Federal Court  Cour fédérale

Date: 20240205

Docket: T-2504-22

Citation: 2024 FC 182

Ottawa, Ontario, February 5, 2024

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

JUANITA WOOD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Overview and background

[1] The applicant, Ms. Juanita Wood, is self-represented. By way of motion in writing under Rule 369 of the *Federal Courts Rules*, SOR/98-106 [Rules], Ms. Wood seeks, pursuant to subsection 51(1) of the Rules, to appeal the Order of Associate Judge Coughlan dated February 17, 2023, granting the motion to strike under Rule 221 of the Rules that was brought by the respondent, the Attorney General of Canada [AGC], and dismissing her underlying application for judicial review (*Wood v Canada (Attorney General)*, 2023 FC 224 [*Wood FC*]);

Ms. Wood also brings a separate motion for an extension of time to do so. The AGC takes no position on the motion for an extension of time, but certainly takes issue with Ms. Wood's motion to appeal the Associate Judge's decision.

[2] The facts are relatively straightforward. The Government of Yukon's Department of Highways and Public Works terminated Ms. Wood's employment in 2014. Ms. Wood thereafter commenced extensive litigation in relation to her termination, including efforts to bring prosecutions under Yukon's health and safety legislation; she was unsuccessful and eventually declared a vexatious litigant by the Supreme Court of Yukon and the Court of Appeal of Yukon. Ms. Wood subsequently commenced a series of criminal prosecutions in relation to the same dispute; in April 2022, she swore 11 informations containing 59 counts against the Government of Yukon, the Yukon Workers' Compensation Health and Safety Board [YWCHSB], and a number of their employees and directors. Nine of the eleven informations were stayed by the Director of Public Prosecutions [DPP] acting on behalf of the AGC, while the remaining two saw process declined by the Territorial Court of Yukon; Ms. Wood's application for leave to set aside the decision of the Territorial Court of Yukon was dismissed by the Supreme Court of Yukon.

[3] In July 2022, Ms. Wood swore five new informations in a private prosecution, naming as accused the Government of Yukon, the YWCHSB, and a series of individuals. In October 2022, the DPP, acting on behalf of the AGC, stayed all five informations prior to the pre-enquete hearing [Decision]; it is this Decision that forms the subject matter of the underlying application for judicial review, which includes a request for an order of mandamus so that the five new informations may proceed to a pre-enquete hearing.

[4] The AGC brought a motion to strike the underlying application on the grounds that this Court lacks jurisdiction to hear the matter, arguing that the Crown prosecutor was exercising prosecutorial discretion in making the Decision, and that in doing so, the prosecutor was thus not a "federal board, commission or other tribunal" within the meaning of section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [FC Act]. Ms. Wood, on the other hand, takes issue with that assertion, and argues that the Federal Court indeed has exclusive jurisdiction to determine an application to quash the AGC's Decision to enter a stay. In doing so, Ms. Wood relies on two decisions of the Supreme Court of Yukon for the proposition that a Crown prosecutor entering a stay of a private information is acting as a "federal board, commission or other tribunal" as defined in section 2 of the FC Act because in doing so, the Crown prosecutor was "exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament", specifically section 579 of the *Criminal Code*, RSC 1985, c C-46 [Criminal Code], thus bringing the Crown prosecutor within the Federal Court's exclusive jurisdiction pursuant to subsection 18(1) of the FC Act (*Knol v Canada (Attorney General)*, 2013 YKSC 121 [*Knol*] at paras 15–16, citing *Joe v Canada (AG)*, 2008 YKSC 68 [*Joe*] at para 9).

[5] The Associate Judge sided with the AGC in determining that that the Yukon line of jurisprudence had been displaced by more recent jurisprudence of the Supreme Court of Canada, granted the motion, and dismissed the underlying application for judicial review; the Associate Judge found that this Court's jurisdiction is to be determined not by the nature of the body exercising the authority but, rather, by the source of the authority being exercised, and that the prosecutorial discretion to stay Ms. Wood's private informations was derived neither from an Act of Parliament—in this case, presumably the *Director of Public Prosecutions Act*, SC 2006,

c 9, s 121 [DPP Act] or the Criminal Code—nor from an order made pursuant to a prerogative power of the Crown, but instead from the common law and the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91 [Constitution]. Consequently, in exercising his discretion as he did, the Crown prosecutor was not a "federal board, commission or other tribunal" necessary to clothe the Federal Court with jurisdiction (*Wood FC* at paras 16–21, citing *Anisman v Canada (Border Services Agency)*, 2010 FCA 52 [*Anisman*] at para 29; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 [*Mikisew Cree*] at paras 106–109; *SNC-Lavalin Group Inc v Canada (Public Prosecution Service)*, 2019 FC 282 [*SNC-Lavalin*] at para 171).

