2010

Commentary on "Prosecutions, Politics and the Public Interest: Some Recent Developments in the United Kingdom, Canada and Elsewhere"

Mary Condon

Osgoode Hall Law School of York University, mcondon@osgoode.yorku.ca

Commentary on "Prosecutions, Politics and the Public Interest: Some Recent Developments in the United Kingdom, Canada and Elsewhere"

Mary Condon[*]

1. Introduction

Professor Stenning is to be congratulated for providing a fresh and timely perspective on some crucial dilemmas of prosecutorial decision-making,[1] and for grounding his incisive analysis in a close discussion of a particularly provocative case emerging from the U.K. House of Lords in 2008.[2] The core conundrum he addresses in his paper is the long-standing one of what should be the contours of the role played by a jurisdiction's Attorney General in prosecutorial decision-making. The context here is one in which attorneys general have multiple and significant responsibilities in governmental arenas.[3] Specifically, he poses two questions about the Attorney General's role. The first is (i) are we close to achieving "institutional arrangements and constitutional conventions and practices" which will guarantee "a satisfactory balance between political independence and political accountability of those with ultimate responsibility for prosecutorial decision-making?". The second question is (ii) "are we closer to achieving consensus about what such a

* Osgoode Hall Law School.

1. Philip C. Stenning, "Prosecutions, Politics and the Public Interest: Some Recent Developments in the United Kingdom, Canada and Elsewhere" (2010), 55 C.L.Q. 449.
2. *R (on the application of Corner House Research and others) v. Director of the Serious Fraud Office*, [2008] UKHL 60 (*BAE case*).
3. These include acting as chief legal advisor to the government, being the representative of the Crown in criminal prosecutions and, in some jurisdictions, also cabinet membership.

'satisfactory balance' might be?" The article ultimately answers both of these questions in the negative.

In coming to this conclusion, Professor Stenning confronts the idea that the best answer to the conundrum of the appropriate balance to be drawn between the independence of an Attorney General or a Director of Public Prosecutions and the need for "political considerations" to be taken into account in some decisions to prosecute or not to prosecute is the one originally proposed by Professor Edwards in his 1964 book.[4] That answer was that it all comes down to the "strength of character and personal integrity" of the office-holder, who is required to ensure his or her own independence of mind with respect to the prosecutorial decision to be made. Professor Stenning is skeptical of the idea that political considerations do not play a role in some prosecutorial decision-making, and indeed is equally skeptical of the supposed distinction between partisan and non-partisan political considerations. Rather, he argues that in a democracy it may be indeed be *appropriate* for political considerations to play a role, thus erasing or severely circumscribing the distance between "independent" prosecutorial decision-making and politics. This amounts to a plea for an acknowledgement that some prosecutorial decisions are irreducibly political when they are being made.

Instead, Stenning argues for more transparency and accountability for prosecutorial decision-making, whether or not the official is an Attorney General or a Director of Public Prosecutions. He cites the *BAE case* as an example of a situation where robust levels of such accountability were present. Indeed, though Stenning's paper does not dwell on this, the *BAE case* is also an example where no-one involved impugned the integrity of the Director of the Serious Fraud Office who made the actual decision to close down the investigation in that case.

In these brief comments, I want to concentrate on two issues raised by Stenning's excellent paper. They are (i) do contemporary cases like the *BAE case* highlight the need to

4. John Ll.J. Edwards, *The Law Officers of the Crown: A Study of the Offices of Attorney-General and Solicitor-General of England* (London, Sweet and Maxwell, 1964).

probe whether we have the right decision-making processes in place to handle matters with elements of multi-jurisdictional, foreign policy and defence-related as well as economic concerns? (ii) do we need to interrogate the concept of the "public interest" more closely in this context?

2. Do We Have the Right Decision-Making Processes in Place?

The discussion in Professor Stenning's paper about the conditions needed to ensure appropriate discretionary decision-making by an Attorney General seems particularly interesting if we shift perspective to consider it through the lens of other highly contested decision-making processes. Take for example the corporate context. There has been much attention paid to issues of corporate governance in recent years,[5] following well-publicized scandals and failures such as Enron, Nortel and Hollinger. One result of all this legislative, regulatory and public debate about governance in the corporate context is that no-one thinks that a complete, or even a primary, answer to the question of whether a corporation is well governed or not lies in the personal integrity of the Chief Executive Officer (CEO). Instead, good governance is taken to reside in mechanisms for information-sharing, up-the-line reporting, codes for avoiding conflicts of interest, risk management processes and so on.[6] In other words, the emphasis is on *processes for decision-making* and whether these are crafted appropriately.

Now Stenning might well respond that a focus on governance processes in complex organizations is different from the kind of episodic, discretionary decision-making, engaging multiple political sensibilities, he is grappling with in his paper. My answer would be that perhaps there is something to be learned from our experience in designing governance process in other

5. *Sarbanes-Oxley Act of 2002* (Pub.L. 107-204, 116 Stat. 745); NI 58-101.
6. The literature here is voluminous. See for example, Christine Mallin, *Corporate Governance* (N.Y.: Oxford University Press, 2007); Robert A.G. Monks and Nell Minow, *Corporate Governance*, 3rd ed. (Blackwell, 2004); Laura Spira, *The Audit Committee* (Boston, Kluwer, 2002); Organisation for Economic Cooperation and Development, *Principles of Corporate Governance* (OECD, Paris, 2004).

situations where discretionary decisions have to be made.[7] In the corporate context for example, a well-established antidote to the perception of conflict of interest[8] when a CEO or a board of directors makes a decision is the need for independent external advice, often from lawyers but also other relevant professionals such as bankers or valuators.

