

# “Inherent Tension”: Is it Time to Separate the Minister of Justice from the Attorney General?

During the SNC-Lavalin scandal, former Minister of Justice [MOJ] and Attorney General [AG] Jody Wilson-Raybould stated that there were attempts by the Prime Minister’s Office and other government officials to “politically interfere” with her independent discretion as AG.<sup>[1]</sup> This episode has called into question whether the positions of AG and MOJ would better serve Canada’s democracy if they were performed by two individuals.

Currently, the positions of AG and MOJ are exercised by one Cabinet minister, and he or she must perform the two distinct roles. Arguments about whether Canada should reorganize the roles into two different positions, like in the United Kingdom and New Zealand, have been ignited by claims of political interference in the SNC-Lavalin affair, but it is unclear whether the government will see fit to separate them.

## Why Tension Exists: The Current Role of AG and MOJ

There is a significant difference between the roles of AG and MOJ; however, since they are performed by one individual they can be difficult to distinguish. The roles have been combined since before Confederation and have been occupied by one Cabinet minister since the founding of the Department of Justice in 1868.<sup>[2]</sup>

The Minister of Justice [MOJ] is described as “a partisan political advisor” with duties which include providing legal advice to Cabinet and overseeing Department of Justice policy.<sup>[3]</sup> The MOJ is also tasked with reporting if any bill introduced in the House of Commons is inconsistent with the *Charter*.<sup>[4]</sup> In contrast, the Attorney General [AG] litigates on behalf of the Crown, oversees prosecutions, provides legal advice to government departments and agencies, and drafts legislation and regulations.<sup>[5]</sup> In essence, the MOJ is a Cabinet minister and must take in to account partisan plans for policy development; the AG is intended to be an impartial law officer of the Crown.

The combined MOJ and AG roles can lead to conflict of interest concerns because they put two of Canada’s constitutional [conventions](#) at odds with one another. The MOJ is expected to adhere to the principle of Cabinet solidarity, which requires that all Cabinet ministers “maintain a public front of unanimity” on Cabinet decisions.<sup>[6]</sup> However, the AG is expected to adhere to the Shawcross Doctrine which “asserts that AGs should not be pressured or driven by partisan colleagues or considerations” in making decisions about prosecutions.<sup>[7]</sup> The Supreme Court of Canada stated that, in regard to managing prosecutions, the AG should be “fully independent from the political pressures of the government.”<sup>[8]</sup> Thus, tension can arise when one individual is expected to act in both partisan and independent manners.

## **Comparative Analysis: The AG in the United Kingdom and New Zealand**

The combination of the MOJ and AG in one Cabinet minister is not a consistent practice in Commonwealth nations. For example, the United Kingdom [UK] and New Zealand [NZ] separate these positions.

The English AG evolved to have political responsibilities in addition to the obligation for executing the Crown's legal duties.<sup>[9]</sup> Since 1928, the AG is excluded from a Cabinet post; however, the AG is still a Member of Parliament with the governing party and is appointed by the government. The AG can attend Cabinet meetings "by invitation" to give legal advice and to keep abreast of government business.<sup>[10]</sup> The AG's responsibilities include:

- provide legal advice to the government,
- represent the government in court,
- independently control major prosecutions, and
- perform other legal functions as the Crown's lawyer.<sup>[11]</sup>

These functions are distinct from ministerial responsibilities and the development of justice policy. The responsibility for overseeing justice policy rests with the Lord Chancellor and the Home Secretary, both of which are senior Cabinet positions.<sup>[12]</sup>

New Zealand also has the AG and MOJ portfolios exercised by different individuals. The AG is "the senior Law Officer of the Crown" who exercises similar responsibilities to the UK AG.<sup>[13]</sup> In contrast, the Minister of Justice has responsibilities for the creation of government policy on justice and legal issues.<sup>[14]</sup> While the NZ AG is a member of Cabinet, by convention the AG is not bound by Cabinet solidarity.<sup>[15]</sup>

The NZ AG has a similar reporting function to that of Canada's MOJ. The NZ AG is required to report to Parliament if a legislative bill "appears to be inconsistent with the *Bill of Rights*."<sup>[16]</sup> In the period of 1990-2012, the NZ AG reported 53 bills for being in violation of the *Bill of Rights*, including 37 government bills.<sup>[17]</sup> The AG's reporting function has arguably led to greater transparency and dialogue about the constitutionality of bills.<sup>[18]</sup>

### **Independence and Interference: Arguments to Separate the Roles**

Arguments for separating the AG and MOJ positions, as has been done in the UK or NZ, include:

#### 1. Eliminate conflict of interest concerns

- It has been suggested that the current dual role creates an inherent "clash of loyalties and a conflict of interest."<sup>[19]</sup> This conflict comes from the tension between Cabinet solidarity and adherence to the Shawcross doctrine, which requires the AG to be independent in overseeing prosecutions. If the roles were performed by separate individuals this concern would be

eliminated.

