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Commentary

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The SNC-Lavalin Case: Getting Past the Politics and Identifying Necessary Changes

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For over a month, Canadians have been gripped with the evolving SNC-Lavalin "scandal" or "Lavscam," which began with a *Globe and Mail* story that alleged – using unnamed sources – that former Minister of Justice and Attorney General (AG) Jody Wilson-Raybould had been subject to inappropriate political pressure. According to this story, she was demoted after refusing to help the Quebec-based company avoid criminal prosecution on fraud and bribery charges (Fife and Chase 2019).

The charges against SNC-Lavalin were laid by the RCMP in February 2015 before the current Liberal government took office. They pertained to alleged corruption in the company's activities in Libya beginning in 2001. Under our Criminal Code, these actions abroad are nonetheless subject to criminal prosecution in Canada. This prosecution is led by the Public Prosecution Service of Canada, which was itself created as an independent office in 2006 by the former Conservative government.

Following the original story, more details emerged about the details of the alleged pressure brought on the former Minister/AG – specifically, that it entailed efforts by political staff from the Minister of Finance, the Prime Minister's Office (PMO), including Prime Minister Trudeau's best friend and Principal Secretary Gerald Butts, and the Clerk of the Privy Council Michael Wernick, who is the purportedly non-partisan head civil servant in Canada. Given the political backdrop, it is not surprising that the efforts to determine what happened and why took on a political focus that continues to this day.

This political focus has accelerated following the decision by the House Justice Committee to examine the issue and bombshell accusatory evidence from former Minister Wilson-Raybould and the subsequent resignation

from Cabinet of Jane Phillipot who is a friend and supporter of Wilson-Raybould. The Committee has also heard from the Deputy Minister of Justice, the Clerk of the Privy Council and Gerald Butts, who bizarrely also resigned. Yet Butts has claimed that he, or his staff, had done nothing inappropriate. More recently, the Clerk of the Privy Council Michael Wernick has also announced his retirement as well.

The issue is also now being investigated by the Ethics Commissioner and Opposition parties have formally asked the RCMP to investigate the matter for possible criminal obstruction of justice. There have even been calls for both a public inquiry and the resignation of the Prime Minister himself. Largely overlooked in all of this is an identification of relevant facts and applicable laws to what took place and necessary reforms to prevent it from happening in the future. This "lessons learned" approach is necessary because the issues involved in this case are critical to the independence of our justice system from political interference.

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Although there are some conflicting versions of facts, some matters appear verifiable – that is a good place to start in order to analyse what happened and what changes, if any, are worth consideration.

This case began in February 2015 when the RCMP decided to lay a fraud charge under s.380 of the Criminal Code and a bribery charge under s. 3 of the *Corruption of Foreign Public Officials Act* against SNC-Lavalin as a company (rather than against specific individuals). The charges arose from corruption allegations against the company in its efforts to secure contracts in Libya dating from 2001 to 2010.

It should be noted that upon conviction the company is liable to unspecified fines but any ban on federal contract bidding is *not* authorized under either statute. This is important because SNC-Lavalin and its senior officials have been previously convicted of corruption-related offences and, from the outset, it has been clear that avoiding the contract bidding ban is the real objective of the company.

The contract bidding ban of 5 or 10 years is instead simply the internal policy of the Department of Public Works (now known as Public Services and Procurement Canada) known as the "Integrity Regime," which has been under review since 2017. Astonishingly, changes to this policy are expected within a month. According to Minister Carla Qualtrough, the proposed changes will include removing fixed bidding disqualification periods and replacing them with a wholly discretionary determination, including no ban, by the existing "Registrar" in an independent process (Government of Canada 2018). This policy reform could also include authorizing contract bidding bans where the Registrar concludes that the bidder poses a potential risk to Canadian security interests. In today's heightened espionage environment, such a provision could be a useful public interest tool.

In other words, SNC-Lavalin, and its various political advocates, could have sought the outcome they wanted without becoming entwined in efforts to influence the independent decision-makers in our criminal justice system, which would have avoided this 'crisis' altogether. Why did no one suggest or seek that "solution"?

