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**CANADIAN ASSOCIATION OF CROWN COUNSEL
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INTERNATIONAL ASSOCIATION OF PROSECUTORS



**IV LATIN AMERICAN REGIONAL CONFERENCE OF
INTERNATIONAL ASSOCIATION OF PROSECUTORS
Fortaleza/CE – Brazil – March 23rd – 25th 2011
“THE ROLE OF PROSECUTOR IN COMBATING CORRUPTION”**

Corruption in Canada: myth or reality

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I) Canada in facts:

-It is a democratic country which counts only 34 M peoples (vs. 190 M). We share our frontiers in the South and the North, with the USA. We are also boarded by three oceans, the Atlantic on the East coast, the Pacific on the West coast and the Arctic in the North.

-It represents the 2nd largest country in the world with 9,984,670 sq. km compare to Brazil which is the 5th largest country with 8, 514, 877 sq. km.

-Our country has 2 official languages which are English and French. More than 62 % of the population is English speaking mostly concentrated in 9 provinces and territories and 23 % French speaking mainly concentrated in the province of Quebec. Other languages are also spoken such as Chinese, which counts large communities in Toronto and Vancouver, and we count also more than 400,000 Portuguese, 325, 000 Spanish speaking people, most of them mostly concentrated in Toronto, Vancouver but also in Montreal areas. These statistics don't take into account that many of our citizens learn and use Spanish as a third language.

II) Canadian government:

a) Kind of political system

Canada is a federal parliamentary democracy - (a union of several provinces with a central government), and a constitutional monarchy (vs. your federal presidential constitutional republic).

The Constitution sets out the basic principles of democratic government in Canada when it defines the powers of the three branches of government: the

executive¹, the legislative² and the judicial³. The Constitution provides only for federally appointed judges. Provincial judges are appointed to office under provincial laws.

b) Characteristics of the government

The legislature is composed of 2 houses, the Upper called the Senate and the Lower which is called the House of Commons. Most of our laws are adopted in the latter one which counts 308 Members of Parliament. The leader of our government is the Prime Minister, Mr. Stephen Harper.

Our country is subdivided in 10 provinces and 3 territories. Each of those has what we call a legislature. Members of those legislatures are elected. The federal parliament and the provinces are each sovereign with respect to their areas of legislative authority.

The government of Canada, also called the federal government, do have the power by its constituent to enact any statutes of its jurisdiction granted by the constitution such as criminal laws (most of them being regrouped into a Criminal code that is applied from one coast to another), telecommunication, constitutional matters and foreign policies.

For the purpose of our discussions, the legislatures also have their own field of legislations such as education, healthcare, property and civil rights and many

¹ The **executive** power in Canada is vested in the Queen. In our democratic society, this is only a constitutional convention, as the real executive power rests with the Cabinet. The Cabinet, at the federal level, consists of the Prime Minister and Ministers.

² The **legislative** branch is Parliament, which consists of the House of Commons, the Senate and the Monarch or her representative in our country (power purely formal), the Governor General. In the provinces, the same process applies but the Queen's provincial representative is called the Lieutenant Governor.

³ Our Constitution also provides for a **judiciary**, the judges who preside over cases before the courts. The role of the judiciary is to interpret and apply the law and the Constitution, and to give impartial judgments in all cases.

more. Their jurisdiction also extends to the administration of justice. The provincial governments have the power to enforce and prosecute laws. It also means that they have to allocate the necessary resources to the system of justice in order to have it running properly. It includes the power to run and establish courts, namely criminal courts.

III) HISTORIC BACKGROUND OF OUR CANADIAN JUSTICE SYSTEM

The Canadian legal system has been under the dominant influence our historical background. Partly inherited from the English system of precedents developed in Great Britain, the common law is one of the pillar of our justice system. It regulates matters that concern public and civil laws, except in the province of Quebec where civil private affairs are governed by principles mainly exported from the French Napoleon code. Both systems still co-exist in Canada. It regulates specific power granted by the Constitution;

IV) CRIMINAL LAW IN CANADA

a) General principles

The Canadian constitution grants the exclusive jurisdiction to the federal government to enact criminal laws. Most of the existing criminal laws have been codified within the Criminal Code of Canada. The provincial governments enact any legislation to enforce those criminal laws, including establishing criminal courts, and others of penal nature. It is under their authority that the provincial and municipal police forces will apply the laws.

b) Legal rights in criminal matters

The Canadian Charter of Rights protects the individual and ensures fairness during legal proceedings, particularly in criminal cases.

