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Premier Danielle Smith and the (Non) Observance of Constitutional Conventions

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Matter Commented On: Premier Smith’s interactions with the Department of Justice in the matter of Artur Pawlowski

For the past several weeks, [news outlets](#) have been reporting on Premier Danielle Smith’s involvement in prosecutions for COVID-19 and Coutts border blockade related offences. Most recently, a video was leaked of Premier Smith’s conversation with Artur Pawlowski, who is facing criminal charges for the Coutts blockade that Smith [said she would discuss](#) with Justice officials. One issue that has not squarely been addressed is the significance of whether Premier Smith actually spoke to prosecutors in Pawlowski’s case, or whether she just spoke to officials within the Department of Justice, including the Deputy Attorney General, about the case. The Premier’s back and forth on who she contacted suggests she believes this distinction matters, such that if she “only” did the latter she did not breach any constitutional convention relating to prosecutorial independence. In our view this is incorrect. Any contact by the Premier with the Department of Justice in relation to any *particular* case or class of cases is inconsistent with the constitutional conventions associated with the prosecution of criminal charges. These constitutional conventions are essential elements of the rule of law, the separation of powers, and ideas of equality before the law.

This post will set out the applicable constitutional conventions and then measure the Premier’s conduct against those conventions. Before doing so, however, it is necessary to affirm an equally basic principle, which is that the administration of justice in the province is the sole responsibility of the Attorney General, and not any business of the Premier. This follows from the terms of Schedule 9 of the *Government Organization Act*, [RSA 2000, c G-10](#). The Schedule confirms that the Minister of Justice “is by virtue of the Minister’s office His Majesty’s Attorney General in and for the Province of Alberta.” Section 2 of Schedule 9 outlines the powers and duties of the Minister:

2 The Minister

- (a) is the official legal advisor of the Lieutenant Governor;
- (b) shall ensure that public affairs are administered according to law;
- (c) *shall superintend all matters relating to the administration of justice in Alberta that are within the powers or jurisdiction of the Legislature or the Government;* (emphasis added)

...

(e) shall exercise the powers and is charged with the duties attached to the offices of the Attorney General and Solicitor General of England by law or usage insofar as those powers and duties are applicable in the Province of Alberta;

(f) shall advise the heads of the several departments of the Government on matters of law connected with them respectively;

...

(h) shall regulate and conduct litigation for or against the Crown or a public department in respect of subjects within the authority or jurisdiction of the Legislature;

...

(j) is responsible for the conduct of the following matters, the enumeration of which shall not be taken to restrict the general nature of any provision of this Schedule:

...

(iii) the consideration and argument of appeals from convictions and acquittals of persons charged with indictable offences;

....

(vi) the appointment of counsel for the conduct of criminal business;

As noted in *Krieger v Law Society of Alberta*, [2002 SCC 65 \(CanLII\)](#), the Attorney General's prosecutorial function "finds its source in the Attorney General's general role as the official legal advisor to the Crown" (at paras 25 & 45).

With that premise established we can now turn to the first convention, which is that the Attorney General acts independently of cabinet, including the Premier, in the exercise of the prosecution function. The prosecution function includes the decision to lay charges or to stay a prosecution (for a more complete statement see *Krieger* at para 46). The Attorney General may take *advice* from their cabinet colleagues but must not accept *direction*. This is known as the Shawcross Doctrine after Sir Hartley Shawcross, Attorney General of England Wales, who said this in 1951:

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.

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 consist, in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney-*

General, and he is not to be put, and is not put, under pressure by his colleagues in the matter.

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.

(Reproduced from Honourable A. Anne McLellan, P.C., O.C., A.O.E., [*Review of the Roles of the Minister of Justice and Attorney General of Canada*](#) (2019) at 14 – 15, emphasis added).

Marc Rosenberg, former Justice of the Court of Appeal of Ontario and assistant deputy Attorney General for civil law in Ontario, confirms that although “Canadian governments have been somewhat late in recognizing this convention,” since 1978 “there has been no serious challenge to the Shawcross doctrine in Canada. Occasional lapses by a premier or other cabinet member — as where the Premier in full rhetorical flight announces that controversial federal legislation will not be enforced in his province — are the result of ignorance rather than intentional defiance, and have usually been quickly remedied.” (See Mark Rosenberg, “The Attorney General and the Administration of Criminal Justice” (2009), 34 Queen’s LJ 813 at 821 – 822. This important article is also available on the website of the Ontario Court of Appeal [here](#)).

