



MEMORANDUM / NOTE DE SERVICE

TO / DEST: Michael Wernick
Clerk of the Privy Council

FROM / ORIG: Me Nathalie G. Drouin Ad. E
Deputy Minister of Justice and Deputy Attorney General of Canada

SUBJECT / OBJET: **SNC-Lavalin**

Comments/Remarques

This was prepared further to your request in regards to charges against SNC-Lavalin and the impact on SNC-Lavalin if the final disposition of the current charges is a conviction. We have also provided you with an outline setting out process and considerations under the new Remediation Agreement regime under the *Criminal Code* and the *Director of Public Prosecutions Act* (attached). We have no information to provide on the possible impact on the Quebec or Canadian economy of a possible conviction of SNC-Lavalin.

Charges

According to their corporate website, each of SNC-Lavalin Group Incorporated, SNC-Lavalin International Incorporated and SNC-Lavalin Construction Incorporated have been charged with one count of fraud under section 380 of the *Criminal Code* and one count of corruption under Section 3(1)(b) of the *Corruption of Foreign Public Officials Act*.

Media reports indicate that these matters have been adjourned several times and that a preliminary hearing has yet to occur. Depending what the entities choose, these matters will go directly to trial, or to a preliminary hearing. If there is a preliminary hearing, and if the prosecution is successful in showing that there is admissible evidence which, if believed, could result in a conviction, a trial date would be set.

Possible sentence and related outcomes

1) Fines

Pursuant to section 735 of the *Criminal Code*, the maximum fine available for each offence is in the discretion of the court and is unlimited. The minimum, of course, is zero. What fines, if any, might be recommended in the actual prosecution is a matter for the Public Prosecution Service of Canada.

In assessing the appropriate fine for a conviction for fraud, subsection 380.1(1) of the *Criminal Code* requires a judge to consider, among other things:

- the magnitude of the fraud;
- whether the offence adversely affected investor confidence in such a financial market; and
- as an aggravating circumstance, the fact that the value of the fraud committed exceeded one million dollars.

Only a judge can order a fine pursuant to a conviction.

Past sentences for corporations convicted of corruption-related offence include:

- Hydro Kleen Systems paid a fine of \$25,000 for bribing a U.S. customs official;
- Niko Resources was fined \$9.1 million for bribing a foreign public official in Bangladesh; and
- Griffiths Energy paid \$10.4 million for bribing the wife of a foreign public official from Chad.

2) Probation Order

A probation order may be ordered under section 731 of the *Criminal Code* in addition to fines, or without a fine. In the Niko case, the company was also placed on probation for a period of three years.

Niko's Probation Order contains a number of continuing obligations imposed on Niko regarding disclosure and reporting to the RCMP, assistance to Canadian and U.S. law enforcement authorities, strengthening internal compliance controls, and conducting independent compliance audits to be paid for by Niko.

3) Impact of a conviction compared with the successful completion of a Remediation Agreement

Under a remediation agreement, "penalties" and "compliance measures" are among the possible options available, if both parties agree and a judge approves of the agreement. A **penalty** is similar to a fine, and monitored **compliance measures** would likely resemble a probation order that would follow a conviction.

While these Remediation Agreement conditions could provide for outcomes similar to those that would result from a sentence following a conviction, the biggest difference for a company convicted of a fraud or corruption charge would likely be an ineligibility period (also known as a debarment period) during which the company could not do business with the government. This would follow a criminal conviction, but would not follow the successful completion of a Remediation Agreement. In other words, a conviction might lead to a period of ineligibility, but a Remediation Agreement would not. Any period of suspension or debarment is likely to trigger adverse effects, such as foregone business opportunities, reputational damage, and possible

reporting requirements to third parties, such as banks and other financial institutions that are the source of operating capital.

Canadian Integrity Regime

The ability of a company/supplier to contract with the federal government is affected by the *Ineligibility and Suspension Policy* (Policy). The Policy ensures the government does business only with ethical companies/suppliers in Canada and abroad. Public Services and Procurement Canada (PSPC) administers the Policy on behalf of the government.

The Policy sets out when and how a company/supplier may be declared ineligible or suspended from doing business with the government. It provides that a company/supplier is suspended when charged with, or admits guilt to one of a number of listed offences, such as fraud and bribery of foreign public officials. The suspension from being able to contract with the federal government is for a duration of 18 months. This suspension is subject to extension pending the final disposition of the charges.

Administrative Agreements

The company/supplier can enter into an Administrative Agreement with the government to stay the suspension. An Administrative Agreement is an arrangement between the company/supplier and the government where the former must adopt certain compliance measures. It is used to mitigate the risks of contracting with a particular company/supplier. For example, the government and a company/supplier may wish to enter in Administrative Agreement to stay a suspension instead of terminating an existing contract due to a determination of ineligibility or suspension.

PSPC has only concluded one Administrative Agreement. On December 8, 2015, it announced an agreement with SNC-Lavalin Group Incorporated, staying a suspension. According to PSPC, the stay means that SNC-Lavalin Group Incorporated is “allowed to continue doing business with the government pursuant to the regime”.

