions. No invoices or receipts were provided, no correspondence or reporting letters were written. I conclude that the covert manner in which Mr. Mulroney and Mr. Schreiber carried out their transactions was designed to conceal their business and financial dealings.

“Mr. Mulroney accepted the first installment of cash on August 27, 1993, while he was still a sitting member of parliament, and the other two installments on December 18, 1993, and December 8, 1994. He had several opportunities to disclose these dealings – when he filed his tax forms between 1993 and 1999, for instance; when he gave evidence under oath in his lawsuit against the Government of Canada in 1996;<sup>xxiii</sup> and when he or his spokespersons were interviewed by various journalists – but he chose not to do so. Instead, at all times he attempted to prevent the public disclosure of his dealings with Mr. Schreiber. ...

“In my view, Canadians are entitled to expect from those who govern, particularly the holders of high office, exemplary conduct in their professional and personal lives. Further, those who are making the transition from public life to private life must live up to the standards of conduct expected of them in order to preserve integrity of government. ...

“This Inquiry provided Mr. Mulroney with the opportunity to clear the air and put forward cogent, credible evidence to support his assertions that there was nothing untoward about his dealings with Mr. Schreiber. I regret that he has not done so. I express this regret on behalf of all Canadians, who are entitled to expect their politicians to conserve and enhance public confidence and trust in the integrity, objectivity, and impartiality of government. Mr. Mulroney’s actions failed to enhance public confidence in the integrity of public office holders.”<sup>xxiv</sup>

Edward Greenspan, the acclaimed Canadian criminal defense counsel, who unsuccessfully defended Conrad Black against criminal fraud charges before a jury in Chicago, Illinois, and Garth Drabinsky against criminal fraud charges before a judge alone in Ontario, and failed to prevent the extradition of business lobbyist Karlheinz Schreiber to Germany, where he was sentenced to jail for tax evasion, once expostulated that if one was to commit white collar crime, the best place to do it was in Canada. Counsel Greenspan later delivered a blistering speech condemning the Canadian justice system of “business bashing” and improperly moving white collar crimes “to the top of the hit parade.”<sup>xxv</sup> Most knowledgeable commentators and observers strongly disagreed with Greenspan’s ill-informed “business bashing” attacks on Canada’s policing agencies and remained of the opposite view, namely, that Canada has one of the least active and most ineffective prosecutorial and enforcement regimes.

### **Ethical Corporate Culture**

There are many factors to consider in assessing the environment in which corruption may exist in a corporation or other organization. One may start with a fundamental evaluation of the intrinsic character and the nature and quality of the predominate characteristics of the individuals that are involved in the leadership and governance of the organization and in the conduct of its business operations. I am of the view that culture and character trump everything. What that means is that the inherent traits and beliefs, values, ideals, personalities and the resultant behaviour of the individuals who are responsible for the leadership of the organization are the key influential factors affecting the ethical or non-ethical behaviour that is exhibited by the organization. Some may argue that the external circumstances and competitive exigencies that challenge the ability of business to succeed prescribe and strongly influence the decisions of business leaders to take actions that are necessary to win business and to grow. The oft-quoted example is that to win business in a certain country or industry the company has to conduct its affairs based on the maxim that “in Rome do as the Romans do”, namely, pay bribes in one form or another to gain a licence, contract or concession where it is the practice to do so. Related justifications by those who engage in unethical conduct are often that, not only is it required to succeed in business in certain environments, that everyone else is doing it, and that it benefits the company and its stakeholders, but also that, in the poorer countries, the citizens there will also benefit from the local investment and the employment and related opportunities created as a result of the impugned investment or financing in that underdeveloped country. While these arguments and perspectives are strongly voiced by so-called hard-headed, accomplished and respected business leaders, such determinations reflect not only their personal values, ideals and ethical principles, but also that they believe that the achievement of success is dependent upon, if not dictated by, reacting to external circumstances and the requirement to undertake the appropriate necessary means to achieve the desired business ends.

It is sometimes asserted that three factors are conducive to fraudulent or corrupt conduct. The first is ‘pressure’, and this is often associated with the need to win business and generate earnings, sometimes to meet profit targets that trigger incentive compensation. The second is ‘opportunity’ and this can occur in many circumstances and is frequently exercised by collusive managements who have the ability to manipulate or override internal controls. The third is more complex but is a necessary ingredient and that is the ability to ‘rationalize’ the illegal behaviour as acceptable or required conduct in the circumstances. Rationalization or justification may be based on the belief that one is pursuing a higher ideal, such as, among others, acting for the best interests of the company, its stakeholders or others, to protect an associate or because of attitudes of entitlement to the personally beneficial ends that are sought to be achieved.

I am not of the theology or persuasion that external factors govern and justify behaviour. I subscribe to the view that individuals, and thereby corporations and other organizations, have the ability and option to make decisions, to say ‘no’, and to choose specific paths that are not forced by the pressure of responding to external or internal prevailing conditions, and to avoid behaviour which some may rationalize is required to achieve so-called justified business or personal objectives. Benjamin Disraeli framed this point in the following manner: “We are not creatures of circumstance; we are creators of circumstance.”

