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Commentary

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The uses and abuses of justice(s) out of office: the SNC Lavalin and Johnston scandals

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Introduction

Should former Supreme Court Justices be offering legal services to public officials entangled with political controversy? David Johnston brought this question yet again to the forefront of Canadian political life by countering accusations of conflicts of interest by citing former Supreme Court (SCC) Justice Frank Iacobucci's legal opinion. Johnston, a former Governor General, was appointed by Prime Minister Justin Trudeau's government as a special rapporteur to investigate allegations of foreign interference in Canadian elections.

The appointment of Johnston – who resigned from the special rapporteur role on June 9 – had been controversial, with accusations of conflicts of interest

* Many thanks to Howard Anglin, Gerard Kennedy, Andrew Irvine, and of course Mark Mancini for comments, criticism, and conversations on this article. It is much stronger as a result and many of the better points expressed in this article can be credited to their names (and *vice versa* regarding mistakes).

given his past ties to the Trudeau family. Johnston claimed that Iacobucci legally advised him that he did not face any conflict of interest. This is not the first time questions have come up about former Supreme Court Justices advising on public controversies, and sadly it is not the first time that Iacobucci's name has been tied to the question. During the SNC-Lavalin scandal, Iacobucci worked as SNC-Lavalin's legal counsel and provided the Trudeau government with a controversial legal opinion.

We can technically separate the general question of how to regulate the conduct of Canadian judges once they are out of office from the particular question of whether or not Iacobucci acted improperly. But the legality, and the perception of the legality, of Iacobucci's conduct in the Johnston and SNC-Lavalin scandals can help guide our thinking about the more general problem. Put briefly, it can be argued that Iacobucci's legal opinion for Johnson may well have violated the Law Society of Ontario's rules about the duty of lawyers (and their *firms*) to avoid conflicts of interest. Because Iacobucci's colleague at Torys LLP, Sheila Block, was retained as Johnston's lawyer, the firm would have lost a retainer had Iacobucci found Johnston in a conflict of interest and unable to serve as special rapporteur. As a result, it could be argued that Iacobucci placed his own firm in a conflict of interest.

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Although no such formal conflict could be alleged in respect of his work for SNC-Lavalin, his involvement demonstrates that former judges can undermine the public perception of our democracy and the rule of law when they participate in public law matters on behalf of actors with a specific agenda. That does not mean that former judges should be barred from all legal practice. But at the very least it suggests that they should avoid offering legal services in highly political matters where it can appear that their reputation is being used to embellish a contentious legal argument in ways that could call into question the judiciary's reputation for political impartiality. It also suggests that the law societies should

introduce partial restrictions on former judges practising constitutional and administrative law.

This article is not about the content of David Johnston's report on foreign interference in Canadian elections, but rather how a former SCC Justice may have helped compound and confuse rather than clear away whatever conflicts of interest Johnston may have faced. The question of Johnston's own conflict of interest will be discussed but it is not the focus here. The article draws on a previous article co-authored with Mark Mancini (Mancini and Sigalet, 2021) to discuss the broader question of how the regulation of former judges relates to the principles of democracy and the separation of powers.

The Johnston scandal

Before looking at the more general problem, it may be useful to review the details of the Johnston and SNC-Lavalin scandals. This also offers an opportunity to sketch the existing rules, or relative lack thereof, concerning the professional activities of former judges.

Johnston was appointed as special rapporteur by the Trudeau government in order to investigate claims that the government had knowingly ignored or failed to respond to information about foreign interference by the People's Republic of China in Canadian elections. This may have been a tactically smart move on the government's part, partly because Johnston was appointed and served as Governor General under Stephen Harper's Conservative government. He has the sheen of bipartisan approval that is rare for someone so ensconced in the world of federal politics. Johnston is also inarguably an honourable man and servant of this country. Before becoming Governor General he attended Harvard, Cambridge, and Queen's, worked as a law professor at Queen's and the University of Toronto before becoming Dean of Western Law, then served as Principal and Vice Chancellor of McGill and President of the University of Waterloo. At Harvard he was the captain of the varsity hockey team. Despite these Laurentian laurels, he is not from Ottawa, Toronto, or Montreal, but Sudbury, a.k.a. the "Big Nickel".