The corollary of this point is that the Attorney General’s cabinet colleagues, including the Premier, have a duty not to bring pressure to bear on that person, one way or another. In Appendix E in the McLellan Report – which was commissioned in response to the SNC Lavalin affair involving allegations that Prime Minister Justin Trudeau had asserted pressure on the Minister of Justice/Federal Attorney General, Jody Wilson-Raybould – Philip Stenning puts the point this way:

Whether the Attorney General is a politician or public servant, and whether or not a member of the Cabinet, in most common law jurisdictions he/she is expected, or required by law or constitutional convention, to exercise some of his/her official responsibilities ‘independently’ - that is, not subject to direction, undue influence, ‘interference’ or pressure from anyone, including the Prime Minister or Premier, other ministers or public servants. McLellan Report, Appendix E, item 7.

And as McLellan herself notes in her report:

In countries where this prosecutorial independence is not respected, the police and prosecutors can be directed or pressured to prosecute the political enemies of the government, or to stop prosecutions of the government’s friends. (at 14, reference omitted).

Rosenberg, following a reference to *Krieger*, is equally trenchant:

Nothing could bring greater disrepute to the administration of criminal justice than if the government or the premier were directing prosecution decisions for narrow partisan political purposes. Suspicion that “politics” played a part in the handling of criminal

prosecutions would undermine the impartiality of an entire proceeding. (Rosenberg at 823 - 824).

A second convention (perhaps a subset of the first) is that the Attorney General should only bring a prosecution if they are of the view that there is a reasonable likelihood of conviction and that it is in the public interest to do so (see *Boucher v The Queen*, [1954 CanLII 3 \(SCC\)](#), [1955] SCR 16). The public interest test is malleable, but it is not to be equated with the partisan interests of the governing party. As Ian Scott, the highly respected counsel and Attorney General of Ontario put it: “[t]he confidence of the public in the administration of justice prohibits the use of the criminal law for partisan purposes. Moreover, as guardian of the public interest, the attorney general must act in accordance with the interests of those whom the government represents and not simply in the interest of the government to which he belongs.” (Ian Scott, “Law, Policy and the Role of the Attorney General: Constancy and Change in the 1980s” (1989), 39 *University of Toronto LJ* 109 at 120).

It is here that there is a link between this convention and the Premier’s duty not to put pressure on the Attorney General or the prosecution service. Statements by a premier that “such and such is not in the public interest” would be difficult for a prosecutor to blank out when exercising discretionary authority and may tip the balance in an inappropriate manner. The same may be true of repeated inquiries about whether the public interest is being served in pursuing a particular case.

In articulating these conventions, commentators also emphasise that their mettle largely turns on the moral character of the person occupying the office of Attorney General. An Attorney General who perceives pressure has a duty to call out that pressure, and, if necessary to resign. As McLellan observed: “[i]n my consultations, the personal integrity of the Attorney General was consistently identified as being vital to the role. This means that the Attorney General must be fearless in providing legal advice, no matter what the consequences.” (McLellan Report, at 11)

There is a practical consideration in all of the above and that is that, in most cases, prosecutorial decisions will never come near the Attorney General but will be made by lawyers within the Department (*Krieger* at para 42). To the extent that officials perceive the need to brief the Attorney General on a particular case, perhaps because of its seriousness or its political profile, there is some sentiment to the effect that such briefings should occur without the presence of political staff in order to preserve the independence of the process (see Rosenberg at 832 – 834). It also follows that where prosecutorial authority is delegated within the Department, such delegates are entitled to the benefit of the conventions referenced above. See, for example, *Krieger*, where the Court clearly endorses the constitutional principle that counsel employed or retained by the Attorney General “must act independently of partisan concerns when exercising their delegated sovereign authority to initiate, continue or terminate prosecutions.” (*Krieger* at paras 3, 4, 23).

A third convention relates to the accountability of the Attorney General for their decisions. Since the Attorney General must exercise their functions independently of the Premier and of the Legislature, there is, as Rosenberg acknowledges, only limited accountability (Rosenberg at 825 – 827). At most the Attorney General can be required to answer to the Legislature *after* the relevant decision or decisions have been made. Both Rosenberg and Scott suggest that this can take the form of a statement to the Legislature explaining why a particular decision was made, including

some commentary on the public interest considerations that were taken into account. Both authors promote this as a salutary exercise that balances the independence of the office “with greater openness, accountability and transparency” (Rosenberg at 850). Rosenberg goes on to comment that in his view “Attorneys General should be encouraged [after the event] to provide reasons for important decisions in particular cases” (Rosenberg at 852). He based that observation in part on a broader movement within the judicial system requiring decision makers to provide reasons (at 853). That trend towards a culture of justification has only grown since Rosenberg offered that commentary (see e.g. *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65 \(CanLII\)](#)).

