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# The Ethics Commissioner's Report as a Political Football

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The Ethics Commissioner, Mario Dion, found that the Prime Minister of Canada, Justin Trudeau, contravened section 9 of the *Conflict of Interest Act* by using his position of authority over his former Attorney General, Jody Wilson-Raybould.

In the federal election, this report has been used as a political football.[1]

Did the Ethics Commissioner get it right? I cannot speak to his findings of fact, but he made some legal findings that are open to challenge. He was, however, hampered by the refusal of a waiver of cabinet confidentiality in relation to which nine witnesses informed the Ethics Office that they had information they believed to be relevant.

**Reference to the *Rolls-Royce* case**

The Commissioner cites the U.K. *Rolls-Royce* case as casting further doubt on the position taken by Mr. Trudeau on this issue.[2] The Commissioner cites the Right Honourable Sir Brian Leveson as follows:

> I have no difficulty in accepting that these features demonstrate that a criminal conviction against Rolls-Royce would have a very substantial impact on the company, which, in turn, would have wider effects for the UK defence industry and persons who were not connected to the criminal conduct, including Rolls-Royce employees, and pensioners, and those in its supply chain. None of these factors is determinative of my decision in relation to this DPA; indeed, the national economic interest is irrelevant.[3]

But here is the problem. The Ethics Commissioner fails to mention that the U.K. Court approved a deferred prosecution agreement (DPA) in *Rolls-Royce* on the grounds that the company "is no longer the company that once it was; its new Board and executive team has embraced the need to make essential change and has deliberately sought to clear out all the disreputable practices that have gone before, creating new policies, practices and cultures."[4]

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[1] **Hon. Andrew Scheer:** "Mr. Trudeau, you broke ethics laws twice. You interfered in an ongoing criminal court proceeding. You shut down parliamentary investigations into your corruption, and you fired the only two people in your caucus who were speaking out against what you were trying to do just for telling the truth. Tell me, when did you decide that the rules don't apply to you?" https://www.macleans.ca/politics/federal-leaders-debate-full-transcript/

[2] Trudeau II Report made under the CONFLICT OF INTEREST ACT, August 2019, paragraph 317.

[3] Trudeau II Report made under the CONFLICT OF INTEREST ACT, August 2019, paragraph 317. Emphasis is that of Ethics Commissioner.

[4] SERIOUS FRAUD OFFICE and ROLLS-ROYCE PLC January 17, 2019, at paragraph 62.

Good case analysis requires that one consider both the principles enunciated and also the result in the case as those principles are applied. The result in the *Rolls-Royce* case illustrates that deferred prosecution agreements may be appropriate for other reasons, apart from the prohibited route of national economic interests. I have previously written about these divergent roads in this Journal.[5]

**No allowable discussions of public interests with the Attorney General**

The Ethics Commissioner concludes that "the larger public considerations are inextricably linked to SNC-Lavalin's private interests. Accordingly, Mr. Trudeau could not properly put forward any arguments involving public or private interests to the Attorney General. The remediation agreement regime makes it clear that only the prosecutor must weigh (or exclude) these interests."[6]

The reference to public interests would prohibit the Prime Minister from discussing the issue of a DPA for any company with the Attorney General. But why then did the legislature explicitly require that the Attorney General consent to the negotiation of a DPA?[7] The legislature could have said the public prosecutor must consent. Instead, the legislature chose to refer to the Attorney General, who is also a member of Cabinet.

Section 715.32 (1)(d) of the *Criminal Code* explicitly requires that the Attorney General consent to the negotiation of the agreement. This might be described as the "ladder up" scenario, with the rung above being judicial approval, which is also required.

In the reverse "ladder down" scenario, where the prosecutor does not think that a remediation agreement is appropriate (which was the case in the SNC-Lavalin matter) the legislation for remediation agreements does not explicitly give power to the Attorney General or Cabinet to override the prosecutor. Comparison with other legislation shows that the drafters could have put in such a power but chose not to. For example, section 12 of the *Telecommunications Act* gives the Cabinet power to vary or rescind a decision of the CRTC.[8]

In order to override the prosecutor, the Attorney General must rely on a different piece of legislation, the *Director of Public Prosecutions Act*. Under section 10 of this Act, the Attorney General can issue a directive respecting specific prosecutions and that directive would be