### **Leadership Role of the Chairman of the Board**



The underlying and critical issue with respect to corporate corruption is the quality of the organization's ethical corporate culture. There are three levels to a corporate culture. The first, most important and highest position is the culture of the board of directors. The board of directors is responsible for the governance of the organization.<sup>xxvi</sup> The board cannot deny this responsibility even though the legal accountability for failure to establish and impregnate wholesome values and policies, practices and procedures to implement such values throughout the organization may be lacking or not enforced.

In focussing on the dominating and over-arching governance role of the board of directors, the pivotal and critical role and responsibility of the Chairman of the Board is focussed on and becomes paramount. It is the duty of the Chairman of the Board to provide leadership to the board and to make the board effective and efficient in carrying out its governance responsibilities and duties. The Chairman's administration of the board includes providing direction for the board to establish, promote, monitor and oversee an ethical corporate culture throughout the organization.

While in Canada we have achieved a solid advance in the separation of the roles of the Chairman of the Board and the chief executive officer, there has not been sufficient attention and analysis directed to the appropriate and enhanced functions of the relatively new position of an independent non-executive Chairman of the Board. It is not enough that there simply exists an independent Chairman of the Board who is not the chief executive officer. The mandate of an independent Chairman of the Board is not restricted to organizing and presiding over meetings. The "tone at the top" of an organization radiates from the quality of the leadership of the board of directors which in turn derives its character and quality from the Chairman of the Board. The ethical "tone at the top" must be established by the board, under the leadership of the Chairman, regardless of the exigencies and pressures thrust upon and encountered by the company by its external business operating environment. If you do not create your own culture, someone else will. The Chairman and the board cannot abdicate this responsibility to exterior forces.

In the context of the current subject of corporate corruption, the campaign against dishonest, fraudulent and illegal conduct within the company begins at the board of directors, the leadership of which is placed in and is the responsibility of the Chairman of the Board. The board of directors is responsible for the governance of the organization and the Chairman of the Board is posited with the leadership to move the board to carry out that duty. That the Chairman of the Board has a superior obligation is not to disparage or impede upon the significance of the role of the chief executive officer. The interrelationship between and the segregation of the roles and functions of the Chairman of the Board and the chief executive officer is the subject of another analysis. The company leadership role of the Chairman of the Board has long been endorsed, in England and Canada, but not in the United States. It is, unfortunately, the situation that most Chairmen of the Board in Canada are invisible and do not exercise nor rise to the needed levels of functional governance leadership of their companies that their positions entitle and require. This analysis is not a new concept in Canada.

"The person with the ultimate formal authority and responsibility for the management of any company is the chairman, not the CEO. This is so because the legal governing body of all corporations is the board, and its

chairman is the person who, through appointment or election by the directors, has the mandate to preside over the board and, through it, the company. The CEO is essentially a creature of, and reports to, the board.<sup>xxvii</sup>

Most acknowledge the importance and critical outcomes from the quality of leadership. The reverence for the “tone at the top”, in the context of ethical behaviour, is but an admission of this acceptance. In the Canadian environment, the question of whether to describe the Chairman of the Board as simply the “Chairman of the Board” or to recognize that important office as the “Chairman of the Company”, although raised, has not been examined, let alone become a serious item of informed discussion or debate.

From a legal perspective, the positions of the “Chairman of the Board” and the “Chairman of the Company” have no statutory or corporate recognition or authority. The formal recognition of those offices are not validated by nor recognized in corporate law. The mandate and role of the Chairman of the Board is pure self-regulatory governance created by the board of directors itself. From a practical point of view, however, the position and functional assignment of the Chairman of the Board are, or can be, significantly influential and often decisive to the outcomes of corporate decisions. In too many cases, however, the role and leadership of the Chairman of the Board, and thereby the board of directors, is not exercised. The consequence is that, by default, management’s initiatives and perspectives fill the vacuum of leadership and thereby determine the corporate policies and manner of doing business. The frequent failure of the Chairman of the Board and the directors to be “in control” is regrettable and not acceptable. The failure of the Chairman of the Board to develop an appropriate board culture and the omission of the board of directors to provide leadership to management creates a void, not only in direction and operations, but also in ethical values and compliance, leaving management to determine its own path forward internally and in responding to external circumstances.

Sir Adrian Cadbury expressed the position of the Chairman of the Board and the board of directors forcefully and clearly, although this United Kingdom annunciation of the quoted principle below has been neither accepted nor frequently practiced in this country. In Canada, in a corporate default, the Chairmen of the Board ‘do not fall on their swords’.

“The standards in a company are set from the top. It is for the chairman and the board to ensure that everyone in their business knows what the company stands for and what standards of conduct are expected from them. It is also their responsibility to see that those standards are lived up to. It is not enough to pass pious resolutions at the board; what matters is making sure that they are adhered to down the line. That is why if anyone in the company acts improperly, the ultimate responsibility rests with the chairman.”<sup>xxviii</sup>

