

STILL UNANSWERED QUESTIONS REGARDING the SNC-LAVALIN AFFAIR

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Even with all of the print and cyber deluge surrounding the Wilson-Raybould-SNC-Lavalin scandal, there are still some key questions that remain unanswered, questions only partially dealt with by a generally sympathetic media.

Whatever the political theatre (and there's an over-abundance of that) the heart of the SNC affair concerns the duties of the Attorney General of Canada, whomever may occupy that position. This isn't about prosecutorial independence, which is a separate point. This is about the role and responsibilities of Canada's chief law officer.

In this regard, *Department of Justice Act* says he or she,

- (a) is entrusted with the powers and charged with the duties that belong to the office of the Attorney General of England by law or usage, in so far as those powers and duties are applicable to Canada; and
- (b) shall advise the heads of the several departments of the Government on all matters of law connected with such departments.

As made clear in English common law, the AG is the chief legal adviser of the Crown – meaning the government of the day.

Wilson-Raybould has stated over again that her motivation in the affair was protecting prosecutorial independence. As important as that is, the law ascribes other duties of Canada's chief legal officer.

As the government's top lawyer, she had duties to her client, duties that would include the requirement to provide direct, clear and unambiguous advice on this matter in writing.

In this regard, it is curious that in the four months since her initial meeting with the PM on September 17 2018, as chief law officer Wilson-Raybould apparently provided no written memo or legal opinion to the PM or the Government on the SNC matter, never putting on paper the points she relayed in December to Michael Wernick in a secretly recorded telephone call.

It also seems that at no time, in the 15 or so cabinet meetings from September 17th to mid-December, at least from the record as we know it, did Ms. Wilson-Raybould raise the SNC matter or provide her views as the government's chief legal advisor.

And at no time, at least from the record as we know it, did she speak directly to the PM, including before or after cabinet meetings. In fact, from what appears on record, she had no direct contact with the PM for close to 4 months, during which time she believed the SNC matter was putting her client at risk.

Ms. Wilson-Raybould was upset with contacts among political staffers about the SNC file. If that was so central a concern, it seems reasonable that there should have been a memorandum for the PM and the cabinet setting out her position as the government's top lawyer. Instead, things were seemingly left in a state of some ambiguity regarding the issue of the Deferred Prosecution Agreement (DPA).

So the question is this. Apart from her legitimately admirable desire to protect prosecutorial independence, did Ms. Wilson-Raybould discharge her other duties to her client – the government of Canada - as its chief legal officer?

On this last point, there's the often cited *Shawcross doctrine*, a doctrine that's been incorporated from English law into Canadian law by virtue of the *Department of Justice Act* cited earlier. It's been referred to in these past weeks and, in fact, is described in the Public Prosecution Service's own publication called the "Deskbook" (on the PPS website) in this way:

It is a core constitutional tenet that the Attorney General, and by extension the DPP, are bound by the principle of independence in respect of the prosecution function . . . It is a

constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions. *However, it is quite appropriate for the Attorney General to consult with Cabinet colleagues before exercising his or her powers under the DPP Act in respect of any criminal proceedings. Indeed, sometimes it will be important to do so in order to be cognisant of pan-government perspectives.* The Attorney General of England, Sir Hartley Shawcross (later Lord Shawcross) in 1951 best described the proper relationship between the Attorney General and Cabinet colleagues (and now, likewise, between the DPP, his or her designated agents and the departments that administer the statutes):

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.

The foregoing makes it clear that there are three central points regarding the duties of the Attorney-General, none of which gainsays his or her independence or that of the Director of Public Prosecutions.

- First, in the case of criminal proceedings, consultations by the AG with cabinet colleagues is “quite appropriate”;
- Second, in these consultations the AG can and should take into account “pan-government perspectives”; and
- Third, it is the AG’s duty to acquaint himself of herself with all relevant facts, including “considerations affecting public policy.”

Whether appropriate consultations had occurred and whether account was taken of pan-Canadian perspectives and all relevant facts bearing on public policy seems to have been a legitimate

concern to the PMO in those months after Ms. Wilson-Raybould's first and only direct meeting with Mr. Trudeau from September 2018 until January 2019. All of this concern would be within the ambit of *Shawcross doctrine*.

The overriding question thus remains. Given the above, did Ms. Wilson-Raybould properly fulfill her duties as the chief legal advisor to the Canadian government in respect of the SNC-Lavalin affair? Somehow this key question regarding the role and professional obligations of the Attorney-General in our system of governance has been obscured in the unending commentary over this deeply disturbing affair.