In addition to these conventions relating to prosecutorial independence, there is also a fundamental principle of constitutional law, and indeed part of the rule of law, to the effect that no person is above the law, and every person is equal under and before the law and has the right to the equal protection and equal benefit of the law, impartially applied and administered (see Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 5th ed (London: Macmillan and Co, 1897) at 175-84); see also *Alberta Bill of Rights*, [RSA 2000, c A-14](#), s 1, *Canadian Charter of Rights and Freedoms*, s 15.

We can now examine the Premier’s conduct in light of these standards. In doing so we draw upon the Premier’s extended conversation with Artur Pawlowski in early January 2023, (hereafter, DS/AP) ([a link is included within this CBC story](#)) and the Premier’s press conference on [April 3, 2023](#) (between minute 18 and 19). In each case we take the Premier’s comments as to her conduct, including her promises as to future conduct, at face value.

The first thing to note is that Premier Smith does not observe the principle that matters related to the administration of justice fall exclusively to the Attorney General. Evidence of this includes reference to weekly inquiries of prosecutors (DS/AP) (and even if these inquiries were not made of actual prosecutors, they were presumably made of some persons in the Department of Justice), reference to the Premier’s dissatisfaction with the tactics of the prosecution division and communicated to the Deputy AG (DS/AP), and reference by the Premier to having her political staff (Rob Anderson) do much of the work on this file and make further inquiries (DS/AP). The Premier also refers to further inquiries of Justice officials (part of their job) in the April 3 press conference. It is as if the Premier considers that if she steps around the Attorney General there is no breach of convention.

Second, there is evidence that the Premier is bringing pressure to bear, perhaps not directly on the Attorney General, but certainly on others within the Department. The evidence to support this conclusion includes much of what is referenced above. In addition, it is appropriate to note the repeated nature of the meetings referenced, and also, in terms of substance, the Premier’s comments as they pertain to the public interest, including comments to the effect that “everybody has moved on from COVID”, the charges were initiated as a result of a political decision, the passage of time from the original decisions, and simply the idea that, were she in control, the charges would be dropped. We caution that while we know the Premier communicated these ideas to Pawlowski, we do not know that these ideas were communicated to Department officials in the course of the conversations already referenced; but it seems reasonable to infer that at least some,

or perhaps all of these ideas were communicated; if not, what would be the purpose of these repeat meetings?

Third, it is clear that the Premier's decision to engage in a phone conversation with an accused person charged with serious offences under the *Criminal Code* and to discuss with that person the opportunities for amnesty, or for withdrawing charges, puts at risk the fundamental constitutional rule of the equal protection and equal benefit of the law. How can that principle be upheld unless the Premier extends the same special treatment to all that she has extended to Pawlowski? At a stroke, the Premier has seriously undermined the principle of equality before the law of all persons, and public faith in the fairness of criminal prosecutions. As noted by [Eric Adams](#), the Premier's conduct is reminiscent of the conduct of Premier Duplessis as described in *Roncarelli v Duplessis*, [1959 CanLII 50 \(SCC\)](#), [1959] SCR 121, the Supreme Court of Canada's leading authority on the rule of law.

In conclusion, it is our view that whether or not the Premier or members of her staff actually communicated with prosecutors, the evidence supports the view that the Premier's conduct and that of her staff, as revealed principally in the Premier's conversation with Pastor Pawlowski, is inconsistent with the constitutional conventions pertaining to prosecutorial authority and principles of equality before the law. As the Court noted in *Krieger*:

The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference ... could erode the integrity of our system of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict. (at para 32).

[Alberta's Ethics Commissioner](#) is now investigating the Premier's conduct in relation to COVID-19 prosecutions. The Ethics Commissioner takes her jurisdiction from the *Conflicts of Interest Act*, [RSA 2000, c C-23](#), which defines conflicts to include actions that "further a private interest of the member, a person directly associated with the member or the member's minor child or ... improperly further any other person's private interest" (see e.g. s 2). While the latter part of this definition may be relevant to Premier Smith's conduct, the definition is a relatively narrow one that does not fully encompass the conventions we discuss above. Therefore, we need not await the Ethics Commissioner's decision to register concerns with the Premier's actions and their inconsistency with constitutional conventions.

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