



SNC-Lavalin Affair and the Charity Sector

By Mark Blumberg (March 2, 2019)

The SNC-Lavalin affair has been in the news for a while. I have a few comments on how this relates to the charity sector.

First we often forget that probably the bigger scandal involving SNC-Lavalin was related to the building of the McGill University Health Centre (“MUHC”). For those who are not familiar with the details, the Canadian individual, Arthur Porter, in charge of the construction of the MUHC project, which was probably the largest charity sector building project ever, died in a Panamanian jail trying to avoid extradition back to Canada for accepting a bribe of over \$22 million to pick SNC-Lavalin for the project. You can read about the scope of the project on the [SNC-Lavalin website](#). My favourite part is “One of the largest construction sites on the continent at the time, the 346,150 square-metre (Over 7 american (sic) football fields) MUHC Glen site is also the product of one of North America’s biggest public-private partnerships project.”

Here are some articles dealing with MUHC and SNC-Lavalin:

[Former MUHC manager pleads guilty in SNC-Lavalin bribery case](#)

[Former hospital manager who took \\$10 million bribe to favour SNC Lavalin bid sentenced to 39 months in prison](#)

MUHC superhospital: Guilty plea but no jail for former SNC-Lavalin CEO

SNC-Lavalin and the MUHC settle out of court through independent [sic] mediation process

Deferred prosecution agreement not right in SNC-Lavalin case

Wikipedia has a good summary:

“The 2004-2011 tenure of Arthur Porter, a politically active Montreal physician, as the hospital's CEO attracted extensive media scrutiny which intensified when it was revealed that he had received \$22.5 million in consulting fees from SNC-Lavalin. After receiving these payments, Porter awarded the firm with a \$1.3 billion contract related to the construction of the hospital. These dealings were found to be in violation of the Quebec Health Act, and along with the emergence of other questionable business activities undertaken by Porter, led to calls for his resignation. Porter resigned on December 5, 2011.^{[4][5]} Further investigation of the case by Quebec anti-corruption investigators resulted in allegations of the involvement of SNC-Lavalin and health centre employees in fraud and forgery. The investigators then issued a warrant for Porter's arrest on February 27, 2013, on charges of fraud, conspiracy, breach of trust, taking secret commissions and money laundering. Porter had since left Canada, and was apprehended by INTERPOL agents with his wife in Panama, where he remained imprisoned awaiting extradition to Canada.^{[4][5]}”.

Porter subsequently died in the Panamanian prison. It is noted in the article that the budget for the project was \$700 million but ultimately cost around \$1.3 billion. We always focus on the bribe but often not the consequences. It is possible that as a result of the flawed procurement process and massive bribery, the project costed hundreds of millions of dollars more than it should have. That is money basically being stolen from a number of hospitals including a children's hospital.

Now this brings me to the Liberals and SNC-Lavalin. There is absolutely nothing illegal about a big corporation wanting to have dozens of meetings with senior government and political people. There is also no constitutional right that a major corporation has to force government people to meet with them. So in other words it's really a policy maker's and government official's choice as to how much time they spend with different groups. The Liberals it appears had lots of time to meet with this major multinational corporation to discuss their every need, including changing the criminal code to allow for avoiding prosecution by entering into a deferred prosecution agreement and pushing for such an outcome.

I wish everyone in the charity sector was given such a warm welcome. A few favourite charities that are ideological completely in sync with the Liberals and a few large foundations with lots of money receive the red carpet from the Liberals and others don't. This by the way is very similar to the way the previous Conservative government operated – but the Liberals criticized them for being anti-democratic, not pluralistic and ignoring evidence. No one charity or fraction of a subsector has a monopoly on understanding the needs of Canadians and unfortunately this playing the charity sector by one party or another is not good for the sector and its beneficiaries.

The Liberals don't seem to be that concerned, or weren't really thinking about, how standing up for the rights of such a problematic corporation to avoid a trial was really a slap in the face to the charity sector that has been abused by this company and also to many other engineering firms that are not using bribery and corruption to advance their agenda. I know people say that if SNC-Lavalin went under then there would be a loss of jobs. That may be true, but on the other hand, companies go under and typically business units that are successful will continue and others will not, and those people will find other jobs. The company does not seem very contrite and they seem to be portraying themselves as a victim in this matter which is quite incredible.