The focus of the current controversy in the SNC-Lavalin case is the unsuccessful attempt by the company to secure a Deferred Prosecution Agreement as authorized under Part XXII.1 of the Criminal Code and the efforts by political actors to persuade the former AG to invoke her lawful authority under the *Director of Public Prosecutions Act* to direct such action be taken or to take over the prosecution to ensure that result.

It is important to remember that when SNC-Lavalin was charged in 2015, there was no express authorization in the Criminal Code for this kind of diversionary process, although prosecutors have a general authority not to proceed with a criminal prosecution if they decide it is in the "public interest" to do so. This kind of discretion has existed from time immemorial and it is used on a daily basis by prosecutors especially in less serious offences. This discretion was formalized in the Criminal Code (Alternative Measures) and the *Youth Criminal Justice Act* (Extrajudicial Measures) decades ago.

After being charged in 2015, SNC-Lavalin asked the Public Prosecution Service if they could resolve the case by entering into a Deferred Prosecution Agreement, which was a process in which they had participated in the US and the UK. They were told by the Prosecutor's Office that this was not possible as there was no express legal authorization for that to occur.

This is what resulted in the massive lobbying effort by the company to get the law changed. This has been extensively reported by the media, but it should be noted that it appears that the lobbying by the company was legal, appropriate and effective. The government added the current section XXII.1 authorizing these non-prosecution remediation agreements by adding it as the final Part of the 2018 Budget Bill, which itself has been criticized as being an attempt to hide the change.

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Because the amendments were to the Criminal Code, that means they were drafted by the Justice Department and approved by former Minister Wilson-Raybould. The Bill went to the House Finance Committee where one amendment irrelevant to the current controversy was made and also to the Senate Legal Affairs Committee which asked the Minister to appear which she declined to do. The Bill was passed in June 2018 and came into force in September 2018.

With the law having been changed, SNC-Lavalin went back to the Public Prosecutor's Office expecting that the remediation process would be agreed to but instead were told that their request to negotiate such an agreement was rejected. Also noteworthy is the fact, revealed in the recent Federal Court ruling on the case by Justice Kane which upheld the prosecutorial discretion in the case, that the refusal provided to SNC-Lavalin did not provide any specifics on why the request was rejected. The company was simply told that the Director of Public Prosecutions "continues to be of the view that an invitation to negotiate a remediation agreement is not appropriate in this case. Therefore, no invitation to negotiate a remediation agreement will be issued and as a result crown counsel shall continue with the prosecution of this case in the normal course" (Federal Court 2019).

It appears that it was this unexpected and unexplained refusal by the Public Prosecution Service which prompted SNC-Lavalin's subsequent lobbying efforts with the government at both the political and public service level that resulted in the current political scandal now dominating the public agenda. It also resulted in the company seeking a judicial review of the Prosecutor's Office's refusal to grant the deferred prosecution which was filed in October 2018 and which was just dismissed as being without merit in the above noted ruling of Justice Kane

released in early March 2019. The judgement provides an excellent and detailed analysis of the importance of the independence of prosecutors but offers very limited information about what facts or issues were considered in this case.

It is now clear that the core of the controversy is about why SNC-Lavalin was denied the Deferred Prosecution Agreement by the Public Prosecution Service, which the revised law specifically permits. Opponents and advocates of allowing this deal have pointed to the economic consequences, not of the criminal conviction itself, but rather of the federal contract bidding ban that was expected to result from the conviction. Supporters of SNC-Lavalin legitimately point to the newly created s.715.31(f) of the Criminal Code, which states that one of the objectives of these Agreements is to:

> (f) to reduce the negative consequences of the wrongdoing for persons — employees, customers, pensioners and others — who did not engage in the wrongdoing, while holding responsible those individuals who did engage in that wrongdoing.

Clearly, potential job loss is an intended consideration. This is also reflected in s. 715.32(2)(i), which requires consideration of "any other factor that the prosecutor considers relevant."