No one can be deprived of the right to liberty and security of his or her person except through proper legal procedures. Canadian citizens are protected against unreasonable searches and seizures, and against police using excessive force, even when a search or seizure is authorized by law. We are also protected against being detained or arrested arbitrarily. The Charter also protects us against arbitrary actions by law enforcement agencies.

c) Criminal and civil courts and guarantee of independence

i) Federal and provincial court jurisdictions

Constitutional authority for the judicial system in Canada is divided between the federal and provincial governments in this way:

The federal government has the exclusive authority to appoint and pay the judges of the superior or upper-level courts in the provinces. Parliament also has the authority to establish a general court of appeal and courts for the better administration of the laws of Canada. It has used this authority to create the Supreme Court of Canada. In addition, as part of its criminal-law power, Parliament has exclusive authority over the procedure in criminal courts. Federal authority for criminal law and procedure ensures fair and consistent treatment of criminal behavior across the country.

The provinces have jurisdiction over the administration of justice in the provinces, including the organization and maintenance of the civil and criminal provincial courts and civil procedure in those courts. Provincial courts trial most criminal offences;

The Supreme Court of Canada acts as the final court of appeal in Canada. Its nine judges represent the five major regions of the country, but three of

them must be from Quebec, in recognition of the civil law system. As the country's highest court, it hears appeals from decisions of the appeal courts from all the provinces and territories. Supreme Court judgments are final.

ii) Judicial independence

Canada has a level of judicial independence entrenched in its constitution. Before 1997, different courts had the benefit of judicial independence but in that specific year, Canadians clearly assisted to a major shift towards judicial independence. The Supreme Court of Canada stated in a decision that an unwritten constitutional norm guaranteeing judicial independence to all judges, including civil law inferior court judges⁴.

Within our country, that judicial independence means that there is an institutional independence that establishes a clear line between the judicial branch of government and the two others, the executive and legislative branches. There is also a decisional independence which provides a guarantee that judges should be able to make decisions solely based on the law and facts, without the risk of being disturbed by any kind of external interferences or influences that could affect their capacity to exercise judicial discretion.

⁴ Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I. ; [1997] 3 S.C.R. 3 (September 18, 1997)

d) Canadian Prosecution services

i) Role of The Minister of Justice

Under the Constitution, the Prime Minister and the Cabinet, mainly composed of Ministers, are the ones responsible for the government activities and are accountable to the Parliament. Provincially, the premier and the cabinet are accountable to their respective legislature. Both federal and provincial governments have a Department of Justice run by a Minister called Attorney General. Its duties consist in organizing the administration of justice which include the specific responsibilities of providing legal services such as the development and the making of justice policies, drafting laws, hiring legal counsel and prosecutors.

ii) Organization of Canadian prosecutorial services

In Canada, each province's Crown Attorney's office is responsible for the conduct of criminal prosecutions. Only the provinces of British Columbia, Nova Scotia and Quebec have a Director of Public Prosecutions office. In 2006, Parliament split the conduct of federal prosecutions from the Department of Justice and established the Public Prosecution Services of Canada. The Federal prosecution services conducts prosecutions for offences under federal Acts (including offences relating to drug-dealing, organized crime, terrorism, and various regulatory matters).

Crown Attorneys represent the Crown and act as prosecutors in proceedings under the Criminal Code of Canada. As you can imagine, prosecutors play a key role in the Canadian criminal justice system. Like most of their foreign counterparts in democratic countries, much is expected of them both by the courts and the public. They must see that all cases deserving of prosecution are brought to trial and prosecuted with

competence, diligence and fairness. Prosecutors must be of absolute integrity, above all suspicion of favoritism and must exercise the important discretion conferred on them fairly, in good faith, and without any consideration of the political implications of their decisions.

iii) Prosecutors independence

Crown Attorneys are not elected in Canada. Our prosecutorial system is often seen as less politically motivated than other systems. Moreover, because they are paid a regular salary and are entitled to permanent position rather than being hired on a case-by-case basis, they are often seen as independent from the police. That frontier between prosecutor and the police forces is even more noticeable in provinces where the prosecutors have a prescreening authorization system allowing them to scrutinize the evidence gathered by police investigators before making a decision on the opportunity to lay charges against an individual.

The absolute independence of the Attorney General in deciding whether to prosecute and in making prosecution policy is an important constitutional principle in Canada. In 2002, the Supreme Court of Canada clearly stated that «...*It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions.*»⁵

Moreover, the Court also underlined the quasi-judicial role of crown attorneys in Canada:

*«...The **quasi-judicial function** of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute.*

⁵ Krieger v. Law Society of Alberta, 2002 SCC 65, [2002] 3 S.C.R. 372, par. 30;

*To subject such decisions to political interference, or to judicial supervision, could **erode the integrity of our system of prosecution**. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict.⁶ » (bold characters are ours)*

Lately in 2009, our highest court had another opportunity to consider that important issue in a case of malicious prosecution⁷. The court then strongly reaffirmed the existence of that principal and underlined, how fundamental that notion is for the public confidence in our criminal justice system. I quote:

«The independence of the Attorney General is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched. The principle of independence requires that the Attorney General act independently o political pressures from government and sets the Crown's exercise of prosecutorial discretion beyond the reach of judicial review, subject only to the doctrine of abuse of process...»⁸

Public prosecution services across the country and other Attorney General's offices have also integrated that fundamental notion of independency into their current daily businesses. To ease the work of front line prosecutors, some of those services, such as the Public Prosecution Service of Canada, have published an official guideline textbook in order to remind every single prosecutor, that landmark of our public prosecution service.⁹

Now that I have reviewed the general aspects of our criminal justice system and the guarantees of independence granted to those by the Canadian constitution,

⁶ Idem pr., par. 32;

⁷ *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339;

⁸ Idem pr., para. 46;

⁹ The Federal Prosecution Service DESKBOOK, chapter 4 The independence of Attorney General (2002);

let's now take some time to have a closer look at it to see how well these guarantees are to preserve our public institutions from the phenomenon of corruption.

IV) CORRUPTION IN CANADA

First of all, I have to say that the term corruption in Canada, generally speaking, was until recently, to my recollection, an odd word that was not in the public eye. On a few occasions, we talked about corruption when people are making reference to isolated scandals that took place from time to time in different locations across the country.

The term corruption was used as common gossip when people were making jokes or references to scams or allegations of corruption that occurred abroad, far from us, far from our daily occupations, like something that could happen in foreign countries, let's say in a pictorial way, run by dictators. In other words, our folks were commonly sharing the strong impression that we were not concerned at all by any kind of corruption in our country except for those rare situations mostly revealed in mob cases.

I will now try to explain to you how that perception shifted now that we have experienced a national political scandal a few years ago and have left that childish state of mind behind, kind of naivety, that we no doubt fostered for good and/or bad reasons.

To start let me review briefly different aspects of the involvement of our country in its efforts to fight corruption. Then, I will further tell you more about recent examples of corruption that took place in our country.

a) Efforts deployed to fight corruption:

i) Enforcement of the Criminal code sections

First of all, even if bribery and corruption could be consider without any doubt extremely serious crimes, which strike at the heart of public confidence in administrative and judicial affairs, Canada doesn't have many laws or provisions written to combat these crimes. Nevertheless, the federal government seeks to prevent and prohibit potential domestic corruption by a combination of federal statutes, parliamentary rules and administrative provisions.

The Canadian criminal code includes many offences such as *bribery, frauds on the government and influence peddling, fraud or a breach of trust in connection with duties of office, municipal corruption, selling or purchasing office, influencing or negotiating appointments or dealing in offices, possession of property or proceeds obtained by crime, fraud, laundering proceeds of crime and secret commissions.*

ii) International involvement of Canada

On the international scene, Canada has actively participated in anti-corruption initiatives in various international forums, including the Organization for Economic Co-operation and Development (OECD), the Organization of American States, the Council of Europe, the United Nations, the Commonwealth and within the G-8 and the G-20.

In 1999, our government has enacted, under Canadian law, crimes that forbid bribing a foreign official to obtain and retain advantage in the course of business, laundering property and proceeds, and possession of property and proceeds. In addition, the *Corruption of Foreign Public*

Officials Act would make it possible to prosecute, for example, a conspiracy or an attempt to commit those offences. The five-year maximum term of imprisonment for the offence of bribing a foreign public official ensures that this is an extraditable offence. *The Act* was one of the first responses of the Canadian government to the problem of this kind corruption.

Moreover in 2007, Canada has ratified *the United Nation Convention Against Corruption*. Since then, the Royal Canadian Mounted Police have put in place new anti-corruption squads. However, for public eye, this initiative, in that new field of investigation, is still in a tentative stage of development.

b) Corruption cases:

i) Corruption in the judiciary:

On the other hand, there are a few well known examples of corruption in Canada but not so many in what we can call the judiciary. There is no public record of justice officials such as judges, justice of the peace or court clerks could have been directly involved in a so called corruption case.

Recently however, one of my former colleagues, a crown prosecutor in a little town, has been charged with bribery. His trial is still pending. He supposedly withdrew charges against individuals after accepting amounts of money.

Also, during the last decade, a scandal widely diffused involving drug squad police officers took place in Toronto. The charges laid against those included conspiracy to commit an indictable offence, illegal possession of

a firearm, accepting a benefit and influence peddling. These court cases, initially stayed for delay, are not back for pending trial after a success appeal by prosecutors.