And yet he is also known to have some ties with the Trudeau family, the extent of which became subject to much controversy in the wake of his appointment as special rapporteur. Conservative Official Opposition Leader Pierre Poilievre and Bloc Québécois leader Yves-François Blanchet reacted to Johnston's

appointment by alleging that he was conflicted by his past ties to the Trudeau family. One of the more politicized connections to the Trudeau family is Johnston's membership in the Trudeau Foundation, a charity that recently returned a $200,000 donation traced to Beijing (D'Andrea 2023). (Though the corporate structure of the Trudeau Foundation is complicated, being a "member" is not a minor involvement in the way that a "mentor" like Iacobucci was for a brief period. There are only 21 members who in turn choose the board of directors and approve the by-laws, among other duties. And it should be noted that the foundation received the Beijing-traced money before Johnston became a member.) This strengthened Poilievre and Blanchet's criticisms once it became public that Johnston was involved with an organization that was suspected of playing a *part* in Beijing's attempt to unduly influence Canadian politics. NDP leader Jagmeet Singh cited the fact that Block, the lawyer Johnston hired to advise him on his investigation, has a history of donations to the Liberal Party as a reason that Johnston is perceived as biased. The fact that the Opposition Leaders became arguably more focused on Johnston rather than Trudeau may have proved clever for the Liberals, although it appears to have backfired in terms of anyone accepting Johnston's findings.

Iacobucci and the scandal within the scandal

Although Johnston has now resigned from the special rapporteur role, the scandal within the scandal continues to involve his use of former Supreme Court Justice Frank Iacobucci to try to clear his name of any conflict of interest. We don't have much detail, but at a press conference following the release of his report, Johnston responded to questions about his conflict of interest by stating:

> I took the trouble of seeking a legal opinion from a retired Supreme Court Justice, Justice Frank Iacobucci, he was very clear that there's no conflict of interest with respect to the Trudeau obligations… so I have no doubt whatsoever that I had any conflict of interest.

Since lawyers must take special care to be clear about when they are conveying a professional legal opinion, as opposed to a personal opinion, it is probable that Johnston hired Iacobucci to assess whether he could be considered in a conflict of interest. It seems likely that Iacobucci was formally retained for a legal opinion on conflicts of interest, and it is material that Iacobucci works for the same law firm as Johnston's lawyer Block. It is possible that Iacobucci *placed his own law firm* in a conflict of interest by offering legal advice to Johnston

that was biased *for Torys LLP* in favour of clearing Johnston of any conflict of interest. Why? Because clearing Johnston of any conflict of interest meant he could serve in the role of special rapporteur and pay Torys LLP for Block's legal services. In the *McKercher* (2013) and *Neil* (2002) SCC cases dealing with the "bright line rule" for determining whether or not a lawyer is failing to fulfill the duty to avoid conflicts of interest, the Court specified that this duty applied to lawyers "and by extension a law firm" (*McKercher* para.8). Even if Iacobucci argues that he and Block were not representing clients with conflicting interests (which is true), it remains arguable that Torys LLP was conflicted by offering advice about a question directly related to *its own interest*.

> *Iacobucci managed to politically damage his own reputation and Johnston's by offering legal advice.*

Besides this technical conflict, Iacobucci managed to politically damage his own reputation and Johnston's by offering legal advice. To understand this damage, it is worth thinking about whether the *content* of Iacobucci's advice was worth more than the *source*: an ex-SCC Justice. We do not know the grounds on which Iacobucci judged that Johnston was not in a conflict of interest, but as an opinion about black letter law the advice might have been uncontroversial. A technical conflict of interest under the *Conflict of Interest Act* would involve a position of improper financial gain or potential benefits to intimate relations or friends. But these are not the kinds of conflicts being alleged by the likes of Poilievre, Blanchet and Singh. No political actor is saying that Johnston is violating the narrow terms of the *Conflict of Interest Act*. Rather, the alleged conflict is that Johnston's past ties, and especially his association with the Trudeau Foundation, implicate him in the very events he is meant to impartially investigate. This is only compounded by revelations that his colleague Block is a longstanding Liberal Party donor.

Given that a *legal* opinion about technical conflicts answers a question no one has asked in Parliament or the courts, it seems likely that Johnston sought out Iacobucci's opinion because the latter's status as an ex-SCC Justice granted his words the much grander political legitimacy of the judiciary. It is perhaps telling that Johnston did not explain or release the contents of Iacobucci's opinion.

By loaning out the political value of his opinions, particularly in a manner that may have violated his firm's duty to avoid conflicts of interest, Iacobucci damaged not only his own reputation but also the source of his political value: the perceived independence and impartiality of the judiciary.