Unfortunately, the same legislation also contains s. 715.32(3) which states:

> (3) Despite paragraph (2)(i), if the organization is alleged to have committed an offence under section 3 or 4 of the *Corruption of Foreign Public Officials Act*, the prosecutor must not consider the national economic interest, the potential effect on relations with a state other than Canada or the identity of the organization or individual involved. [emphasis added]

There have been conflicting explanations offered by officials about what exactly the "national economic interest" is supposed to mean. At his recent appearance before the Justice Committee, then Privy Council Clerk Michael Wernick explained that it is based on language from a British ruling and is intended to refer to international economic competition as opposed to domestic job loss. This position has recently been contradicted by the Anti-Bribery Unit from the Organization of Economic Cooperation Development (OECD), which has chosen to stick its collective nose into the issue and advises it is now "monitoring" the case.

> "Clearly, the Criminal Code amendments that created the Remediation Agreement process have now been shown to have a serious deficiency related to qualifying criteria that is directly relevant to the current controversy."

It should also be noted that the legislation regarding allowing a Deferred Prosecution Agreement specifically requires the consent of both the AG and a judge from the Court where the criminal prosecution was being heard. These are important and appropriate transparency measures that should be maintained.

Clearly, the Criminal Code amendments that created the Remediation Agreement process have now been shown to have a serious deficiency related to qualifying criteria that is directly relevant to the current controversy. Greater clarity is required through legislative amendments, which is also a recommendation from the former Privy Council Clerk Wernick.

This lack of clarity was also present in the non-legislative actions in this case. It began with issuance of a Public Interest Note by the Director of Public Prosecutions on September 4, 2018 to then Attorney General Wilson-Raybould, which advised that SNC-Lavalin would not be allowed to enter into a Deferred Prosecution Agreement and appeared to have provided the rationale for that decision. This notification is authorized under s. 13 of the *Director of Public Prosecutions Act*. The *Act* does not prohibit the sharing of information from that Note by the AG, although internal Public Prosecution policy suggests that the Note is a personal communication between the Director and the AG.

Based on the evidence provided by former Minister Wilson-Raybould, it appears that she reviewed the Public Interest Note provided to her and by September 14 had concluded that she endorsed the decision not to allow SNC-Lavalin a Deferred Prosecution Agreement. This specifically included a decision by the former Minister not to issue a Directive to the Director of Prosecutions under s. 14 of the *Act* to allow the Agreement or to give notice under s. 15 of the Act that she was taking charge of the case.

It is important to note that the former Minister did *not* provide the Public Interest Note to the PMO or to the Clerk of the Privy Council. This created a lack of information in those offices which may have contributed to them believing that they had 'new' information relating to potential job losses which they felt justified their continuing communications with the Minister.

Evidence provided to the Justice Committee also revealed that the former Minister attempted to give her Deputy Minister the Public Interest Note but, strangely, the Deputy Minister refused to receive the Note and only accepted extracts. In other words, the Deputy Minister was offered relevant information on a subject of a public interest and instead chose *not* to receive that information. Why?

> "It is important to note that the former Minister did not provide the Public Interest Note to the PMO or to the Clerk of the Privy Council."

The former Minister did not issue any kind of written statement to the PMO or Privy Council Office (PCO) regarding her refusal to intervene or the rationale for refusing the Deferred Prosecution Agreement. It should be noted that there are no established rules or protocols about this and that there is also nothing in place regarding how Ministers, the PMO and PCO should conduct themselves in interactions with the AG once such a decision has been formally made. Once again, this absence of defined protocols appears to have contributed to the alleged difference in perceptions about whether the Minister was open to reconsidering her decision not to intervene.

We also now know from witness evidence that this "misconception" lasted for at least three months and that the advocates of SNC-Lavalin, including PMO senior staff and the Clerk of the Privy Council, improperly introduced blatantly political considerations in trying to convince the former Minister to change her decision. At one point, political staffers actually suggested that an outside legal opinion be sought even after the issue was before the

Federal Court as a result of the SNC application to overturn the refusal. The former Minister was absolutely correct in refusing this request in light of the court proceedings and the request itself is an insight into the desperation of political staff to find a "solution."