Second, in September to December 2018 the Liberals at the same time as they were trying to provide special treatment for SNC-Lavalin decided to change the Income Tax Act to allow registered charities to conduct unlimited non-partisan political activities. I did not think that this change was good or necessary especially as 99.9% of charities were not even spending 1% of their resources on political activities. Well now we have it – there should be no excuses for registered charities not being more engaged in political activities. My fear is that charities will not in general be more engaged – but just a small group of wealthy private foundations and activist groups will use charities to push their narrow agenda without now having to do anything charitable. Some of these groups have interests which are not at all in line with the needs of charity beneficiaries or the charitable sector – but if regular charities don't get engaged in non-partisan political issues then we are leaving SNC-Lavalin and a few wealthy individuals to basically run the show.

Third, SNC-Lavalin is not the only company that has been implicated in inappropriate procurement and Canadian charities. There have been a number of media articles discussing problematic procurement by universities and hospitals in Canada. The SNC-Lavalin MUHC project, however, was a huge project. It's very important that when Canadian charities are procuring services, they do so in a careful manner with oversight. Most Canadian charities are not going to be spending \$1 billion or \$2 billion on a construction project but many similar principles apply when making other purchases or hiring senior executives or fundraising companies, etc.

CRA provides in their guidance [Fundraising by Registered Charities](#) some ideas as to appropriate procurement practices that are worth remembering especially Appendix C dealing with best practices which partly reproduced below:

“Appendix C – Best practices

135. The adoption of best practices to manage fundraising may reduce the risk of a charity engaging in unacceptable fundraising.

Prudent planning processes

136. As a rule, a registered charity's planned fundraising costs should be reasonable and proportionate to the type and scope of activity it needs to conduct to further its charitable purposes. Before undertaking fundraising, the registered charity should review:

- any regulatory obligations that apply to the type(s) of fundraising it is considering
- the costs and returns that can be expected based on the types and scope of fundraising it is considering undertaking
- other potential fundraising methods

137. Based on this review, the charity should select the best fundraising approach, taking into account its fundraising goals, projected fundraising costs, current resources, and projected expenditures on charitable activities.

Adequate evaluation processes

138. At a minimum, a charity should evaluate its fundraising performance in the context of CRA guidance. In addition, the charity may develop its own criteria or gauge its achievements against external standards. Registered charities should strive to spend no more on fundraising than is required to support their charitable activities, and should review cost-effectiveness as well as outcomes in assessing performance.

139. The effort and cost of the evaluation measures should be proportionate to the risk of unacceptable conduct, given the type and scope of fundraising undertaken by the charity.

140. A number of organizations provide research and standards on various aspects of fundraising costs, such as salaries, return on investment associated with different types of fundraising, and typical

cost ratios. Where a charity uses an external standard as evidence that its fundraising conduct has been reasonable, it should be able to show that applying the criteria is appropriate in its circumstances.

Example

A charity that requires fundraising revenues of less than \$1,000,000 to support its programs hires a single fundraiser and pays that fundraiser a salary of \$200,000. The charity maintains that the salary is reasonable based on a salary survey of other charities. The survey the charity relies upon is a survey of larger charities with minimum fundraising revenues of \$10,000,000. In this circumstance, the survey would not be considered an appropriate criterion to establish that the charity's fundraising conduct has been reasonable.

Appropriate procurement and staffing processes

141. The effort and resources devoted to the following best practices should be commensurate with the type and scope of fundraising undertaken by the charity:

- contacting organizations with a profile similar to the charity's to determine reasonable and appropriate costs and terms for the type and amount of fundraising to be undertaken
- soliciting bids from three or more potential suppliers
- issuing a request for proposal
- reviewing the provisions of contracts to ensure they are reasonable
- including provisions to terminate a contract if the third party acting on behalf of the charity does not act in compliance with the provisions of this guidance
- limiting the length of contracts, particularly when signing an initial contract

142. When hiring in-house staff for fundraising activities, a charity should:

- contact organizations with a profile similar to the charity's to determine reasonable compensation for the type and amount of fundraising to be undertaken
- base the compensation on a salary survey
- set compensation that is appropriate based on the remuneration received by other employees of the charity in light of the respective responsibilities and requirements of the positions

143. Important considerations for charities include the following:

- services should not be contracted out to non-charitable entities if they could be delivered as effectively and efficiently using the charity's own resources
- a charity should fully document procurement, negotiation, and approval of all contracts (see Keeping complete and detailed records relating to fundraising activities)
- details of purchasing and hiring practices and processes should be disclosed to the public (see Providing disclosures about fundraising costs, revenues, practices, and arrangements)