## 2. Limit risks of political interference

- Former AG and MOJ Jody Wilson-Raybould has expressed the view that there were “consistent and sustained efforts” by the Prime Minister’s Office to politically intervene with prosecutorial independence during the SNC-Lavalin affair.[\[20\]](#) She thinks there is “merit” in separating the positions to limit future risk of political interference.[\[21\]](#)

## 3. Bolster public confidence in Canada’s justice system

- Former Ontario AG and MOJ Michael Bryant believes the public may have lost confidence in the independence of the justice system because of political interference concerns. He argues that separating the roles of AG and MOJ would help to regain public confidence.[\[22\]](#)

## 4. Increased clarity for Cabinet ministers on how to approach the MOJ and AG

- Former AG and MOJ Irwin Cotler argues that there is an “inherent tension” between the two roles that can lead to confusion from other Cabinet ministers. He states that it can be difficult for ministers to remember to approach the AG with a “legal hat” and not a political one.[\[23\]](#)

## 5. Fewer constitutional challenges to laws

- It has been argued that placing the MOJ’s reporting power in an independent AG would create an improved dialogue about the *Charter* compliance of bills. Because of Cabinet solidarity, the Canadian MOJ has never deemed a government bill to be incompatible with the *Charter*; in contrast, this is a consistent practice of the separate AG in NZ.[\[24\]](#) This move could lead to fewer bills being challenged as unconstitutional once they become law.

## 6. Manageable workload

- It has been suggested that the incredible workload of the AG and MOJ is reason to consider separating the roles.[\[25\]](#) Currently, the AG and MOJ is responsible for work-intensive areas such as making policy, appointing judges, providing legal advice, and overseeing the representation of the government in court. Splitting the roles could provide more attention to these areas

## **Much Ado About Nothing: Arguments for the Status Quo**

Arguments for the current system, where one Cabinet minister performs the roles of AG and MOJ, include:

1. Corruption has appeared to be rare with the combined positions
  - Current AG and MOJ David Lametti acknowledges that “there are good arguments” to split the roles, but he also believes that there has been a long history of the dual role working in Canada. He states that it is “indicative that the system can work” because concerns of political interference have been rare.[\[26\]](#)
2. Separate roles may not address all concerns about political interference
  - It has been argued that any AG appointed by a government could still face pressure to act in that government’s political interest. Notably, the UK AG has still faced controversy from concerns of improper political pressure.[\[27\]](#)

### **Conclusion: A Question of Political Will**

Generally, there are more arguments in favour of separating the positions of AG and MOJ than those for keeping them combined in one person. For this reason, there has been pressure on the government to consider this change.

Prime Minister Justin Trudeau stated on March 4, 2019 that separating the roles would be a “significant change” that should “require considerable reflection and analysis.”[\[28\]](#) The Prime Minister has appointed former AG and MOJ Anne McLellan to “[impartially] review” whether the dual role should be split; she is due to provide recommendations to the Prime Minister by June 30, 2019.[\[29\]](#)

Thus, it is a real possibility that the dual roles of AG and MOJ could be split into separate individuals. It remains to be seen if the political will exists to change a system that has, until recently, seen little controversy despite being in place since 1868.

[\[1\]](#) “Read the full text of Jody Wilson-Raybould’s statement to the House of Commons justice committee” (27 February 2019), online: *National Post* <[nationalpost.com/news/canada/read-jody-wilson-rayboulds-full-remarks-to-the-house-of-commons-justice-committee](http://nationalpost.com/news/canada/read-jody-wilson-rayboulds-full-remarks-to-the-house-of-commons-justice-committee)> [Wilson-Raybould testimony]. Specifically, Wilson-Raybould argued that government officials sought to interfere in the “exercise of prosecutorial discretion... in an inappropriate effort to secure a Deferred Prosecution Agreement with SNC-Lavalin” that was previously rejected by

prosecutors.

[2] Department of Justice, “History of Department of Justice” (last modified: 10 July 2016), online: Department of Justice <[www.justice.gc.ca/eng/abt-apd/hist.html](http://www.justice.gc.ca/eng/abt-apd/hist.html)>.