### **CEO and Management Responsibilities**

While the Chairman of the Board and the board of directors have the primary obligations to enrich and expand their leadership roles to fashion the company’s ethical culture, it is the chief executive officer (CEO) of the organization to whom the mantle of day-to-day effective and operational implementation of ethical behaviour is delegated. The leadership role

of the Chairman and the board should not extend into the day-to-day normal management of the organization. The board of directors must, however, be satisfied that the CEO's personal values, moral standards and principled behaviour are not only in harmony with the board's mandates for ethical conduct but that the CEO will adopt, practice and provide clear leadership to management and employees to infuse that culture throughout the organization. The personal conduct of the CEO does matter and is critical. The CEO's ethical principles of behavior in relation to his transparency and open, non-political communication with the board, the nature of his relationships with subordinates and others, his attitude towards conflicts of interest, related party transactions and outside engagements and associations are some indicia of the values of a CEO. There can be no effective governance if the board of directors does not trust the CEO. While trust is a prerequisite, it must not be converted into devotion. The board must maintain a questioning attitude of balanced scepticism. "Trust, but verify." When a board has lost its trust in the CEO, the CEO must go. The board of directors of HP fired its respected CEO when the board lost trust in him when it concluded that, as a result of its review of his allegedly inappropriate conduct towards a woman consultant, he reflected a lack of integrity and judgment.<sup>xxix</sup>

"The bottom line is: Mr. Hurd violated the trust of the Board by repeatedly lying to them in the course of an investigation into his conduct. He violated numerous elements of HP's Standards of Business Conduct and he demonstrated a serious lack of integrity and judgment. The Board was unanimous in its decision that he must go, including the seven directors Mr. Hurd recruited to the Board. These directors would not have acted unanimously to remove Mr. Hurd for "piddling expense account problems".

The third layer of protection for the realization of an effective ethical corporate culture is senior management, particularly the direct reports to the CEO, the CFO and their respective direct reports. Senior and middle management must be trained by the CEO that they have, as an essential part of their daily business efforts, the responsibility to reinforce, strengthen and practice an ethical behaviour in performing their tasks. The CEO, CFO and the other senior executives are the team leaders and supervisors of management's conduct and behaviour. Oversight of the behaviour of management and employees and compliance with the company's code of business conduct is a more difficult supervisory and monitoring role for the board of directors to fulfill. Significant reliance is required to be placed by the board on the CEO and the CFO to promote compliance and to be accountable for the administration of its policies and codes of conduct.

It is of course vital for the board of directors to appoint individuals to lead management who will not aggregate to themselves the powers and influence of an "Imperial CEO". There are many classic examples of CEOs who are allowed to assume such authorities, often, in the past and less so currently, where the board members are the chosen acolytes of the CEO who are expected to celebrate his tenure and follow his will. One classic example is the then seemingly spectacular but fundamentally flawed leadership of WorldCom by Bernie Ebbers. The bankruptcy of WorldCom and subsequent criminal conviction of Bernie Ebbers and 25 year prison sentence led to several independent court-appointed reviews of governance at WorldCom. Richard C. Breeden, the former Chairman of the SEC who was retained in 2003 as counsel and advisor to the Special Committee of the Board of Hollinger International that uncovered previously undisclosed related party transactions with the company's controlling shareholder,

Conrad Black and his associates, was appointed by the court in 2002 to review the transactions leading to the bankruptcy of WorldCom. Part of Mr. Breeden's report concluded:<sup>xxx</sup>

“Lack of time commitment was not the board's worst failing. Despite having a separate Chairman of the Board and independent members, the board did not act like it was in control of the Company's overall direction. Rather than making it clear that Ebbers served at the pleasure of the board, and establishing reasonable standards of oversight and accountability, the board deferred at every turn to Ebbers.”

“Ebbers controlled the board's agenda, the timing and the scope of the board review of transactions, awards of compensation, and the structure of management. He ran the Company with iron control, and the board did not establish itself as an independent force within the Company. The Chairman of the Board did not have a defined role of substance, did not control the board's agenda, did not run the meetings and did not act as a meaningful restraint on Ebbers.”

Notwithstanding oversight by a vigilant board of directors, senior executives' and managers' decisions generally reflect their personal beliefs, values, experiences and cognitive processing attributes, as well as their demographic characteristics (age, education, professional status, prior assignments) and the implementation of firm policies often reflect the characteristics of these individuals. This is especially the case where there is an element of judgment or discretion in the decision making process. Individual manager's 'styles' can impact the company's policies and decisions in economically meaningful ways. It is with this understanding that the board and the CEO need to communicate throughout the organization and to offer training to employees so that they will understand what is expected of them in order to practice the company's commitment to living a culture that prevents corporate wrongdoing and that unethical behaviour is never acceptable. In this regard, it is informative to the board how the CEO handles management and employee issues as they offer insight and evidence into the operational culture of the CEO and management. How tolerant management is of unacceptable behaviour is another measure of management's 'tone at the top'. A commitment to integrity, ethical values and behaviour requires actual performance and written policies and codes of conduct are insufficient and ineffective by themselves. Leadership has to “walk the talk”. “You can issue all the memos and give all the motivational speeches you want, but if the rest of the people in your organization don't see you putting forth your best effort every single day, they won't either.”<sup>xxxi</sup>

### **The 'Broken Windows' Policy**

There has to be a culture of and commitment to “zero tolerance” with respect to matters of integrity, ethical conduct and behaviour, and compliance with the code of business conduct. The concept or practice of assessing the 'materiality' of a violation or breach cannot come into the discussion. The board needs to make a choice and a decision in this regard, not simply to express a preference: “We will not do it. Period. No matter what the circumstances.” If this is not the case, making a bribe or engaging in other forms of corrupt practice feels only half as bad after the fact as previously thought. Once the corporation has knowingly taken this step, it is easier to keep continuing 'sliding down the slippery slope'.