144. A charity should establish accountability processes for the supervision and evaluation of in-house fundraising personnel. A charity should be cautious of putting performance evaluations in place based solely or excessively on fundraising performance or results achieved (for example, bonuses or incentives exclusively tied to the number or amount of donations). Footnote33

Managing risks associated with hiring contracted (third-party) fundraisers

145. If hiring a contracted fundraiser, a charity should:

- show that expenditures on the activity or activities represent an investment and will result in lower costs for subsequent activities

- demonstrate that it has taken appropriate steps to determine the fair market value for the goods or services supplied, and has adequate measures in place to control costs
- disclose costs so that the public or attendees are not misled about the use of their donations, entrance fees, or other contributions

146. If a contracted fundraiser's payment is based on the actual work performed rather than the amount of funds raised, this is more likely to result in incidental, and therefore acceptable, private benefit. For example, payments based on the number of calls completed or contacts made—regardless of whether a donation is received—and payments based on an hourly or weekly basis, at a fair market value for the work performed, are more likely to result in incidental, and therefore acceptable, private benefit.

147. The details surrounding such arrangements should also be disclosed to the public, to ensure donors are not misled about the use of their donations (see Providing disclosure about fundraising costs, revenues, practices, and arrangements).

Ongoing management and supervision of fundraising

148. Whether fundraising is carried out by employees or contracted out to third parties, a charity's fundraising oversight measures should include:

- establishing and following fundraising policies that set out acceptable and unacceptable fundraising practices
- exercising adequate control over the scope of fundraising and the use of fundraising resources
- pre-approving fundraising solicitation scripts or other representations
- following up with donors to confirm what representations were made, fulfilling undertakings (such as donor requests for

designation of funds to a specific purpose), and ensuring general satisfaction

- monitoring the receipting process regularly
- periodically conducting a financial analysis of the quantity of resources being devoted to fundraising in comparison with the resources being devoted to other aspects of the charity's work
- using internal audits to review expenditures and revenues
- exercising contractual rights to review or audit the financial and other records of the work done by any third party

149. Contracts and job descriptions that include fundraising responsibilities should provide the charity with all the authority necessary to adequately manage and supervise fundraising practices.

Keeping complete and detailed records relating to fundraising activities

150. The more complete and detailed a charity's records related to fundraising are, the easier it will generally be for the charity to demonstrate to the CRA that its fundraising activities comply with the requirements of the Income Tax Act. To help show that it is meeting these requirements, a charity should have:

- minutes of board meetings or other meetings where decisions on a fundraising contract were made
- records of research to determine appropriate costs
- documentation on any procurement processes, appropriate for the size of the fundraising services being sought, undertaken before entering into the contract(s)
- written copies of any fundraising contract(s) entered into”

There are many other resources out there to assist nonprofits and Charities with procurement systems and policies.

The same attitude that SNC-Lavalin has that they are too big to fail and that irrespective of their malfeasance they deserve to continue you will sometimes see with other corporations and even nonprofits and charities. It is a dangerous way of thinking about things. It is interesting to note that when it comes to charities, CRA has adjusted the selection of charities to be audited to focus far more on risk and the risk that charitable assets could be misused is greater when there are greater charitable assets! Hence the [CRA is auditing far more very large registered charities as we have noted before](#) and as you can see from the number of large registered charities that have been recently revoked, there is no such thing as a registered charity that is too big to fail.

On the bright side if you are a large registered charity and you are deliberately involved in malfeasance, you can now spend 100% of your budget trying to convince politicians to change the law to allow you to be exempted from consequences! For other smaller and less arrogant charities, and directors who care about their personal reputations, you might want to just remember that registered charities have to comply with rules and you might want to do an [informal risk review](#) every 5 years to see if your organization has any obvious problems in terms of compliance.

Mark Blumberg is a lawyer at Blumberg Segal LLP in Toronto, Ontario. He can be contacted at mark@blumbergs.ca To find out more about legal services that Blumbergs provides to Canadian charities and non-profits please visit www.canadiancharitylaw.ca, www.globalphilanthropy.ca, www.smartgiving.ca or www.charitydata.ca

This article is for information purposes only. It is not intended to be legal advice. You should not act or abstain from acting based upon such information without first consulting a legal professional.