The Johnston scandal was not the first time that Iacobucci has brought the judiciary's reputation into a political controversy. During the SNC-Lavalin scandal, Iacobucci worked as co-counsel for SNC Lavalin and offered a legal opinion advocating for the "legitimacy" of the Attorney General's "intervention in criminal matters seized by the Prosecution Service" while also attempting to obtain a supporting opinion from former SCC Justice John Major (Dion 2019, para.193). The Canadian Ethics Commissioner Mario Dion's report on the SNC-Lavalin scandal found that Prime Minister Trudeau violated section 9 of the *Conflict of Interest Act* by unduly seeking to influence his then Minister of Justice and Attorney General, Jody Wilson-Raybould, asking her to overturn a decision of the Director of Public Prosecutions. Dumont found that part of the Prime Minister's improper influence involved asking Wilson-Raybould to "re-examine" her views by looking to the legal advice of "someone like" former SCC Chief Justice Beverley McLachlin (Dion 2019, para.201). Iacobucci not only reached out to former Justice Major for an opinion but also to former Chief Justice McLachlin. He failed to recruit either colleague.

To be clear, Iacobucci did not act unlawfully in the SNC-Lavalin scandal. Nor did any of the other former SCC Justices involved. There are no laws or regulations prohibiting former Canadian judges from practising law *tout court*. One might think that regulating former judges is the job of the Canadian Judicial Council (CJC). The CJC is a body created by the 1971 federal *Judges Act* for regulating the conduct of judges in office, and so it has no formal jurisdiction over former judges. Formal regulation over former judges practising law is left to the provincial law societies, and they have a mixed set of procedural rules, with some requiring former judges to obtain the approval of benchers to practise (Alberta), others requiring a three-year break from appearing in court (BC), still others applying different rules to former judges from different courts (Ontario) (Mancini and Sigalet 2021, 269-70). Despite this lack of jurisdiction, the CJC's *Ethical Principles for Judges* does have some updated principles for guiding the conduct of former judges: e.g. it cautions them against "accepting retainers and providing legal advice in high profile or politically contentious matters where it can be anticipated that a client may make use of the judge's former status to advance the client's interests" (5.E.3). Although Iacobucci hasn't broken any

formal laws specific to former judges, in both the Johnston and SNC-Lavalin scandals he arguably acted against the CJC's *Ethical Principles* by allowing his status to be used for the political benefit of the Trudeau government (although to be fair this guideline was not put in place during the SNC-Lavalin scandal). Because the CJC has no formal jurisdiction over former judges, it will not launch an investigation into his conduct.

Democracy and the rule of law

Iacobucci's involvement in the Johnston and SNC Lavalin scandals invites us to think more carefully about the general principles threatened by involving former judges in the practice of law. There appear to be at least two principles threatened: democracy and the rule of law. These principles appear to be especially threatened where former judges practicse constitutional and administrative law, as these are the areas of law most liable to clients abusing the status of former judges to inappropriately advance their own interests.

How does democracy relate to the regulation of former judges? At a glance it might seem like democracy is only related to concerns about *sitting* judges, such as the concern that unelected judges will overturn valid democratic legislation for their own preferred policy outcomes. But the relationship between democracy and judges is even more subtle than this. In many cases, legislatures will *cede* responsibility for "hot potato" constitutional questions to courts and judges will engage in policymaking, sometimes even with the informal blessing of political actors. Courts are rarely heroic actors overturning laws enacted by tyrannical majorities, and yet they can still threaten democracy where judges do the democratic work of policymaking and let legislators off the hook.

On this view, the actions of former judges practising law can contribute to the democratic problem of political actors giving up responsibility for following and understanding the Constitution. This is not an issue where former judges *run for elected office*, as Carol Baird Ellen CJ did in 2015, because there the former judge is seeking to *take on* democratic accountability rather than shirk it. But it can be an issue where former judges are acting as lawyers for political actors. In the Johnston scandal, Iacobucci arguably traded on (or knowingly allowed Johnston to trade on) the political legitimacy of the judiciary in absolving Johnston of any conflict of interest. By having Iacobucci treat the conflict of interest question as a narrow matter of law, and treating the opinion like judicial holding, Johnston shirked responsibility for the inherently political judgement about whether he

was a suitable candidate for special rapporteur. Similarly, to quote Dion's report on the SNC-Lavalin scandal, Iacobucci's opinion was used by Trudeau and the PMO to support the legality of "partisan political interests" being used to pressure the Attorney General "on at least four separate occasions" (Dion 2019, para.329). This problem will arguably become more acute where public law issues are at stake (i.e. constitutional law and administrative law), because public law issues are more likely to press legal responsibilities onto political actors. In other words, former judges practising constitutional and administrative law can give government action a veneer of legality (or lack thereof) by essentially selling the status of their institutions.