Rudi Giuliani, while the 107<sup>th</sup> Mayor of New York, successfully implemented the “Broken Windows” theory of crime-fighting, namely, that paying attention to ‘minor’ infractions would greatly reduce major felonies. He explained the policy as follows:

“The theory holds that a seemingly minor matter like broken windows in abandoned buildings leads directly to a more serious deterioration of neighbourhoods. Someone who wouldn’t throw a rock at an intact building is less reluctant to break a second window in a building that already has one broken. And someone emboldened by all the second broken windows may do even worse damage if he senses that no one is around to prevent lawlessness.”<sup>xxxii</sup>

In its anti-fraud and corruption program, the Securities and Exchange Commission has adopted the strategy of “Broken Windows” practiced by Rudy Giuliani. The Chair of the SEC announced it will enforce compliance with law, no matter how minor. When a window is broken and someone fixes it – it is a sign that disorder will not be tolerated. But, when a broken window is not fixed, it “is a signal that no one cares, and so breaking more windows costs nothing.”<sup>xxxiii</sup> This policy applies equally to the board’s responsibility to monitor and enforce compliance with its ethical standards of behaviour, including with its approved code of business conduct and related practices and policies.

During the 15 months preceding January 2005<sup>xxxiv</sup>, Nortel Networks Corporation (“Nortel”) conducted an investigation under the authority of its audit committee that identified inappropriate accounting practices and inaccuracies in its financial statements, including approximately \$900 million of liabilities that were carried on its previously reported balance sheet as at June 30, 2003, before restatement. Based on periodic reports on the progress of the Nortel Independent Review, the Nortel board terminated for cause in April 2004 the CEO, Frank Dunn, the CFO and the Controller, and, in August 2004, seven additional senior finance employees of the company because it held them responsible.<sup>xxxv</sup> The background and facts relating to the alleged inappropriate accounting practices at Nortel need not be repeated in detail and are disclosed and discussed in the independent report of the law firm and expert accountants retained by the Audit Committee of the Board of Nortel to investigate the matter (“Nortel Independent Review”)<sup>xxxvi</sup> and in the Settlement Agreement between Staff of the Ontario Securities Commission and Nortel (“OSC Settlement Agreement”).<sup>xxxvii</sup> In summary, it was alleged that former corporate management (terminated for cause) and former finance management (terminated for cause) endorsed, and employees carried out, accounting practices relating to the recording and release of provisions that were not in compliance with U.S. generally accepted accounting principles nor Canadian GAAP. In certain of the financial quarters in question – when Nortel was at, or close to break even - the practice of releasing provisions were undertaken to meet internally imposed pro-forma earnings before taxes (“EBT”) targets. The achievement of the EBT targets entitled the payment of bonuses to Nortel employees and significant bonuses to senior management under bonus plans tied to a pro-forma profitability metric. The allegations asserted that Nortel senior management treated identified excess provisions as a pool from which releases could be made to income to ‘close the gap’ between actual EBT and EBT targets in subsequent quarters.

The Nortel Independent Review concluded that one of the characteristics that allowed for the allegedly inappropriate accounting conduct at Nortel included a management

“tone at the top” that “conveyed the strong leadership message that earnings targets could be met through application of accounting practices that finance managers knew or ought to have known were not in compliance with U.S. GAAP and that questioning these practices was not acceptable.”<sup>xxxviii</sup> With respect to the importance of the “tone at the top”, the Nortel Independent Review noted:<sup>xxxix</sup>

“An effective “tone at the top” requires effective policies and procedures, but those alone are not sufficient. Those who manage and lead the Company, and are its officers, must exercise the highest fiduciary duties to the Company and shareholders and must be accountable, both to corporate management and the Board, for accurately reporting financial results. ...

“The Board of Directors must make clear that it has not tolerated, and will not in the future tolerate, accounting conduct that involves the misapplication of U.S. GAAP. It must further communicate its expectation that every Nortel employee will adhere to the highest ethical standards; will have training and experience commensurate with his or her job responsibilities; and will be held accountable for his or her actions and decisions. The Board of Directors and management should continue to address the issues associated with the inappropriate use of provisions.”

“Employees must be convinced of the Company’s commitment to an ethical climate, and of the central role that they play in ensuring that the Company’s code is followed. They must view compliance with the Company’s code of conduct, standards, and control systems as a central priority, and understand that they will be rewarded for ethical behaviour, even if it uncovers some problem that others might prefer to remain undisclosed.”<sup>xl</sup>

Fraud charges under the *Criminal Code* were laid against Frank Dunn, the dismissed CEO, former CFO, a certified management accountant and long-time senior financial officer of Nortel; against Douglas Beatty, a chartered accountant and Nortel’s CFO; and against Michael Gollogly, a chartered accountant and Nortel’s Controller. After a lengthy trial before a judge sitting alone, all three defendants were found not guilty. “I am not satisfied beyond a reasonable doubt that Frank A. Dunn, Douglas C. Beatty and Michael J. Gollogly deliberately misrepresented the financial results of Nortel Networks Corporation and, therefore, I find each of them not guilty of counts one and two in this indictment”, the court concluded.<sup>xli</sup> The Crown decided that it would not appeal the not guilty verdicts.