[5] Kenneth Jull, "The Right and Wrong Way to Seek Remediation Agreements", Toronto Law Journal, March 2019.
[6] Trudeau II Report made under the CONFLICT OF INTEREST ACT, August 2019, paragraph 319.
[7] *Criminal Code*, section 715.32(1)(d).
[8] See *Telecommunications Act*, S.C. 1993, c. 38, section 12(1).

published in the Canada Gazette to ensure transparency.[9] The Attorney General can also take over the prosecution under section 15.[10]

I have previously advanced the position that in the absence of an explicit power in the remediation regime for Cabinet to override a decision to not negotiate a remediation agreement, the Attorney General's power to override the prosecutor should be read restrictively and not permit a wide policy override. The legislation does not give the Attorney General or the polycentric Cabinet variance power which could incorporate broader policy concerns. Such an interpretation would be consistent with the prohibition to consider factors such as the national economic interest, which raises political-economic considerations.[11]

In my view, if the Attorney General must resort to the *Director of Public Prosecutions Act*, the reasons for such an intervention should relate to the legislative criteria in the remediation scheme and a purported failure of the prosecutor to properly consider or apply that criteria. For example, if a prosecutor did not properly consider the reduction of the negative consequences of the wrongdoing for persons — employees, customers, pensioners and others — who did not engage in the wrongdoing, or consider the relevant factors, that might be a valid reason to intervene.

Here is the magic question. Should the Prime Minister be allowed to discuss with the Attorney General the legislative criteria in the remediation scheme and a purported failure of the prosecutor to properly consider or apply that criteria? Given the explicit reference to the Attorney General in the legislation, and given that he or she is a member of Cabinet, it would seem to make sense that the Prime Minister could have a legal discussion about these criteria. This would not be a political discussion, but rather a principled discussion about the criteria in the legislation. The Ethics Commissioner would not permit such a discussion.

This is an important issue, that may very well come up in future cases. This might be a suitable subject for the government to study and consider making regulations as they are empowered to do under the legislation.

**Complex balancing of the right and wrong roads to remediation agreements**

The Ethics Commissioner does not spend a lot of ink on the complex legislative scheme for remediation agreements, which has six objectives and nine factors to balance. The

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[9] https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p1/ch01.html; 1.1 Relationship between the Attorney General and the Director of Public Prosecutions. Public Prosecution Service of Canada Deskbook: Directive of the Attorney General Issued under Section 10(2) of the *Director of Public Prosecutions Act*, March 1, 2014. See 2.2. The power of the Attorney General to issue directives to safeguard the DPP's independence, s. 10, requires that directives respecting specific prosecutions and respecting prosecutions generally be in writing and published in the Canada Gazette. Mandatory publication of the directive assures transparency and enables the Attorney General to be accountable for his or her decisions.

[10] https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p1/ch01.html; 2.5. The power of the Attorney General to assume conduct of proceedings.

[11] Kenneth Jull, "The Right and Wrong Way to Seek Remediation Agreements", Toronto Law Journal, March 2019.

Commissioner cites my testimony before the Justice Committee as a double negative: "Mr. Jull proposed that to resolve this apparent paradox, one must consider principles of corporate criminal liability, where national economic interests are excluded from consideration only when harm to culpable stakeholders was at issue."[12]

This is a convoluted way of describing my evidence, which was that there is a right road to follow that has nothing to do with economic interests.

I said "If you have a situation where a crime is committed by senior or even middle-level officials, but there's a whole range of folks who had nothing to do with it, those two provisions work together. You can give a deferred prosecution to save those people from being affected, while at the same time it has absolutely nothing to do with economic interest."[13]

The Ethics Commissioner has confirmed in correspondence with me that my testimony "makes it clear that, in your view, an entity could be invited to negotiate a remediation agreement in instances where a range of non-culpable stakeholders is involved."[14]

Perhaps more time should have been spent on whether or not discussions went down the right or wrong roads. We could also learn from the United States' experience, which weighs the impact on innocent persons when considering whether to offer a deferred prosecution agreement. The following comment from the OECD Working Group underscores the division between innocence and the prohibited factor of national economic interest:

> Under section 9-28.300 ("Factors to be Considered") in the "Principles of Federal Prosecution of Business Organizations", a decision of prosecutors on whether to charge a corporation, negotiate a plea or other agreement, may consider "collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as the impact on the public arising from the prosecution". The evaluators questioned whether these considerations could feasibly include the national economic interest, contrary to Article 5 of the Convention. The U.S. reassured them that a decision based on "disproportionate harm" would not result in terminating proceedings. Instead, the DOJ would carefully consider whether a DPA or NPA might lessen the potential harm **to innocent third parties.** In addition, the DOJ would make the same kind of determination if the potential for "disproportionate harm" were to non-U.S. companies and individuals.[15] [Emphasis added]

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[12] Trudeau II Report made under the CONFLICT OF INTEREST ACT, August 2019, paragraph 313.
[13] https://www.ourcommons.ca/DocumentViewer/en/42-1/JUST/meeting-133/evidence
[14] Letter to the author dated August 29, 2019.
[15] PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED STATES, October 2010, paragraph 60. The OECD made the following commentary: "The evaluators welcome confirmation from the United States that the national economic interest is not a factor to be considered in investigative and prosecutorial decision-making under the FCPA, and that pursuant to the 'Principles of Federal Prosecution of Business

The concept of innocent third parties appears to have alluded the leaders' discussion of this issue in the election.[16] Perhaps this is a result of the fact that it requires a complex assessment of the principles of criminal liability. It is possible for senior officers or certain middle managers acting with intent, at least in part, to benefit a corporation and acting within the scope of their authority to have committed bribery offences on behalf of the corporation. At the same time, there may be many employees who are not involved or even aware of the misconduct. Customers and pensioners are a further step removed from knowledge about corrupt practices. A similar test is used in the U.K. legislation which refers to "collateral effects" on the public, employees and shareholders or institutional pension holders.[17]

**Refusal to waive privilege: What is behind the curtain?**

Lastly, the Ethics Commissioner was rightly troubled by the refusal of the Prime Minister or the Privy Council Office to waiver cabinet confidentiality. Nine witnesses informed the Ethics Office that they had information they believed to be relevant, but that could not be disclosed because, according to them, this information would reveal a confidence of the Queen's Privy Council and would fall outside the scope of Order in Council 2019-0105.

What is the principled basis for the decision to waive cabinet privilege for discussions with an Attorney General, but not waive the privilege for a period when she was no longer an Attorney General but rather Minister of Veterans affairs? This distinction remains unclear, but it is hard to assess privilege claims without knowing more about the nature of the privileged documents or discussions.

Jody Wilson-Raybould hints at what might be behind the curtain in her last letter to the Justice Committee[18] when she stated:

> After much reflection, I decided to take the Prime Minister at his word that this was not the case, and accept a post I was honoured to have as the Minister of Veterans Affairs and Associate Minister of National Defence.

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Organizations' a decision of prosecutors on whether to charge a corporation, or negotiate a plea or other agreement, would also consider the potential harm to innocent third parties in all cases, including those involving non-U.S. companies and individuals" (at paragraph 63).

[16] In response to the question quoted above from Mr. Scheer, the **Rt. Hon. Justin Trudeau** replied: "Mr. Scheer, the role of a Prime Minister is to stand up for Canadians' jobs, to stand up for the public interest, and that's what I've done and that's what I will continue to do every single day. The way I have worked for Canadians is around investing in them, unlike the vision that you're putting forward of giving tax breaks that help people who are making $400,000 K a year". There is no distinction between jobs of persons who are innocent and jobs of persons who were complicit in alleged foreign corruption. https://www.macleans.ca/politics/federal-leaders-debate-full-transcript/

[17] Deferred Prosecution Agreements Code of Practice, Crime and Courts Act 2013, Serious Fraud Office, Section 2.8.2 vii: A conviction is likely to have collateral effects on the public, P's employees and shareholders or P's and/or institutional pension holders.

[18] Letter to Anthony Housefather dated March 26, 2019.

> However, I did make another decision at this time — that I would immediately resign if the new Attorney General decided to issue a directive in the SNC-Lavalin matter as this would confirm my suspicions as to the reason for the shuffle of me in particular.

We know that Minister Wilson-Raybould did resign. In her letter of resignation, she noted that she was in the process of obtaining advice on the topics that she was legally permitted to discuss in this matter.[19] The unanswered question is whether there were further discussions at the Cabinet table or elsewhere about SNC-Lavalin, and whether the right road was followed or the wrong road was discussed.

[19] https://www.macleans.ca/politics/ottawa/read-jody-wilson-rayboulds-resignation-letter/