L'Affaire SNC-Lavalin: The Public Law Principles

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I have not posted to this blog branch of my website for years, but shall do so this morning on the issue of: the role of the Attorney General in criminal prosecutions. The context: the *Globe and Mail* reported on Thursday, February 7:

> Prime Minister Justin Trudeau's office *attempted to press* Jody Wilson-Raybould when she was justice minister to intervene in the corruption and fraud prosecution of Montreal engineering and construction giant SNC-Lavalin Group Inc., sources say, but she refused to ask federal prosecutors to make a deal with the company that could prevent a costly trial. [emphasis added]

The article uses even stronger language later:

> Sources say Ms. Wilson-Raybould, who was justice minister and attorney-general until she was shuffled to Veterans Affairs early this year, *came under heavy pressure* to persuade the Public Prosecution Service of Canada to change its mind [in relation to seeking a remediation agreement in lieu of prosecution]. [emphasis added]

The Prime Minister's office asserted the "Prime Minister's Office did not direct the attorney-general to draw any conclusions on this matter," a position repeated by the Prime Minister himself the next day: "At no time did I or my office direct the current or previous attorney-general to make any particular decision in this matter". The Prime Minister also stated: "The allegations reported in the story are false."

The matter is now a matter of political controversy, and partisan preoccupations will drive the narrative. My concern here are the public law issues. I cannot resolve the contested facts, but I will try to suggest the legal standards that apply in assessing them.

1. Starting Observation

I shall, throughout this note, assume that the *Globe*'s sources are being truthful in recounting what they believe happened, and likewise that the PMO and the Prime Minister are honest. From a public law perspective, this is the line in the *Globe* story which galvanizes this post: the Attorney General "*came under heavy pressure* [from the PMO] to persuade the Public Prosecution Service of Canada to change its mind."

I note right away the story is inconsistent on the degree of this pressure. In its opening line it says "attempted to press". Later, it says "Sources say officials from Mr. Trudeau's office, whom they did not identify, had *urged* Ms. Wilson-Raybould, Canada's first Indigenous justice minister, to *press* the public prosecution office to abandon the court proceedings." The story then variously uses "pressure" and "political pressure".

These are all different degrees of influence – and as I shall note below, that matters. The first point, however, is that the reporting is ambiguous, even if you accept the anonymous sources as credible. No judgment can be made, in the end, about the propriety of the relationship between the PMO and the AG on this matter without much more specificity.

That is because the rules in this area are nuanced.

2. What Does the AG Do?

The AG is *not* a minister like all others. In our system, he or she does have a more classic ministerial administrative or political function, as "Minister of Justice". As "Minister of Justice", the minister manages and directs Justice Canada. The minister is also the "official legal advisor to the Governor General and the legal member of the Queen's Privy Council for Canada", which makes the minister the chief law officer to Cabinet. Among other things, the minister must "see that the administration of public affairs is in accordance with law".[1]

In her or his role as AG, however, the minister has very different functions. Here, the minister inherits the traditional powers and duties belonging to the office of the AG of England "by law and usage, to the extent applicable to Canada".[2] Most critically, the attorney-general oversees federal prosecutions in Canada's criminal

[1] Department of Justice Act, s.4, online: https://laws-lois.justice.gc.ca/eng/acts/J-2/page-1.html#h-4.
[2] *Ibid*, s.5.

justice system. By long-standing constitutional tradition, the attorney general is expected to be above partisan concerns in supervising prosecutions, creating an independence within executive government not shared by other members of Cabinet.[3]

3. What is AG/Prosecutorial "Independence"?

The most famous recognition of the "constitutional convention" of AG independence came from the Supreme Court of Canada in *Krieger*: "It is a constitutional principle that the Attorneys General of this country must act independently of partisan concerns when exercising their delegated sovereign authority to initiate, continue or terminate prosecutions."[4] The Court also noted: "The gravity of the power to bring, manage and terminate prosecutions which lies at the heart of the Attorney General's role has given rise to an expectation that he or she will be in this respect fully independent from the political pressures of the government."[5]

In the United Kingdom, this AG independence is preserved by leaving the AG out of Cabinet. Because Canada "double-hats" the AG and Minister of Justice function, we do not have this structural safeguard. Thus, as the Supreme Court noted, "Membership in Cabinet makes the principle of independence in prosecutorial functions perhaps even more important in this country than in the UK"[6]

The principle of AG independence is nicely summarized by Justice Rosenberg of the Ontario Court of Appeal as follows:

> The most important of these constitutional conventions is that although the Attorney General is a cabinet minister, he or she acts independently of the cabinet in the exercise of the prosecution function. This convention is now so firmly entrenched in the Canadian political system that any deviation would likely lead to the resignation of the Attorney General or would, at the very least, spark a constitutional crisis. The resignation of the Attorney General would expose any attempted interference by the premier or the

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[3] *Krieger v. Law Society of Alberta*, 2002 SCC 65, online: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2007/index.do.
[4] *Ibid* at para. 3
[5] *Ibid* at para. 29
[6] *Ibid*.