[6] The AGC argues that Ms. Wood is conflating the "creation" of the duty or power with the "codification" of the duty or power, and that the fact that Parliament has passed a statute defining the duties or powers of a body does not mean that the "source" of the duty or power is that federal statute. The answer to such an argument, it seems to me, is that it all depends on how one is to define "source". For my part, I think we must be careful not to conflate the notion of justiciability with that of jurisdiction. In the end, and with respect, I find myself unable to agree with the Associate Judge's determination of what constitutes the source-based test for the determination of this Court's jurisdiction, and I find that this Court does in fact have jurisdiction to deal with Ms. Wood's underlying application for judicial review. I will therefore grant the present appeal.

II. Issues and standard of review

[7] There are two issues before me, the first being whether I should grant Ms. Wood's request for an extension of time to file her appeal, and the second being whether the present motion to appeal should be allowed.

[8] The standard of review applicable to discretionary decisions of associate judges is correctness for questions of law, and palpable and overriding error for questions of fact and questions of mixed fact and law, absent an extricable error of law or legal principle (*Housen v Nikolaisen*, 2002 SCC 33 at paras 19–37; *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 66 and 79; *Wi-LAN Inc v Apple Canada Inc*, 2022 FC 974 at paras 9–11; *Apotex Inc v Canada (Health)*, 2012 FCA 322 at para 9; *David Suzuki Foundation v Canada (Health)*, 2018 FC 380 at paras 122–127).

III. Analysis

A. *Should Ms. Wood be granted an extension of time to file her appeal?*

[9] It is common ground between the parties that in exercising its discretion regarding whether to grant an extension of time under Rule 8 of the Rules, this Court should take into account the following four factors:

1. the moving party's continuing intention to pursue the proceeding;
2. whether there is some merit to the proceeding;
3. whether the respondent is prejudiced by the delay; and
4. whether the moving party has a reasonable explanation for the delay.

(*Canada (Attorney General) v Hennelly*, 1999 CanLII 8190 (FCA) [*Hennelly*] at para 3; *Canada (Attorney General) v Larkman*, 2012 FCA 204 [*Larkman*] at para 61.)

[10] In addition, not all criteria need to be resolved in the moving party's favour; a weak factor may be balanced by a stronger one. In any event, the overriding consideration is whether granting the extension is in the interests of justice (*Larkman* at para 62).

[11] Ms. Wood's explanation for the delay is that she was confused by the language of subsection 51(1) of the Rules, which refers to prothonotaries and not associate judges, and as a self-represented litigant without legal training, she was unaware that decisions of associate judges could be appealed to the Federal Court because in the Yukon, all appeals lie to the Court of Appeal. In fact, following the decision of Associate Judge Coughlan, Ms. Wood advised the AGC that she intended to appeal that decision to the Federal Court of Appeal; her attempt to file her notice of appeal was not accepted by the Registry of that Court on account of subsection 51(1) of the Rules. In addition, Ms. Wood asserts that she was not able to address the motion to appeal before she actually did because she was in court defending herself against an application brought by the AGC to have her declared a vexatious litigant. Finally, Ms. Wood argues that it is in the interests of justice that this Court hear the present appeal given the serious allegation of flagrant impropriety that she has brought against the AGC and the serious allegations of criminal activity that she has brought against the accused public servants in the Yukon (the subjects of the five private informations).

[12] For his part, the AGC concedes that Ms. Wood, in all likelihood, had a continuing intention to bring the appeal of Associate Judge Coughlan's decision, as evidenced by the fact

that she attempted to file a notice of appeal before the Federal Court of Appeal. The AGC also concedes that he will no longer suffer prejudice if the extension of time is allowed in that prejudice, if any, has already been suffered and can be compensated by an order for costs. The AGC also accepts that Ms. Wood's explanation for the delay is reasonable, and while he notes that a party's lack of legal training or understanding of the Rules is not normally a reasonable explanation for delay, the AGC concedes that the delay was not excessive or unexplained. That said, and while the AGC takes no position on the extension motion, he notes simply that the appeal motion has no merit; thus, the extension motion does not meet the second factor of the test in *Hennelly*.

[13] As discussed below, I am of the view that the present appeal does indeed have merit and that it should therefore be allowed, and I also find that the *Hennelly* factors weigh in favour of Ms. Wood; her request for an extension is to be granted.