One of the principal factors that boards of directors have to recognize is that there is the possibility that they will not be able to discover or even have reasonable grounds to suspect that management may have or be engaging in improper conduct. Collusion among members of management to engage in and hide improper conduct is difficult to detect even by prudent board oversight in the normal and rigorous course of board affairs. Fraudulent collusion among management has occurred in high profile public companies unbeknownst to diligent overseers and gatekeepers properly exercising their responsibilities. In the Livent Inc. situation, the evidence discovered after the fact clearly established that: “The financial records of the

corporation were systematically altered to mislead auditors, the Board of Directors, investors and the public.”<sup>xlii</sup> As concluded by the trial Judge in convicting Garth Drabinsky and Myron Gottlieb of charges under the *Criminal Code*, “Mr. Drabinsky and Mr. Gottlieb presided over a corporation whose corporate culture was one of dishonesty.”<sup>xliii</sup>

Corporate collusion among management was also revealed on March 26, 2012 in the independent review of the facts and circumstances surrounding certain payments and contracts made by SNC-Lavalin Inc. in connection with winning engineering contracts. One of the ‘red flags’ of collusion is management override of approved policies and procedures that are designed to prevent corporate corruption. The SNC-Lavalin review reported that after its designated officer, the CFO, refused to approve requested payments of US \$33.5 million to agents, the requests were brought to SNC’s former CEO, Pierre Duhaime, who authorized or permitted the former EVP Construction, Riadh Ben Aissa, to make the payments. Such authorization by the CEO was in breach of SNC’s Agents Policy and its Code of Ethics and Business Conduct. The company’s Code of Ethics and Business Conduct did not then require an officer who was aware of a breach of the Code to report a violation or possible violation of the Code.

Another ‘red flag’ of management collusion, in addition to management override, and which is also difficult to detect, is when transactions are not recorded, or are booked falsely in coded accounts to prevent disclosure. This was also revealed in the SNC-Lavalin review: “...In December 2009 and July 2011, presumed agents ... were hired by the Former EVP Construction [of SNC-Lavalin], without complying with the Agents Policy. The agencies ... were neither properly disclosed within the Company, nor were they disclosed to its internal nor external auditors until shortly before the Independent Review began [February 2012]. The CEO and Former EVP Construction [of SNC-Lavalin] authorized or permitted this course of action until 2012, which did not comply with the Code [of Ethics and Business Conduct].”<sup>xliv</sup>

### **Commitment to an Ethical Corporate Culture**

The ethical corporate culture of an organization is an interrelated and interdependent triangle of critically connected and supporting elements. The case has been made in this note that an organization must have tenacious, dedicated and principled ethical leaders who light the path forward, guide others by their own personal examples and monitor conduct throughout the entity. That ethical leadership needs to be undertaken and infused throughout the company by the board of directors under active administration of the chairman of the board. The CEO receives his or her authorities from the board and the board’s responsibilities include ensuring that the CEO’s values are not different from the enhanced standards of the board and that the CEO leads management and the employee team to behave and conduct themselves in accordance with the heightened codes. This leadership cornerstone of culture, of course, assumes and requires that the leaders have core ethical values and that they ‘walk the talk’ by exhibiting those values naturally and continuously in the performance of their personal lives and in the conduct of their duties at work.

Without digressing further into an analysis, the third part of the triangle bounding an ethical culture is the design and implementation of programs, policies, procedures and procedures that provide formal ethics training throughout the organization. All employees need

to be informed not only that the company's leadership has endorsed and expects ethical conduct but also need to receive instruction, coaching and reinforcement of the skills for that type of behaviour in undertaking their work. Without sufficient training, codes of conduct and inspiring communications from leadership remain ineffective in enhancing behaviour.<sup>xlv</sup>

### **Foreign Bribery and Corruption Cases**

The World Bank blacklisted SNC-Lavalin and 114 of its affiliates for a period of 10 years effective April 17, 2013 for breach of the World Bank's 2006 consultant guidelines and 1997 procurement guidelines. SNC-Lavalin was suspended following an investigation by the World Bank relating to the Padma Bridge project in Bangladesh. The World Bank announced the debarment following its investigation, with the Royal Canadian Mounted Police, into SNC-Lavalin's "misconduct in relation to the Padma Multipurpose Bridge Project in Bangladesh, as well as misconduct under another Bank-financed project." The other 'misconduct' referred to by the World Bank was the Bank-financed Rural Electrification and Transmission project in Cambodia. The World Bank stated that the 'misconduct' involved a conspiracy to pay bribes and misrepresentations when bidding for World Bank-financed contracts.

In June 2013, SNC-Lavalin was awarded a \$2.2 million contract to design the Penal hospital and rehabilitation center in Trinidad and Tobago. The son of the Tourism Minister of the T&T government was an employee of SNC-Lavalin in Toronto. The High Commissioner of Trinidad and Tobago to Canada was the former Director of the Caricom Region Energy and Infrastructure Division of SNC-Lavalin from 2006 to 2010, when he was appointed by his government as High Commissioner to Canada. The Canadian Commercial Corporation (CCC), the Canadian government agency that facilitates private sector companies that wish to participate in government-to-government funded arrangements, selected SNC-Lavalin to be the designer and contractor for the \$1 billion hospital project. In light of the allegations of scandal and bribery that had surfaced surrounding SNC-Lavalin, the T&T government raised questions and concerns about the appointment of SNC-Lavalin to construct the hospital. In early October 2013, the CCC acquiesced and advised the T&T government that it would consider another company to construct the Penal hospital.