> cabinet both to the public and especially to the press, and would further entrench the convention of institutional independence.[7]

More generally, prosecutorial independence from the rest of executive government, Parliament and, to a considerable degree, judicial supervision, is a carefully protected expectation in Canadian law.[8] At the federal level, it is reinforced within the Justice portfolio by a statute that separates Justice Canada and the Public Prosecution Service of Canada (PPSC). Under the supervision of a director of public prosecutions, the PPSC conducts most federal prosecutions and its law imposes transparency requirements where the AG her- or himself assumes the conduct of a prosecution, or directs its initiation or conduct.[9] Put another way, we have added a layer of additional buffers between Cabinet and prosecutors. If an AG were to compromise and surrender his or her independence, the PPSC structure makes it more difficult to act on that surrendered independence, at least not without considerable risk of exposure.

To be sure, this does not mean that PPSC/prosecutors operate with impunity. There is such a thing as lawsuits for malicious prosecution – though the threshold for winning such lawsuits is high.[10] And prosecutor discretion can be structured through general policy, such as the PPSC's manual.[11]

4. Why AG/Prosecutorial Independence?

The reason for this AG/prosecutorial independence is straightforward: the role of the AG and prosecutors is to act in the public interest, not in the interest of whoever is in the PMO. They must, therefore, not be under the thumb of the political executive, and indeed must be insulated from political pressures that would, for instance, leave some people favoured in the criminal justice system, and others targeted. A core ingredient of the "rule of law" is that "there is, in short, one

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[7] Marc Rosenberg, "The Attorney General and the Prosecution Function in the Twenty-First Century," (2009) 43(2) of Queen's Law Journal 813, online: http://www.ontariocourts.ca/coa/en/ps/publications/attorney_general_prosecution_function.htm

[8] See *Hinse v. Canada (Attorney General)*, 2015 SCC 35 at para. 40, online: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15406/index.do.

[9] *Director of Public Prosecutions Act*, S.C. 2006, c. 9, s.121 at ss. 10 and 15.

[10] See *Hinse v. Canada (Attorney General)*, 2015 SCC 35 at para. 40, online: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15406/index.do

[11] See https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/index.html.

law for all".[12] We do not have one criminal law for the powerful and influential, and another one for everyone else.

5. Where would AG/Prosecutorial Independence be Violated?

The key issue is: what degree of "interference" would trammel AG independence. Justice Rosenberg summarizes the standards in what is called the "Shawcross" doctrine, now practiced throughout Canadian jurisdictions:

> First, the Attorney General must take into account all relevant facts, including the effect of a successful or unsuccessful prosecution on public morale and order — we would probably now call this the public interest. Second, the Attorney General is not obliged to consult with cabinet colleagues *but is entitled to do so*. Third, any assistance from cabinet colleagues is confined to *giving advice, not directions*. Fourth, responsibility for the decision is that of the Attorney General alone; the *government is not to put pressure on him or her*. Fifth, and equally, the Attorney General cannot shift responsibility for the decision to the cabinet.[13]

Sir Hartley Shawcross's statement itself reads:

> I think the true doctrine is that it is the duty of an Attorney-General, in deciding whether or not to authorize the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other considerations affecting public policy.
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> In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the Government; and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations, which might affect his own decision, and does not consist, and must not c*onsist in telling him what that decision ought to be.* The responsibility for the eventual decision rests with the Attorney-General,

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[12] Reference re Secession of Quebec, [1998] 2 SCR 217 at para. 71, online: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do

[13] Marc Rosenberg, "The Attorney General and the Prosecution Function in the Twenty-First Century," (2009) 43(2) of Queen's Law Journal 813, online: http://www.ontariocourts.ca/coa/en/ps/publications/attorney_general_prosecution_function.htm (emphasis added).

> and he is not to be put, and is not put, under pressure by his colleagues in the matter.
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> Nor, of course, can the Attorney-General shift his responsibility for making the decision on to the shoulders of his colleagues. If political considerations which, in the broad sense that I have indicated, affect government in the abstract arise, it is the Attorney-General, applying his judicial mind, who has to be the sole judge of those considerations.[14]

From these standards, it is clear political advice is one thing, but a political executive "direction" to the AG in a criminal justice matter would exceed the Shawcross standard. In response to such a direction, the AG should refuse – and resign. [Addendum Sun Feb 10: on AG resignations, see the addendum below the footnotes in this post.]

The murk lies where discussions fall short of "direction". To use the language from the *Globe* article "heavy pressure" would raise, in my view, serious Shawcross standard problems – indeed, I do not see how "heavy pressure" could be consistent with those standards. As Justice Rosenberg notes, "responsibility for the decision is that of the Attorney General alone; the *government is not to put pressure on him or her*."