[3] *Ibid.*

[4] *Department of Justice Act*, RSC 1985, c J-2, s 4.1(1); *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

[5] Department of Justice, “Roles and Responsibilities of the Minister of Justice and Attorney General of Canada” (last modified: 28 April 2016), online: Department of Justice Canada Minister’s Transition Book <[www.justice.gc.ca/eng/trans/transition/tab2.html](http://www.justice.gc.ca/eng/trans/transition/tab2.html)>.

[6] Élise Hurtubise-Loranger, “Constitutional Conventions” (11 July 2006), online (pdf): Library of Parliament <<https://lop.parl.ca>>.

[7] James B Kelly & Matthew A Hennigar, “The Canadian Charter of Rights and the minister of justice: Weak-form review within a constitutional Charter of Rights” (2012) 10:1 Intl J Constitutional L 35 at 54 [Kelly & Hennigar].

[8] *Krieger v Law Society of Alberta*, 2002 SCC 65 at para 29.

[9] LJ King, “The Attorney General, Politics and the Judiciary” (2000) 29 UW Austl L Rev 155 at 156 [King].

[10] Kelly & Hennigar, *supra* note 7 at 45.

[11] King, *supra* note 9 at 157.

[12] *Ibid.*

[13] Department of the Prime Minister and the Cabinet, “Ministerial Profile Attorney-General” (last modified: 31 October 2017), online: <<https://dpmc.govt.nz/cabinet/portfolios/attorney-general>>.

[14] Department of the Prime Minister and the Cabinet, “Ministerial Profile Justice” (last modified: 12 October 2017), online: <[dpmc.govt.nz/cabinet/portfolios/justice](https://dpmc.govt.nz/cabinet/portfolios/justice)>.

[15] Kelly & Hennigar, *supra* note 7 at 51.

[16] *New Zealand Bill of Rights*, 1990 No 109, s 7.

[17] Kelly & Hennigar, *supra* note 7 at 65.

[18] *Ibid.*

[19] Adam Dodek, “The impossible position: Canada’s attorney-general cannot be our justice

minister” (22 February 2019), online: *The Globe & Mail* <[www.theglobeandmail.com/opinion/article-the-impossible-position-canadas-attorney-general-cannot-be-our/](http://www.theglobeandmail.com/opinion/article-the-impossible-position-canadas-attorney-general-cannot-be-our/)>. Notably, Dodek asks the rhetorical question: “How can the minister and attorney-general provide legal advice on their own policies or legal advice that they have a political interest in promoting?”

[20] Wilson-Raybould testimony, *supra* note 1.

[21] Tessa Wright, “Lametti floats separating justice minister and attorney general roles in wake of SNC-Lavalin scandal” (2 March 2019), online: *National Post* <<https://nationalpost.com/news/canada/growing-support-for-separating-roles-of-justice-minister-and-attorney-general>> [Wright].

[22] Samantha Wright Allen, “Splitting AG from justice minister not a ‘quick fix,’ experts say, but separation a welcome reform” (6 March 2019), online: *The Hill Times* <[www.hilltimes.com/2019/03/06/splitting-ag-from-justice-minister-not-a-quick-fix-experts-say-but-separation-a-welcome-reform/191141](http://www.hilltimes.com/2019/03/06/splitting-ag-from-justice-minister-not-a-quick-fix-experts-say-but-separation-a-welcome-reform/191141)> [Wright Allen].

[23] *Ibid.*

[24] Kelly & Hennigar, *supra* note 7 at 51.

[25] Wright Allen, *supra* note 22. This point was argued by Matthew Hennigar, Professor of Political Science at Brock University.

[26] Wright, *supra* note 21.

[27] *Ibid.* University of Ottawa Law Professor Elizabeth Sanderson argued that political pressures to agree with the government could remain. See also Clare Dyer, “Attorney general’s prosecution role may be curtailed” (29 October 2007), online: *The Guardian* <<https://www.theguardian.com/uk/2007/oct/29/constitution.politics>>.

[28] *Ibid.*

[29] Elise von Scheel, “Special adviser to Trudeau on splitting attorney general-justice minister role promises impartiality” (23 March 2019), online: *Canadian Broadcasting Corporation* <[www.cbc.ca/news/politics/anne-mclellan-interview-attorney-general-justice-minister-1.5069105](http://www.cbc.ca/news/politics/anne-mclellan-interview-attorney-general-justice-minister-1.5069105)>.