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CAN THE SNC LAVALIN CONTROVERSY INFORM LOCAL GOVERNMENTS?

If you are like me, you may have been following with interest the SNC Lavalin story. At the centre of the controversy is a legal issue that is often difficult to discern amongst the partisan rhetoric that usually accompanies political discourse.

If you have been trying to figure out for yourself what this is all about, I offer here a synopsis of the legal issue, so that you can make up your own mind on whether the conduct complained of was appropriate or not. I note though that this discussion will not include any review or comment on the deferred prosecution agreement regime or international treaties to which Canada is a signatory that address corruption.

I also suggest that this controversy can be educational to local governments. This is because, like local government officials who wear multiple hats which result in different powers and duties, the Justice Minister and Attorney General is one person who wears two hats.

In his or her role as Justice Minister, he or she acts and interacts like all other cabinet ministers. The Justice Minister, is expected to consider political issues and may receive pressure from other ministers or the PMO to abide by the party's wishes. The Justice Minister does not have the power to take control of a prosecution.

It is only in the role of Attorney General, that he or she has the power to take control of a prosecution.

Suggestions in the press that discussions with the Attorney General about a prosecution can be dealt with in the same manner as all cabinet ministers on all political issues is simply incorrect and shows a lack of understanding of this area of the law.

The Shawcross Doctrine

The Attorney General is to be fully independent of the political arm of government when supervising prosecutions and to act only in the public interest, rather than for lobby groups. This is an important constitutional principle, not a mere legal technicality. The Shawcross Doctrine informs as to the threshold of what degree of interference from the political arm in the Attorney General's decision-making process is improper. This Doctrine recognizes that the Attorney General should be permitted to conduct due diligence in exercising his or her prosecutorial discretion and should take into account all relevant facts in relation to the public interest. In doing so, the Attorney General is permitted to seek out information from other cabinet ministers or the political arm of government. When called upon for assistance, those in the political arm of government may give advice, but may not direct or exert pressure on the Attorney General. The responsibility is the Attorney General's alone. It is not a cabinet decision. As such, it is for the Attorney General to determine how he or she will conduct his or her due diligence. The Attorney General is to determine what factors are relevant to his or her decision and what weight to give to such factors. In theory, one could argue that the Attorney General should be the one to approach colleagues to seek information, rather than having those colleagues approach him or her. However, in practice, it is likely common that members of the political arm will bring to the Attorney General's attention factors that they believe should be considered. This should not cause any problems, so long as both parties recognize the distinct role of the Attorney General and that the communication is always at the Attorney General's pleasure. If at any time, the Attorney General indicates that he or she is not interested in further input, then failure to respect that wish would be a breach of the Doctrine. It should be kept in mind that the intention behind the Doctrine is for the Attorney General to be able to gather all information he or she considers necessary to exercise his or her discretion. It is not intended to be an avenue for the political arm of government to lobby the Attorney General with their political agenda. Once the Attorney General has made his or her decision, any suggestion from the political arm of government that the decision be changed, reconsidered or subjected to a second opinion would contravene the Doctrine, as that would amount to telling the Attorney General that the decision was incorrect and ought to be different, which is clearly improper. Ignorance of the law is not a defence.

More information on the history and application of the law can be found in this informative legal article by Professor Craig Forcese:

http://craigforcese.squarespace.com/public_law_blog/2019/2/9/laffaire-snc-lavalin-the-public-law-principles.html

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Is this Criminal?

The press has reported that the conservatives have been calling for a criminal investigation in relation to the allegations. It should be kept in mind that the Shawcross Doctrine is a constitutional principle, and a breach is not necessarily criminal. The possible criminal charge is obstruction of justice, which is where there is a wilful attempt in any manner to obstruct, pervert or defeat the course of justice, which includes proposed or contemplated judicial proceedings. To convict, the Crown would need to prove beyond a reasonable doubt that the act occurred with intent to attempt to obstruct justice. Ignorance of the law or errors in judgment are not defences.

How are These Allegations Relevant to Local Governments?

While there may be some confusion or lack of information in the media about what the law is, the polls that have been reported show that the issue has captured the attention of the general public in a much bigger way than other political controversies. The significant drop in the popularity of the Prime Minister and comments on social media sites show that the public cares about the proper exercise of political power and the respect for the rule of law by our elected officials.

While local governments do not exercise criminal prosecutorial functions, the courts have recognized that, like the two-hatted Attorney General, local government officials wear three hats in the exercise of their duties and powers. The first hat involves the exercise of the local government's business powers (such as the administration of its regulations, and the management and purchase and sale of municipal assets). In this role, elected officials owe a duty to act in the best interests of the local government as a corporation. The second hat involves the exercise of legislative powers within its jurisdiction (such as enacting bylaws and resolutions regarding land use and development, or building, plumbing and fire safety standards). This is a political power, and the elected officials involved are accountable to the voters. Political considerations are relevant and expected in this role. However, when wearing the third hat -- which involves acting in a quasi-judicial role, such as making decisions whether to licence a business or rezone a property -- elected officials are to follow due process, which includes acting in a fair and impartial manner, and to recuse oneself from the decision-making if there is a conflict of interest or a reasonable apprehension of bias.

It is important for local government elected officials to recognize what function is being exercised and to ensure that the roles and functions are not conflated, which could result in an improper fettering of discretion (see Community Association of New Yaletown v. City of Vancouver 2015 BCCA 227 (CanLII)).

While these are complex legal issues to fully appreciate, the reaction of the public to the latest SNC Lavalin saga shows us that the public strongly feels that these are fundamental principles that all politicians are expected to fully understand and respect.

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Adrienne is a partner at Civic Legal LLP, a British Columbia law firm with expertise in local government law, land development, construction, procurement and complicated contract matters. Adrienne has over 22 years of experience in litigation and over 20 years of experience in local government insurance and construction litigation in all of its variety, including for the MIABC both as outside counsel and in-house as Senior Staff Lawyer. First Nations. Adrienne frequently provides local governments with advice on insurance, risk management, liability assessment and mitigation strategies. Adrienne assists local governments from the first inkling of a potential dispute to negotiate a resolution where possible, and to guide towards a legally defensible process and position where resolution is not possible. Adrienne has represented local governments at all levels of Court in British Columbia, administrative tribunals, mediations and arbitrations.

Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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