Enacted by the Parliament of Canada in 1998, the *Corruption of Foreign Public Officials Act* (CFPOA) makes it a criminal offence in Canada for persons or companies to bribe foreign public officials to obtain or retain an advantage in the course of international business. The enforcement of CFPOA has been minimal, until recently. The few cases of prosecution of bribery of foreign officials by Canadian persons are summarized below.

*Hydro-Kleen Group Inc.*<sup>xlvi</sup> – On January 10, 2005, Hydro-Kleen, based in Red Deer, Alberta, entered a plea of guilty to one count of bribery under CFPOA. Hydro-Kleen was fined \$25,000. Along with its president and an employee, the company had been charged with two counts of bribing a U.S. immigration officer who worked at the Calgary International Airport. The charges against the director and the officer of the company were stayed. The U.S. immigration officer pleaded guilty in July 2002 to accepting secret commissions and received a six-month sentence and was deported to the United States.



*Niko Resources Ltd.*<sup>xlvi</sup> - On June 24, 2011, Niko Resources, a public company based in Calgary, Alberta, entered a guilty plea to one count of bribery by providing the State Minister for Energy and Mineral Resources of Bangladesh with a vehicle costing \$190,984 in May 2005 for personal use, as well as travel and accommodation expenses for non-business trips to Calgary and New York and Chicago, costing about \$5,000. The payments were made by Niko in order to influence the Minister in his dealings with Niko and to attempt to secure a gas purchase and sales agreement. The Minister was forced to resign soon after the bribes were made and there was no evidence that Niko benefitted from either bribe. Niko was fined \$9.5 million and placed under a three year court-supervised probation order to ensure that audits are completed to examine Niko's compliance with CFPOA. The Canadian Trade Commissioner Service has placed a hold on providing services to Niko during the period of court supervision.

*Griffiths Energy International Inc.*<sup>xlvi</sup> - On January 22, 2013, Griffiths Energy of Calgary, Alberta, pleaded guilty to a charge related to securing a contract for oil exploration blocks in the Republic of Chad. The bribe was paid by Griffiths Energy entering into consulting contracts with a company owned by the Chadian ambassador's wife. Griffiths was required to pay a penalty of \$10.35 million.

*Nazir Karigar*<sup>xlvi</sup> - The accused Nazir Karigar was a paid agent of Cryptometrics Canada, Ottawa, Ontario. He was convicted under CFPOA for agreeing to bribe officials of Air India and India's then Minister of Civil Aviation in an attempt to secure a contract for the supply of facial recognition software and technology for Air India's passenger security system.

*SNC-Lavalin Inc.* - Several charges have been laid against former officers and employees of SNC-Lavalin under CFPOA in relation to the Padma Bridge project in Bangladesh. Kevin Wallace, a resident of Oakville, Ontario, and a former senior executive of SNC-Lavalin, has been charged with bribing a foreign official. Two other former employees of SNC-Lavalin, who reported to Wallace, Ramesh Shah and Mohammed Ismail, have also been charged. In addition, a Bangladeshi lobbyist, Abul Hasan Chowdhury, has been charged and is sought. A fifth person, Zulfiquar Ali Bhuijan, a Bangladeshi businessman who holds citizenship in Canada and Bangladesh and is not an SNC-Lavalin employee, has also been charged under the CFPOA. These allegations have not been proven in court.

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<sup>i</sup>Winston S. Churchill, "*Closing the Ring*", Volume 5, *The Second World War* (Houghton Mifflin Company, 1951), Chapter 4, p. 66 and following.

<sup>ii</sup>David Dilks, "*The Great Dominion*", *Winston Churchill in Canada 1900-1954* (Toronto: Thomas Allen Publishers, 2005), p. 300. The cost was 76 pounds sterling in 1943, which in 2005 was equal to approximately 2,276 pounds sterling (using the retail price index), or Canadian dollars \$4,803.92 (based on an exchange rate of 2.1105 pounds for 1 Canadian dollar).

<sup>iii</sup>*Ibid.*, p. 355

<sup>iv</sup>Steven F. Hayward, "*Churchill on Leadership: Executive Success in the Face of Adversity*", (Prima Publishing, 1997), p. 150, quoting John Keegan, noted author on war strategy.

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<sup>v</sup>*Ibid*, pp. 150-151.

<sup>vi</sup>*Ibid*, p. 151.

<sup>vii</sup>*The New York Times*, January 6, 1960, p. 45.

<sup>viii</sup>The Report dated August 30, 2004 was pursuant to section III.4 of the Order of Permanent Injunction dated January 16, 2004 in the matter of the *Securities and Exchange Commission v. Hollinger International Inc.* Hollinger International Inc., Form 8-K filed August 31, 2004, Exhibit 99.2.

<sup>ix</sup>*Report of Investigation by the Special Committee of the Board of Directors of Hollinger International Inc.* (August 30, 2004), p. 25. The Special Committee noted that it found no evidence that these items were reimbursed by the Blacks, although it stated that Hollinger International's internal controls and recordkeeping practices concerning payables at the time were not comprehensive: p. 25, footnote 16.

<sup>x</sup>Conrad Black, *"A Matter of Principle"*, (McClelland & Stewart, 2011), pp. 214-218.

<sup>xi</sup>Ronald J. Burke, Edward C. Tomlinson and Cary L. Cooper, *"Crime and Corruption in Organizations"*, (Gower, 2011), p. 18.