> *How does the rule of law relate to the regulation of former judges?*

How does the rule of law relate to the regulation of former judges? As my UBC colleague Prof. Andrew Irvine has noted, "the rule of law requires not only that all government actions find their source in law" but also that governments "acknowledge the difference between powers granted to them in law and powers they do not have" (Irvine 2022, 2). Ensuring these requirements demands some measure of independence for courts in deciding questions of law. In turn, judicial independence requires that courts are impartial and *perceived* to be impartial while granting relatively equal access to justice. Having former judges practising law presents a challenge to the impartiality of the judiciary because there is the risk that the prestige of former judges will offer their opinions "the false tint of judicial precedent" (Mancini and Sigalet 2021, 262). Even if the risk is truly remote, it raises the possibility that former judges' opinions as lawyers will be *perceived* as more legitimate than those of their fellow members of the bar, based on their status rather than content.

Perception is enough to trigger concern here because the rule of law requires the "reasonable perception" of public confidence in the judiciary (*Canada AG v Federation of Law Societies* 2015, para.97). Similarly, allowing well connected and resourced litigants to weaponize former judges risks making an already unequal playing field all the more arbitrary and unequal in terms of access to justice. Wealth is already an unequal resource that can improve access to justice,

elite connections to the judiciary is an even more unequally distributed resource. And what's worse, elite connections to the judiciary are most likely to fall to those the courts are meant to help police: political actors.

When Iacobucci agreed to offer Johnston a legal opinion, he undeniably raised the *perception* in many minds that Johnston had special access to the kind of prestigious legal advice that is not available to even well-resourced Canadians. And the harm this may have inflicted on the rule of law in Canada was compounded by the fact that Iacobucci was already on the record as offering post-judicial legitimacy to the Trudeau government's position during the SNC-Lavalin scandal (a position that was likely wrong in law and used in what turned out to be a politically embarrassing way for the government). When the ordinary Canadian imagines needing a lawyer, what likely comes to mind is someone like the *Suits* litigators Harvey Spector or Mike Ross for the rich and *Better Call Saul*'s Saul Goodman for the poor. When the ordinary Canadian imagines Trudeau's or Johnston's lawyers, it is now someone like Frank Iacobucci. That is a problem.

What is to be done?

How should this problem be addressed? There is no silver bullet and it's important to recall that there are some reasons to welcome former judges back into the practice of law. For one thing, it might discourage higher quality and diverse candidates from seeking judicial office. And we certainly want to avoid rules that prevent former judges from engaging in academic debate or teaching. One of my own most cherished teachers, Stanford Law School's Prof. Michael McConnell, has had a prolific career as an academic since he resigned from the Tenth Circuit of the U.S. Court of Appeals. Any rules that would prohibit the likes of McConnell from writing and teaching would have a disastrous cost.

It is also helpful to keep in mind that the CJC's *Ethical Principles* already warns against former judges taking on clients seeking legal counsel in high profile and contentious matters where the former judge's status may be abused. This did not deter Iacobucci from offering Johnston a legal opinion on what can only be described as a clearly high profile and politically controversial matter. On the other hand, the reason this may not have deterred Iacobucci is that the CJC has no jurisdiction to investigate and sanction his conduct. And he has probably followed the Law Society of Ontario's rules for former judges practising law, even if he arguably may have caused his firm to breach the duty to avoid conflicts of interest.

Some scholars such as Amy Salyzyn have reasonably argued the only solution is that law societies should change their codes of conduct to prohibit any former judge from communicating with any court (2019). She also argues that former SCC Justices be prohibited from practising law "in any circumstances" (2019). This might have prevented Iacobucci from acting as he did in the Johnston and SNC-Lavalin scandals. The Federation of Law Societies of Canada (FLSC) has circulated proposed amendments to its *Model Cod* , including Salyzyn's recommended ban on former judges communicating with courts and imposing a new special duty of confidentiality (Salyzyn and Pitel 2022). These recommendations have not been implemented by Canadian law societies.

> *But there's a way to address this problem without placing unnecessary constraints on former judges.*

But there's a way to address this problem without placing unnecessary constraints on former judges. As argued in my coauthored article, *Justice(s) Out of Office*, democracy and the rule of law face different threats from former judges practising constitutional and administrative law, as opposed to other areas of law such as contract and torts. In constitutional and administrative matters, the danger to the principles of democracy and the rule of law is heightened because these are the areas of law most likely to limit or affirm the power of political actors. This heightens the danger of political actors seeking out and abusing the advice of former judges based on their status. In other areas of law, such as contracts and torts, a Supreme Court Justice's prestige could *work against* him or her if it was not backed up by expertise. A client should want Justice Russell Brown for a torts case because in his previous life as a professor he was a fantastic torts scholar, not because of his judicial prestige. And it is notable that there have been no public scandals involving former judges and such matters of private law. Concerns about unequal access to justice are not going to evaporate in private law matters, but they are likely to be less egregious and outweighed the benefits of having former judges contribute to the development of the law.