In his paper, Stenning describes the "Shawcross doctrine", which amounts to the opportunity for an Attorney General to consult with his or her political colleagues about the prosecutorial decision to be made, without impugning his or her own independence of mind. In other words, a high priority is placed on the role of *other government ministers* as sources of knowledge and advice. This leads to a question about whether there is some broader notion of consultation that could be conceived of in cases such as the ones analyzed by Professor Stenning. In the *BAE case*, Stenning describes how the Director of the Serious Fraud Office did obtain the expert assessments of the British Ambassador as to the extent of the threat to "national security" at the relevant time.

More generally, what would we learn from a focus on where the gaps are in the processes used for decision-making in sensitive prosecutorial cases? Stenning describes the need to achieve consensus on "institutional arrangements and constitutional conventions *and practices*" so as to guarantee a balance between independence and political pressures. As I have suggested, an area that could usefully be focused on in this paper is that of the "practices" that are in fact deployed in this kind of "high political" prosecutorial decision-making. Is it possible to conceive of some kind of more detailed guidelines with respect to issues such as who or what categories of people to consult with, and how to reduce the presence of conflicts of interest. I note of course that, at lower levels in the prosecutorial hierarchy, there is a code for conduct for Crown prosecutors in

7. It should also be acknowledged that the question of whether corporate organizations need to take account of the public interest in their decision-making is currently a live and very thorny one in Canada. See *BCE Inc. (Arrangement relatif à)*, [2008] S.C.J. No. 37 (QL), 301 D.L.R. (4th) 80, [2008] 3 S.C.R. 560.

8. Something that is often at issue when an Attorney General is making a sensitive prosecutorial decision.

the United Kingdom and similar ones in Canada.[9] All of this is to say that Stenning's paper ultimately puts a lot of faith in *after the fact* accountability as an antidote to the possibility of prosecutorial decision-making at the highest levels of seniority being "tainted".[10] Left unanswered is the question of whether there is a role for more careful streamlining of decision processes *before the fact*, so that adherence to those processes becomes itself an element of accountability after the fact.

3. What Is the "Public Interest", Anyway?

The emphasis on process that I am advocating raises squarely the issue of how the "public interest" is discerned in these decisions. Stenning has clearly identified this as crucial to justifying action or inaction by an Attorney General in relation to a prosecution. The *BAE case* is a good example of some of the issues here. First, it shows that there can be competing legitimate interpretations of the public interest. How *are* officials to weigh the public interest in the credibility of the rule of law against the public interest in diffusing threats to citizens' lives? Does the invocation of "national security" always trump other considerations? What would count as compelling evidence of those threats? Is an analysis of the public interest that involves an Attorney General's prosecutorial decisions destined to be always episodic and not conducive to structured criteria? We should note here that Attorneys General are not the only arm of government vested with a responsibility to discern the public interest. A variety of regulatory structures and processes also require this as well. Indeed the rise of administrative government is an acknowledgement that decisions about the public interest should be made by those with some sense of experience, history, and specialized skills in the relevant arena of administrative justice. Much of the trajectory of administrative law has arguably been to provide an infrastructure for administrative decisions to be made in a rational, predictable manner and to be shielded from the

9. A representative example is the "Code of Conduct for Crown Prosecutors", promulgated by the Alberta Ministry of Justice and Attorney General: see <http://www.justice.gov.ab.ca/criminal_pros/default.aspx?id=5639>.

10. And particularly the requirement that interventions by the Attorney General in prosecutorial decision-making be "documented and published".

possibility of "political interference".[11] Yet scholars of administrative discretion are increasingly interested in the question of whether there is some role for "democratic deliberation" in ascribing content to the public interest that is applied by regulators in various arenas. As Feintuck puts it,[12]

> . . . in the emphasis it places on active citizen participation in deliberative processes, civic republicanism might seem to offer a legitimate and definite orientation for regulatory activity in the public interest, seeing regulation in effect as a 'surrogate deliberative process', while simultaneously requiring the accountability of those who exercise such power.

In invoking notions of democratic deliberation, I emphasize that I am not suggesting that individual prosecutorial decisions could or should be subject to such deliberation. Rather, the criteria to be weighed in specific situations could be rendered more open for public debate. In the *BAE case* for example, there clearly was some sense of what were *not* appropriate considerations with respect to the public interest. Thus commercial interests and the national economic interest were not supposed to be relevant. Would there be wide-ranging consensus about this, for example, in the Canadian context? Is it even possible to enumerate in advance better or worse interpretations of the public interest in the type of politically charged prosecutorial decisions of which Professor Stenning writes? Going back to my concern for process, it was also clear from the *BAE case* that there *were* representations made by some parties about how officials should understand the public interest. These came from entities like BAE itself and the Saudi government. This again raises serious questions about where the evidence comes from that is used to make a judgment about what the public interest requires and whether those sources are sufficiently inclusive.

4. Conclusion

While this brief comment has ultimately raised more questions than it has answered, they have all been prompted

11. H.W. Arthurs, *Without the Law* (Toronto, University of Toronto Press, 1985).
12. Mike Feintuck *"The Public Interest" in Regulation* (New York, OUP, 2004).

by Professor Stenning's close engagement with an important exercise of criminal authority. He is once again to be congratulated for prising open the fascinating issues here for a new generation of criminal procedure scholars.