<sup>xii</sup>On November 13, 2013, the Quebec Minister of Justice presented an *"Act Mainly to Recover Amounts Paid Unjustly by Public Bodies in Relation to Certain Contracts in the Construction Industry"* (Bill 61). If passed, the Act would allow the Quebec Minister of Justice to seek compensation from businesses which defrauded public bodies or used fraudulent tactics in the course of tendering, awarding or management of public construction contracts in Quebec.

<sup>xiii</sup>Corporal Greg Horton, member of the Sensitive and International Investigations of the National Division of the RCMP, *"Information to Obtain Production Orders"* sworn November 15, 2013 pursuant to s. 487.012 of the *Criminal Code* (Canada).

<sup>xiv</sup>Detective Constable Khoshbooi 9568 of the Toronto Police Service, *"Information to Obtain Search Warrant"* and *"Information to Obtain"*, sworn October 2, 2013 and filed with the Ontario Court of Justice (Toronto Region) containing allegations that Alexander Lisi unlawfully trafficked in controlled substances.

<sup>xv</sup>*"Who is Responsible? SUMMARY"*, Phase 1 Report, *"Commission of Inquiry into the Sponsorship Program and Advertising Activities"*.

<sup>xvi</sup>*Ibid.*, p. 79.

<sup>xvii</sup> Lawrence Martin, *"Liberals visited by ghosts of Chretien's past"*, (Globe and Mail, 2013-12-16).

<sup>xviii</sup>Mr. Justice Jeffery James Oliphant was the Associate Chief Justice of the Court of Queen's Bench of the Province of Manitoba at the time of his appointment as Commissioner on June 12, 2008. He had been appointed a Justice of the Court of Queen's Bench of Manitoba on August 22, 1985 by the Government of Brian Mulroney and later elevated by the Mulroney Government to the position of Associate Chief Justice of the Court of Queen's Bench of Manitoba on December 24, 1990. He resigned from his judicial appointment on July 1, 2008 following his assignment as Commissioner and opted for supernumerary status.

<sup>xix</sup>Order-in-Council P.C. 2008-1092 dated June 12, 2008.

<sup>xx</sup>On recommendation of Prime Minister Harper, David L. Johnston was appointed by Orders-in-Council dated November 14, 2007 and March 19, 2008, as special adviser to the prime Minister to recommend a mandate for a public inquiry. Johnston provided two well-crafted reports to Prime Minister Harper dated January 9, 2008 and April 4, 2008 recommending a tightly focused inquiry that excluded an inquiry into the allegations of bribery

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surrounding the Air Canada deal with Airbus Industrie and into the circumstances surrounding the settlement of Mulroney's libel suit against the Government of Canada in January 1997.

<sup>xxi</sup>Karlheinz Schreiber alleged that the \$1,000 bills in cash that he gave Mulroney aggregated \$300,000, in three instalments of \$100,000 each. Mulroney said the cash he received from Schreiber totalled \$225,000. Commissioner Oliphant could not determine which one to believe.

<sup>xxii</sup>Oliphant Commission Report, Volume 1, p. 22.

<sup>xxiii</sup>Mulroney initiated a \$50 million lawsuit against the Government of Canada in April 1996 claiming damages for injury to his reputation. Mulroney was required to give evidence under oath at hearings in that lawsuit on April 17 and 19, 1996. In response to questions from counsel for the Government of Canada, Mulroney did not disclose his business relationships with Schreiber and the cash payments that Schreiber had made to him in 1993 and 1994. Mulroney's response included a statement: "I had never had any dealings with him [Schreiber]." Commissioner Oliphant stated in his report that Mulroney did not make appropriate disclosure to the questions he was required to answer from counsel for the Government (Volume 1, p. 36):

"Mr. Sheppard also asked Mr. Mulroney whether he maintained contact with Mr. Schreiber after he ceased being the prime minister. In his answer, Mr. Mulroney failed to disclose the true state of affairs, including his agreement with Mr. Schreiber; the two cash payments in envelopes he received from Mr. Schreiber in hotel rooms at Mirabel and in New York, respectively; or the cash payment he received, again in an envelope, in the coffee shop at the Queen Elizabeth Hotel in Montreal. Mr. Mulroney's response would lead anyone not knowing the true situation about Mr. Mulroney's dealings with Mr. Schreiber or the money he had received from Mr. Schreiber to believe that the post-prime ministerial contact consisted of a couple of brief meetings to have a cup of coffee.

"For Mr. Mulroney to attempt to justify his failure to make disclosure in those circumstances by asserting that Mr. Sheppard did not ask the correct question is, in my view, patently absurd. It was not Mr. Sheppard's question that was problematic; rather, it was Mr. Mulroney's answer to the question. Mr. Mulroney's answer to Mr. Sheppard's question failed to disclose appropriately the facts of which Mr. Mulroney was well aware when such disclosure was clearly called for. I suggest that Mr. Sheppard did ask the right question in attempting to ascertain what contact, if any, Mr. Mulroney and Mr. Schreiber maintained subsequent to Mr. Mulroney's departure from the office of prime minister. There was no objection to the question by counsel for Mr. Mulroney because it was not an objectionable question. Nor did the question call for the volunteering of information by Mr. Mulroney. What the question called for was a clear, complete, forthright answer. And that answer was not forthcoming from Mr. Mulroney."

<sup>xxiv</sup>Oliphant Commission Report, Volume 1, pp. 1-3.