For these reasons, law societies should incorporate a simple prohibitive rule into a special oath. In order to be readmitted to the bar, former judges should be required to swear an oath in writing that they will "not advise, sign pleadings,

nor appear in court on any matter of constitutional law or administrative law."[1] The Johnston scandal has shown that it may also be necessary for the oath to incorporate the *Ethical Principles*' guidance against "accepting retainers and providing legal advice in high profile or politically contentious matters" as a stringent commitment (5.E.3).[2] (Although Iacobucci's counsel for Johnston could arguably have been prohibited as a kind of administrative law, even if the unique status of a "special rapporteur" makes this somewhat of a grey zone.)[3] Put together, the prohibitive section of the oath might go as follows:

> I will not advise, sign pleadings, nor appear in court on any matter of constitutional or administrative law. I will not accept retainers nor provide legal advice in high profile or politically contentious matters where it can be anticipated that a client may make use of my former status to advance their interests.

This would leave former judges free to practise law in a variety of other areas, including appearing in court, where the content of their views will likely prove more valuable than the prestige of their source. They would also be free to arbitrate and mediate between private parties without the concern of adding a "veneer of legality" given that mediation and arbitration is by definition private. Former judges found to violate their oaths could be disciplined.

Ideally, the guidance of the *Ethical Principles* would be enough to create a norm where former judges did not entangle themselves in the likes of the Johnston scandal, but this appears to have failed. It is unfortunate that action needs to be taken on this matter, but the Johnston and SNC-Lavalin scandals leave us little choice. The best we can do is seek to ensure that whatever rules we place on former judges practising law will foster rather than constrain judicial virtue. MLI

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Legislation

Judges Act RSC 1985, c-1, ss59(1),60(1).

Cases

Canada AG v Federation of Law Societies 2015, SCC 7.

Canadian National Railway Ltd. v. McKercher LLP [2013] 2 SCR 649.

R. v. Neil [2002] 3 SCR 631.

Endnotes

1 An earlier version of this oath can be found in the appendix of *Justice(s) Out of Office*. That draft oath was designed to fit the Alberta model of regulating former judges. It also included judges swearing not to advise, sign pleading, nor appear in court on any matter of law settled by the judgement of a court during the judge's time in office. I now think that the latter part of the oath is too vague and former judges should simply be trusted to avoid such conflicts in these areas outside of constitutional, administrative, conflicts of interest/legal ethics.

2 A draft version of the proposed rule is formatted here to fit into the Alberta Law Society's Rules, but it could be applied in any other Canadian jurisdiction.

Special Provisions for former Judges and Masters in Chambers:

117 Where an application is made by a former judge referred to in Rule 116(2), or by a former master in chambers under Rule 115 or 116(4)(b), the following provisions apply:

(a)the Executive Director shall not refer the application to the Credentials and Education Committee pursuant to Rule 118(1)(a) unless the applicant swears the following oath in writing:

That I will continue to be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, her heirs and successors according to the law. That I will as a Barrister and Solicitor conduct all causes and matters faithfully and to the best of my ability. I will not advise, sign pleadings, nor appear in court on any matter of constitutional or administrative law. I will not accept retainers nor provide legal advice in high profile or politically contentious matters where it can be anticipated that a client may make use of my former status to advance their interests. I will not pervert the law to favor or prejudice anyone, but in all things will conduct myself truly and with integrity. I will uphold and maintain the Sovereign's interest and that of my fellow citizens according to the law in force in Alberta.

(b) if the applicant is reinstated as a member, it is a condition of the reinstatement that the member must not appear in chambers or in any court in Alberta as a barrister and solicitor without first obtaining the approval of the Benchers, which may be given with or without conditions, or an administrator tasked with confirming that

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such an appearing will not violate the former judges' oath outlined in 117(a). Should an administrator decline to approve the reinstated applicant's submission, an appeal made be made to the Benchers.

3 It may also prove wise to make a special exemption for judges who resign before they are eligible for full retirement benefits and pensions, as McConnell did. This kind of sacrifice should perhaps be rewarded with an exemption from the recommended oath.