Those who were trying to persuade the former Minister to reverse her decision and intervene in the case have explained their conduct as being justified because prosecutorial discretion remains active until the completion of the criminal proceedings. While this may be true in a generic sense, when the decision-maker has considered a specific issue, like economic impact and job loss, and reached a decision, having outside political or official actors re-argue the same issue without new facts to try and change the exercise of discretion is highly questionable.

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Finally, when that pressure reaches the point of veiled threats against the personal interests of the decision-maker, like losing her Cabinet position, that is beyond doubt an impropriety that merits a disciplinary consequence. Given the apparent misunderstanding about the former Minister's willingness to "reconsider" intervention in the case and the fact that the remedy sought was a process authorized by law, it may not reach the threshold of criminal obstruction of justice, but it certainly raises the question of continuing fitness for office.

Notably, Prime Minister Trudeau has recently appointed former Minister of Justice and Attorney General Anne McLellan to provide advice on whether the roles of Minister of Justice and Attorney General should remain together or be separated into two distinct positions. This decision stems from concerns about the distinct nature of each role. The Justice Minister is a partisan Cabinet position that is subject to political considerations and pressure from the Prime Minister, while the latter is a more independent non-partisan position meant to provide legal advice and represent the Government of Canada in legal proceedings.

Given the high-profile subject of this case, the political and official actors involved and the unprecedented resignation from Cabinet followed by explosive condemnation and expressions of loss of confidence in the Prime Minister, it is not surprising that the current political firestorm rages on. Hopefully, attention will also be given to why this controversy happened and if there are legislative and policy reforms that could help prevent it from happening again.

In that perhaps naively optimistic perspective, the following actions are offered for consideration:

- Implement changes to bidding ban policy to allow full discretion as to imposing a ban or what its length will be through an independent process with defined criteria, required explanation of decision and a defined appeal process and let the SNC-Lavalin criminal case proceed;
- Include security-based intelligence considerations in assessing bans on companies bidding on federal contracts;
- Amend Part XXII.1 of the Criminal Code to remove contradictory considerations and retain potential domestic job loss as valid criteria in whether to approve a Deferred Prosecution Agreement;
- Review the Directives in the current Director of Public Prosecutions policy (Deskbook) to expressly permit sharing of s.13 Public Interest notification in defined circumstances by the Minister with the PMO and PCO Clerk;

- Develop government protocols for the AG to give formal notification of decisions regarding case prosecutions as well as a defined mandatory process for any subsequent Ministerial, staff or official contact with the AG on the case or issues related to it;
- Review whether the AG and Minister of Justice should be separate with defined roles;
- Consider the reports of the Ethics Commissioner and the House Justice Committee regarding any official misconduct in the entire SNC-Lavalin case.

Public confidence in our justice system is essential. Having a clearly defined process that stresses independence, transparency and informed rather than political decision making is a cornerstone of maintaining that public confidence. We can learn from this case…so it doesn't happen again.

About the Author

Scott Newark is a former Alberta Crown Prosecutor who has also served as Executive Officer of the Canadian Police Association, Vice Chair of the Ontario Office for Victims of Crime, Director of Operations for Investigative Project on Terrorism and as a Security Policy Advisor to the governments of Ontario and Canada. He is currently an Adjunct Professor in the TRSS Program in the School of Criminology at Simon Fraser University.

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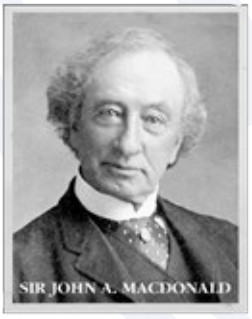

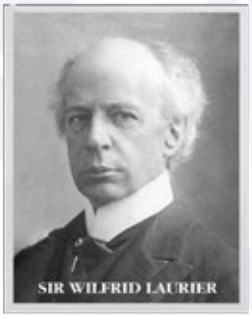

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