<sup>xxv</sup>Janet McFarland, "*Lawyer decries 'business bashing' of executives*", *The Globe and Mail*, September 15, 2009.

<sup>xxvi</sup>*BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, para. 36.

<sup>xxvii</sup>Donald H. Thain and David S.R. Leighton, "*Improving Board Effectiveness – The problem and the solution begin with the chairman*", *Business Quarterly*, Western Business School, The University of Western Ontario (Summer 1992).

<sup>xxviii</sup>Sir Adrian Cadbury, "*The Company Chairman*", (Second Edition, 1995), p. 19.

<sup>xxix</sup>Ray Lane, Non-Executive Chair of HP, Letter to the Editor, *New York Times*, October 18, 2010

<sup>xxx</sup>Richard C. Breedan, Corporate Monitor, "*Restoring Trust*" (August 2003), p. 33:

<sup>xxxi</sup>Oren Harari, "*The Powell Principles – 24 Lessons from Colin Powell, Battle-Proven Leader*", (McGraw-Hill, 2005), pp. 18-19.

<sup>xxxii</sup>Rudolph W. Giuliani, "*Leadership*", (Hyperion, 2002), p. 47.

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<sup>xxxiii</sup>Mary Jo White, Chair, Securities and Exchange Commission, “*Remarks at the Securities Enforcement Forum*”, (2013-10-09).

<sup>xxxiv</sup>It was in October 2003 that the Nortel Audit Committee initiated an independent review of issues leading to the first restatement of Nortel’s previously filed financial statements. The Nortel Audit Committee reported to the Nortel board the findings of the Nortel Independent Review in January 2005.

<sup>xxxv</sup>Message from the Chairman Lynton ‘Red’ Wilson, *Nortel 2004 Annual Report*. There has also been some criticism of the conduct of the board of directors of Nortel. See, Donald H. Thain, “*Reflections of a veteran director: The unsatisfactory performance of Nortel’s ‘distinguished’ board*”, Ivey Business Journal (May/June 2004).

<sup>xxxvi</sup>Wilmer Cutler Pickering Hale and Dorr LLP and Huron Consulting Services LLC, “*Summary of Findings and of Recommended Remedial Measures of the Independent Review submitted to the Audit Committee of the Boards of Directors of Nortel Networks Corporation and Nortel Networks Limited*”, (January 2005) (the “Nortel Independent Review”).

<sup>xxxvii</sup>*Re Nortel Networks Corporation and Nortel Networks Limited*, May 16 2007. The OSC Settlement Agreement was approved by order of the Ontario Securities Commission on May 22, 2007, and Nortel was ordered to make a payment of \$1 million “as a contribution towards the costs of the investigation.” The OSC staff agreed not to initiate any other proceedings against Nortel for violations of the *Securities Act* (Ontario).

<sup>xxxviii</sup>The Nortel Independent Review stated at page 6, with respect to its review of the company’s first quarter, 2003: “...the CFO and the Controller failed to advise the Audit Committee and/or the Board of Directors that release of excess corporate provisions was required to achieve profitability and make up for the shortfall in operational results; that such releases were needed to cover the cost of the bonus compensation; that no event in the quarter triggered the releases (as required by U.S. GAAP); that the releases implicated Staff Accounting Bulletin 99 (relating to materiality) because they turned a loss for the quarter into a profit; and that they retained a significant amount of excess provisions on the balance sheet to be used, when needed, in a subsequent quarter. In separate executive sessions held by the Audit Committee with the CFO and the Controller, neither the CFO nor the Controller raised quality of earnings issues nor questioned the payment of the RTP [Return to Profitability] bonus. Based on management’s representations, the Audit Committee approved the quarterly results, and the Board approved the award of the RTP bonus.”

<sup>xxxix</sup>At pp. 7-8.

<sup>xl</sup>*Ibid.*, pp. 9-10.

<sup>xli</sup>*R. v. Dunn*, 2013 ONSC 137 (CanLII) (2013-01-14).

<sup>xlii</sup>*R. v. Drabinsky*, 2009 CanLII 12802 (ON SC) (2009-03-25).

<sup>xliii</sup>*R. v. Garth Drabinsky and Myron Gottlieb*, Ontario Superior Court of Justice, Court File No. P592/06, *Reasons for Sentence*, Benotto J., paras. 24 and 52.

<sup>xliv</sup>“*SNC-Lavalin Independent Review of certain payments and contracts*”, (2012-03-26).

<sup>xlv</sup>Mark S. Schwartz, “*How to Minimize Corruption in Business Organizations: Developing and Sustaining an Ethical Corporate Culture*” in *op cite.*, endnote x, p. 273.

<sup>xlvi</sup>*R. v. Watts and Hydro-Kleen Systems Inc.*, [2005] A.J. No. 568.

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<sup>xlvi</sup>*R. v. Niko Resources Ltd.*, E-File No.: CCQ11NIKORESOURCES (Alberta Queen's Bench, Judicial District of Calgary, 2011-06-24).

<sup>xlvi</sup>*R. v. Griffiths Energy International*, E-File No.: CCQ13GRIFFITHSENER, Action No. 130057425Q1 (Alberta Queen's Bench, Judicial Centre of Calgary, 2013-01-25).

<sup>xlvi</sup>*R. v. Karigar*, 2013 ONSC 5199 (2013-08-15).