Ineligibility

If convicted, pursuant to the current “interim” Policy, the convicted company/supplier would be ineligible to contract with the government. Depending on the offence for which there was a conviction, the period of ineligibility could be as long as 10 years.

This ineligibility status would remain for the entire period unless the government considered it possible and appropriate to invoke a public interest exception. The reasons to invoke the public interest exception are narrow (emergency where delay could harm public interest; company/supplier is the only person capable of performing the contract; the contract is essential to maintain sufficient emergency stocks; not entering into the contract with the company/supplier would have a significant adverse impact on the health, national security, safety, public security or economic or financial wellbeing of Canadians or the functioning of any portion of the federal public administration). Other than this narrow public interest exception, the Policy does not

afford the government any discretion to continue to contract with the convicted company/supplier.

Proposed new policy

PSPC has proposed to replace the *Ineligibility and Suspension Policy* with a new policy. PSPC is undertaking consultations on the revised *Ineligibility and Suspension Policy*, which will close on November 13, 2018. Under the new policy, the government would have the discretion to vary, or even rescind, the period of ineligibility of a convicted company/supplier. The period of ineligibility would be at the discretion of PSPC.

Quebec Integrity Regime

Quebec's debarment regime applies to construction and public private-partnership contracts over \$5 million and service contracts over \$1 million. Suppliers and subcontractors competing in a call for tenders or an award process equal to or greater than the threshold amounts must apply for approval through the Autorité des marchés financiers (AMF). The AMF verifies applicants, in consultation with the Unité permanente anticorruption (UPAC), pursuant to an *Act Respecting Contracting of Public Bodies*.

Pursuant to sections 21.1 and 21.2 of the *Act Respecting Contracting of Public Bodies*, a corporation that is convicted of an offence listed in Schedule I of the Act will be ineligible for public contracts for five years from the date of the finding of guilt and will be listed in the Register of Enterprises Ineligible for Public Contracts. Schedule I of the Act includes offences such as bribery, theft and fraud, extortion, corruption, influencing, drug trafficking and criminal organization activities. The Register of Enterprises Ineligible for Public Contracts must be consulted for public contracts to ensure that bidders are not debarred. Suppliers established outside of Quebec are required to provide a “good conduct certificate”, sworn letter, criminal or penal court record or an equivalent document when bidding.

Exceptions

Subject to section 25.0.2 of the Act, within 30 days after a corporation is notified of its ineligibility for public contracts, a public body may, in the interests of the public, apply to the Treasury Board of Quebec for permission for the corporation to continue performing a public contract. The Treasury Board may provide permission under specific conditions, such as the implementation of oversight and monitoring measures by the corporation.

World Bank Sanctions System

Investigation of Sanctionable Conduct

The World Bank's Integrity Vice Presidency investigates allegations that sanctionable conduct occurred in connection with World Bank funds. To be sanctionable, conduct must fall within the 10-year statute of limitations and within the definitions of corruption, fraud, collusion, coercion, or obstruction.

In the system's first tier, the Bank's Chief Suspension and Debarment Officer (SDO) determines (1) whether the evidence submitted by the Integrity Vice Presidency is sufficient to support a finding that the respondent engaged in fraud, corruption, coercion, collusion, or obstruction in connection with a World Bank Group-financed project and (2) whether the respondent should be temporarily suspended from bidding on Bank-financed contracts, pending the final outcome of the sanctions process.

In addition, the SDO recommends a sanction to be imposed on the respondent, which becomes effective where the respondent elects not to challenge the allegations against it. If the respondent contests the allegations or the SDO's recommended sanction, the case is referred to the Sanctions Board.

Referral to the Sanctions Board

The Sanctions Board carries out a full *de novo* review in each contested case. It is not bound by the SDO's recommendation. An administrative hearing may be held by the Sanctions Board either upon a party's request or at the discretion of the Sanctions Board Chair.

After completing its review, the Sanctions Board determines whether it is "more likely than not" that the respondent engaged in a sanctionable practice. If so, the Sanctions Board imposes a sanction on the respondent, which may be extended to the respondent's affiliates, successors and assigns. The decisions of the Sanctions Board are final and non-appealable.

Sanctions

The length of debarment periods imposed vary according to circumstances, including the degree of cooperation provided by the company, and the efforts by the company to improve integrity and anti-corruption policies.

On April 17, 2013 the World Bank announced the debarment of SNC-Lavalin Inc. and over 100 affiliates, for a period of 10 years following the company's misconduct in relation to the Padma Multipurpose Bridge Project in Bangladesh, as well as misconduct under another Bank-financed project.

Sanctions imposed by the World Bank Group are published on its website at www.worldbank.org/debarr.

According to the National Post, World Bank business accounted for less than one per cent of the company's revenues when the bank was implemented in April 2013.

<https://business.financialpost.com/investing/trading-desk/snc-lavalin-group-inc-upgraded-as-corruption-overhang-passes>

Many other countries have their own respective debarment regimes.