So, at first glance, even if it appears that our judicial system doesn't seem to be too much afflicted by corruption until now, we should be aware that corruption problems are often bigger than they appear on the public record and we need to be ever vigilant of protecting the criminal justice system from the corrosive effects of corruption of its officials..

ii) Corruption in politics: the Sponsorship scandal

The Gomery Commission, formally known as the Commission of Inquiry into the Sponsorship Program and Advertising Activities, was a federal Canadian Royal Commission headed by the retired Justice John Gomery. The purpose of that commission was to investigate allegations of corruption within the Canadian government, such as misuse and misdirection of funds disbursed through the government's 1990s sponsorship program.

The Commission was called by then Canadian Prime Minister Paul Martin in February 2004 soon after a report by the Auditor General of Canada found misuse and misdirection of funds disbursed through the government's 1990s Sponsorship Program.

Before going further, I think it is important to give you some basic facts of the political context that existed at the time. After winning by a really close margin the province of Quebec secession referendum in 1995, the Federal government, which had actively supported the NO committee, used the most significant part of the funds allowed to the program to raise its visibility within Quebec. Most of the public relation firms hired within the context of that program, were noticed taking unjustified and unreasonable

profit margins on every single contract designed to promote the image of the Federal government.

Justice Gomery had released his report at the beginning of 2006. The purpose was to "*investigate and report on questions raised by the Auditor General's report*". However, as it is typically the case in commissions of inquiry, he was specifically directed not to make any conclusions or recommendations on criminal charges or civil liability.

As a matter of fact, even though the commission succeeded in making direct connections up to the office of the previous Prime Minister, its political party, his cabinet director and the responsible Minister in charge of the administration of that program, virtually everyone that had political involvement are still free of criminal charges. A few individuals at the head of public relations firms involved and the director of the political party concerned were charged and pleaded guilty.

ii) Allegations of political kickbacks within the industry of construction

Lately, recent allegations of organized crime infiltration in construction contracting, as well as underground party financing and cronyism have shaken the Quebec province's political class to its core.

The Premier of that province continues to resist calls from rivals for a public inquiry. He struck an anti-corruption police squad to look into the claims and says police should be allowed to do their work.

But, with practically no significant arrests in more than a year, and new reports of salacious scandals, demands for a public probe are coming from all levels. Joining the chorus is the mayor of Montreal, whose own land and contracting scandals have led to six police investigations.

The government refuses to accede to popular demand concerning a commission of inquiry into links between political party financing and the awarding of government contracts. Within the context of such allegations, I have to tell you that simultaneously there were also other corruption allegations scandals that went public such as the following:

-A recent book published indicates that nearly 600 business pay protection money to the mafia;

-Opposition politicians hand documents to police alleging that four construction firms funnelled \$400,000 to the members of the legislature using false names.

-Former deputy transport minister tells the media that 14 Montreal-area construction firms, backed by the mafia, fix the bidding process for public infrastructure contracts;

-A media report says the mafia tried and failed to extort the head of the construction firm that was repairing the roof at Montreal city hall;

-Mayoral candidate resigned to run for poll after admitting he accepted cash from a businessman accused of schmoozing politicians in exchange for city contracts,

-The RCMP arrest two Revenue Canada employees amid allegations of collusion with a construction company linked to Montreal city hall. Lately, a report that was broadcast in prime time on the main French TV Broadcasting in Canada interviewed a former employee of that public agency revealing that the Canadian Revenue Agency was corrupted by insiders up to the highest rank of the Agency;

-Quebec Provincial police meet former justice minister, who says the Premier and two party fundraisers pressured him to name three friendly political candidates as judges. Notice that since the moment of that public statement, a public Commission lately found that the system of appointment of judges has to be reviewed in order to get ride of any kind of political interference in the process of nomination;

-Family minister quits in July 2010 following revelations that he used a credit card belonging to security firm, which received \$4 million in government financing and donated thousands of dollars to the political party actually in Office;

Last month, the Quebec government went public to announce a new project to reshape its brand new anti-corruption squad put in place last year. The purpose of that announcement, made during the first legal strike of the Quebec's crown prosecutors in order to obtain better working conditions and sufficient resources, was to make official the transmutation of that squad to become very soon a multi-tasked agency under the supervision of the Director of Public Prosecutions.

As you can see from those illustrations, corruption is something that Canadians can no longer view in the abstract. Now that we have seen a major shift into our perception of corruption over the last ten years, it will be easier to share the views of the 140 inspired countries who have supported the efforts of the United Nations when they adopted the *United Nations Convention against Corruption*. Corruption is not anymore a manifestation of an isolated marginal behaviour, it is without any doubt, and I quote, ... «*a transnational phenomenon that affects all societies and economies, making international cooperation to prevent of control it essential*»¹⁰.

You can see my presentation as a little contribution....to that essential international cooperation.

Thank you for your attention.

¹⁰ United Nations Convention Against Corruption, United Nation General Assembly, Resolution 58/4 adopted in Mérid, Yucatán, Mexico, on 31 October 2003;