

OPINION

# Brexit wrangling proves that separating the AG and justice minister is no panacea

By CHRISTOPHER RUSKO APR. 1, 2019

Legal decisions are not necessarily better than political ones for the big problems governments face.



Justice Minister and Attorney General David Lametti is among those who have floated the idea of splitting the two roles, only one of which is intended to be political. *The Hill Times* photograph by Andrew Meade

As the SNC-Lavalin affair continues to roil Canadian politics, the combined role of the attorney general and the minister of justice has come under scrutiny. Under the current arrangement, the justice portfolio requires the incumbent to act in a political capacity—as a member of the cabinet responsible for government policy—and as the government’s chief legal adviser. Several commentators have weighed in to say that this puts the attorney general in an impossible conflict of interest.



As a solution, many are now suggesting that Canada follow the U.K., where the secretary of state for justice and the attorney general are distinct roles—only the former is a member of cabinet, although the attorney general does attend cabinet meetings. Indeed, Prime Minister Justin Trudeau said he is now considering such a separation.

Implicit in this proposal is the idea that decision-making must be insulated from the influence of politics. By applying the cool logic of legal reason, the argument goes, we can ensure a more thoughtful, correct outcome

However, an episode involving the attorney general in the U.K. last week should give Canadians pause about the seeming efficacy of such a reorganization of the offices of state. In an attempt to salvage her Brexit deal, Theresa May and her advisors managed to negotiate with the EU a draft legal instrument designed to get beyond the impasse caused by the “Irish backstop,” the provision in the Withdrawal Agreement designed to prevent a hard border between Northern Ireland and Ireland, or between Northern Ireland and the rest of the U.K. It would do so by keeping all of the U.K. in the European customs union in the event that a permanent and workable agreement cannot be reached. Many of May’s Conservative colleagues fear that the Irish backstop could keep the U.K. in a customs union forever if talks break down. To mollify these concerns, the EU conceded it would use its “best endeavours” to reach a deal. In other words, the EU would not be able to simply refuse to negotiate to keep the U.K. in the backstop in perpetuity.

Following a tentative agreement on March 11, May asked her attorney general, Geoffrey Cox, to render an opinion on the instrument, in the hope that the star barrister and Q.C. would give an imprimatur of legal certainty, thereby making it sellable to Parliament. Cox’s opinion did the opposite. Cox noted that, whilst the instrument would prevent a “bad faith” effort by the EU to undermine achievement of a deal, it offered no recourse if the EU and the U.K. were unable to reach an agreement for bona fide reasons. In effect, the application of Cox’s legal reasoning prevented a possible political solution from materializing.

The matter was further confused by the fact that Cox had participated in the negotiations with Brussels to achieve the fix. In a remarkable twist, Cox delivered the final blow to an amendment that he helped to draft!

The episode demonstrates that the application of law to a problem is not necessarily a panacea. The idea that legal (rather than political) analysis is more rational and ethical, and therefore will lead to the “right” outcome is specious. For the knottiest issues, both the problem itself and any potential solution are likely to be political.

Politicians should resist the temptation to gloss a legal veneer onto difficult decisions. Similarly, they should avoid outsourcing responsibility by claiming that their hands are tied by the law's rigidity. Such misuses undermine public confidence in the law and raise serious concerns about democratic accountability.

Additionally, the division of the two roles will not end partisanship. Recall that Cox is an elected MP and a member of the Conservative Party, not an impartial civil servant. The analysis of even a hived-off attorney general will always bear the colour of party affiliation.

That is not to say that legal reasoning should be discounted; indeed, legal analysis will often play an important role in the consideration of most political issues. But the notion that more law and less politics is an elegant solution to the problems of contemporary governance is flawed. While separating the attorney general's role from the office of the minister of justice may have some virtues, it is unlikely to be the quick fix that many Canadians appear to be hoping for.

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