OPINIONS

Who decides when the red line is crossed in instances like the SNC-Lavalin affair?

By Errol Mendes (https://ipolitics.ca/author/emendes/). Published on Feb 28, 2019 1:10pm

> *'In the interests of securing the long-term legitimacy of our cherished system of prosecutorial independence and the role of cabinet solidarity, security and privileges, some thought should be given to having a deep and thoughtful consultation led by eminent jurists in cooperation with the Privy Council Office.'*

Clerk of the Privy Council Michael Wernick. iPolitics/Matthew Usherwood

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After listening to the testimony of Privy Council Clerk Michael Wernick and Wednesday the riveting testimony of Jody Wilson-Raybould, I have come to the conclusion that there are two fundamentally conflicting views of the legality of the several interactions between the former minister of justice and the clerk, the PMO and the MP. This is due to starkly different views of what is permitted and not permitted in terms of providing any form of context, advocacy, or any form of pressure regarding the role of the minister as regards to her powers over decisions of the director of public prosecutions (DPP).

This could well have resulted in everyone involved in this situation regarding what happened as either a constitutional infraction on prosecutorial independence (i.e. the Shawcross convention) or a legitimate functioning of the machinery of government obeying the direction of the elected government.

The application of the relevant part of the Lord Shawcross statement of prosecutorial independence is crucial to seeing how each side could reach their different conclusions. The Shawcross statement has been accepted in Canada as a constitutional convention that does accept that the task of the attorney general in determining whether a prosecution is in the public interest can't always be made in isolation. However, the statement is clear that the attorney general must in the final analysis control the process and determine the outcome and not be inappropriately pressured:

> *"In order to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the government .... 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 consist, in telling him what the decision ought to be. The responsibility for the eventual decision rests upon the Attorney-General, and he is not to be put, and is not put, under pressure by his colleagues in the matter."*

Listening to the testimony of Wernick, he was emphatic that it was legal advocacy, context and if the "P" word has to be used, it was not "inappropriate pressure" to ask the former minister of justice to take into account the job losses and other effects that could arise if SNC-Lavalin was convicted and faced a 10-year ban on bidding for government contracts. This perspective would argue that this conventional rule does legitimize officials consulting with the attorney general and offering "particular considerations."

The clerk also stated that even today, the present minister of justice can still decide to issue a written directive to the DPP regarding a DPA. This is an indication that it was the view of the government that, despite the September 2018 decision of the former minister not to issue such a directive, there was no constitutional bar to continue offering legal advocacy to the minister that could result in changing her mind on offering a DPA to SNC-Lavalin. Subsequent to the testimony of Wernick and Wilson-Raybould, the prime minister has strongly endorsed this perspective that there was no wrongdoing in the discussions with the former minister.

However, the opposite perspective now equally emphatically put forward by the opposition, and the former minister herself, is that the several meetings and phone calls by the PMO officials, the Department of Finance officials and the clerk of the privy council with Wilson-Raybould and her chief of staff went beyond consultation, context or "particular considerations" and morphed into inappropriate pressure to consider changing her position on issuing a directive ordering the DPP to offer a DPA to SNC-Lavalin.

The opposition has also pointed out that the law on DPAs also prevent national economic interests to be factored into granting the remediation agreement. This would prevent the job and economic losses being legitimate considerations. This can be countered that the huge personal damage to innocents such as employees from an implosion of the company can legitimately be viewed as a non-economic consideration of social and distributive justice countering a hard application of retributive justice. The DPA law itself allows for such consideration of innocent victims of corporate crimes. Wernick, the prime minister and Gerald Butts have all strongly denied that there is any "willful" obstruction to force the former minister to order the DPP to offer a DPA rather than engaging in a form of appropriate pressure.

The opposition, in particular the leader of the Conservative Party, Andrew Scheer, is going further and asserting that the meetings and statements by the government officials amounts to a criminal willful obstruction of justice. This is an immensely serious allegation which should not be stated lightly. The former minister of justice herself has asserted that the "inappropriate pressure" did not stray into criminal obstruction, in large part, because she would not let it happen by warning officials about improper political interference. I suggest that what Wilson-Raybould was determined to do was to present a "teachable moment" to all in government and politics that there are critical red lines that must not be crossed when a justice minister is acting in the role of attorney general dealing with complex decisions on criminal prosecutions. For that we must all be grateful to her and I hope that she stays in politics in whatever party she chooses to be in and further advances her truth.

While some experts have asserted that the Shawcross convention is too "flimsy" to provide any answers, so are many of the other conventions that are critical to the workings of our Parliamentary democracy. Like other conventions, they do allow for those who govern to adjust their decision-making to the imperatives of the time and evolution of society. However, where they do cause severe problems, there is a need to develop guidelines for their future use.

In the interests of securing the long-term legitimacy of our cherished system of prosecutorial independence and the role of cabinet solidarity, security and privileges, some thought should be given to having a deep and thoughtful consultation led by eminent jurists in co-operation with the Privy Council Office. Perhaps the former minister could play a leading role in that. The aim would be to develop an authoritative set of guidelines for the roles of the attorney general, the cabinet and the Privy Council Office relating to attorney general and DPP conduct and decisions on prosecutions. These guidelines could go into the cabinet manual that I gather that the PCO is already engaged in developing regarding other major constitutional conventions that have been the subject of controversial decisions in the past.

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