I am less certain what to make of the *Globe*'s other statements: "attempted to press" and "urged". Without knowing what was said and in what context, it is essentially impossible to know if these were discussions of the sort the Shawcross principle do allow; or whether the line between discussion and pressure was crossed. "Urged" is clearly gauche and the sort of thing a carefully organized Cabinet office would avoid at all costs (for appearance sake at least). Applying Shawcross, it sounds like "telling [the AG] what that decision ought to be". Meanwhile, I simply have no idea what to make of "attempted to press" – the universe of things that might fall in that category is so broad it is impossible to apply the Shawcross standard to the allegation.

In sum, without clarity on the specific statements made and their context, it is simply impossible to measure "heavy pressure", "urged", or "attempted to press". These descriptors all encapsulate the judgment of either the *Globe*'s sources or the

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[14] UK, H.C. Debates, vol 483, cols 683-84, (29 January 1951), reproduced at https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p1/ch01.html#section_1.

Globe reporters themselves. And I have no idea what criteria they have applied to arrive at that judgment.

At risk of being very wrong, one might infer that people in the AGs office thought a line had been crossed – someone was, after all, the *Globe*'s source. But if a clear Shawcross line was crossed, the expectation would then be that the AG would resign. That did not happen.

The Prime Minister's rejection in the *Globe* story suggests that, at the very least, whatever happened did not cross the unquestionable redline of "direct". (There is now a lot of Kremlinology-like speculation about this wording. My assumption when I heard it was just "oh, in using that 'direct' language, he has been responding to legal advice that has focused on this clear Shawcross redline.") His further statement that "the allegations reported in the story are false" might also be a denial of the "attempted to press" and "urged" standards. If so, a clear statement might be useful -- because if none of what is reported happened, then we are all wasting a lot of time while the sea rises.

Bottom line: right now, no one beyond those in the know can presently make a definitive judgment on whether this is a public law nothing-burger, or a rule of law train-wreck. (And I would like to know what lines the people in the know are using in arriving at their conclusions.)

6. Does it matter that this was a remediation agreement issue?

A final point relates to the fact that at issue was the prosecutors' unwillingness to enter into a remediation agreement negotiation. Some on Twitter Law School have suggested this fact relaxes the traditional strictures on AG/prosecutorial independence.

I do not see how that could be. First, a remediation agreement is, essentially, an off-ramp from a prosecution for corporate economic crimes. It is simply impossible to imagine that use of the off-ramp may be a politicized exercise, while only driving down the highway is protected by independence. That would mean, in effect, there is no independence: the off-ramp would available to the politically-favoured companies, who never take a ride down Highway Prosecution if they had friends in high places. We would have, in effect, two Criminal Codes: the Code for corporate friends, and the Code for everyone else. That would do considerable violence to the rule of law. (I would note, also, that the Supreme Court in *Krieger* was clear that the AG's independence extended to the "authority to initiate,

continue or *terminate* prosecutions". By extension, so too would prosecutorial independence extend to these matters.)

I would resist, therefore, any assertion that prosecutorial independence is unavailable where a prosecutor acts under Part XXII.1 of the *Criminal Code*.[15] At any rate: the Code itself does not anticipate politicking. Section 715.32 places the discretionary decision on whether to enter into a remediation agreement negotiations in the hands of the prosecutor, whose decision to negotiate would be approved by the AG. In this context, because of the *Director of Public Prosecutions Act*, the AG should be read as the "director of public prosecutions".[16] (Put another way, unless the AG proactively intervenes under the express powers to do so in that *Director of Public Prosecutions Act*, noted above, he or she is not personally involved in this decision.)

The Code sets out (in considerable detail) the factors the prosecutor is to consider in exercising their discretion. This is a fettered discretion. And even if there were no constitutional conventions of independence applicable here, prosecutors would still err if they were to depart from the language of the Code and contemplate political variables like "heavy pressure", "urge" or "attempts to press" from the PMO. Specifically, if they did not enjoy prosecutorial independence, they would be fully subject to administrative law discipline. And that discipline would preclude abuses of discretion. While administrative law "standards of review" are a muddled mess, it would still be an unreasonable exercise of discretion to act based on improper considerations not anticipated by the statute. In sum, even if the prosecutor were stripped of independence for Part XXII.1 purposes, we are still talking about a legal error, were he or she responsive to political pressure.

Update on Sunday, February 10, 2019 at 11:32AM

I am receiving quite a few queries about this posting over Twitter. I fear I cannot respond to all, for which I apologize, especially the ones involving hypothetical facts. In relation to the question of when an AG should resign, perhaps the best consideration of that question I can point to, as a matter of past practice is the speech given by BR Smith, upon his resignation as Attorney General in BC in 1988 (hat tip to one of my colleagues who wishes to go unnamed for the hyperlink.)

[15] *Criminal Code*, RSC, 1985, c. C-46, online: https://laws-lois.justice.gc.ca/eng/acts/C-46/page-179.html#h-263 .
[16] SC 2006, c.9, s.121, at ss. 3(3).