B. *Should Ms. Wood's appeal be allowed?*

[14] I should mention that although there is no dispute between the parties that the DPP has the prosecutorial discretion to stay private prosecutions, there is some dispute with regard to whether the Decision was made by the AGC or, as Ms. Wood contends, the DPP. To put this issue to bed right away, from my perspective, there is no meaningful distinction to be made between the AGC and the DPP that is determinative of the present appeal. It is clear that the DPP acts on behalf of the AGC in exercising prosecutorial discretion in directing a stay of private prosecutions (paragraph 3(3)(f) of the DPP Act; *Knol* at para 15). In fact, the excerpt of the

pre-enquete hearing transcript in this case confirms that Crown counsel was appearing for the DPP as an agent for and on behalf of the AGC.

[15] As stated earlier, the Associate Judge was satisfied that the prosecutor exercising his discretion to stay Ms. Wood's private informations did so pursuant to the common law and the Constitution, and the Associate Judge thus found that the DPP was not acting as a federal board, commission or other tribunal necessary to clothe this Court with jurisdiction. As noted by the Associate Judge, although acts of prosecutorial discretion are entitled to considerable deference, they are not altogether immune from judicial oversight; decisions made within the core of prosecutorial discretion are nonetheless reviewable for abuse of process (*R v Anderson*, 2014 SCC 41, [2014] 2 SCR 167 [*Anderson*] at para 48; *R v Glegg*, 2021 ONCA 100 [*Glegg*] at paras 40 and 41).

[16] On that issue, I should mention that in her underlying application, Ms. Wood in fact claims that there has been an abuse of process on the part of the DPP in taking the Decision of staying all five informations prior to the pre-enquete hearing; she sets out the grounds for her claims as follows:

> The stay of proceedings in TC #22-08534 at the October 31, 2022 pre-enquete hearing represents an abuse of process, amounting to flagrant impropriety, by the Attorney General or its representative.
>
> The Attorney General's actions that amount to flagrant impropriety include:
>
> … [Ms. Wood lists 12 specific allegations of abuse of process.]
>
> [Emphasis added.]

[17] I should also mention that Ms. Wood is seeking an order of *mandamus* compelling the pre-enquete hearing to proceed in relation to the charges in question. The Associate Judge considered, however, that she need not deal with the *mandamus* issue given her findings on jurisdiction.

[18] More to the point, Ms. Wood relies on subsection 18(1) of the FC Act, which gives this Court exclusive original jurisdiction to grant declaratory relief against any "federal board, commission or other tribunal". The statutory provision reads as follows:

Extraordinary remedies, federal tribunals	**Recours extraordinaires : offices fédéraux**
18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction	18 (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :
(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and	a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;
(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.	b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.
…	[…]

Remedies to be obtained on application	**Exercice des recours**
(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.	(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.
[Emphasis added.]	[Je souligne.]

[19] The expression "federal board, commission or other tribunal" is defined in subsection 2(1) of the FC Act to mean:

federal board, commission or other tribunal means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made under a prerogative of the Crown, other than the Tax Court of Canada or any of its judges or associate judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*; *(office fédéral)*	***office fédéral*** Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges et juges adjoints, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*. (*federal board, commission or other tribunal*)
[Emphasis added.]	[Je souligne.]

[20] Ms. Wood submits that the Associate Judge erred in finding that Crown counsel had exercised his prosecutorial discretion to stay her private prosecutions—for which she swore the

five informations—under the common law or the Constitution, because the prosecutor was in fact acting pursuant to subsection 579(1) of the Criminal Code, a statutory provision which codified the element of prosecutorial discretion; by prosecutorial discretion Ms. Wood means, in this case, "the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence" relating to the "discretion to enter a stay of proceedings in either a private or public prosecution" (*Krieger v Law Society of Alberta*, 2002 SCC 65 (CanLII), [2002] 3 SCR 372 [*Krieger*] at paras 43 and 46).

[21] Subsection 579(1) of the Criminal Code provides:

Attorney General may direct stay	**Arrêt des procédures**
579 (1) The Attorney General or counsel instructed by the Attorney General for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by the Attorney General's or counsel's direction, as the case may be, and the entry shall then be made, at which time the proceedings shall be stayed accordingly and any undertaking or release order relating to the proceedings is vacated.	579 (1) Le procureur général ou le procureur mandaté par lui à cette fin peut, à tout moment après le début des procédures à l'égard d'un prévenu ou d'un défendeur et avant jugement, ordonner au greffier ou à tout autre fonctionnaire compétent du tribunal de mentionner au dossier que les procédures sont arrêtées sur son ordre et cette mention doit être faite séance tenante; dès lors, les procédures sont suspendues en conséquence et toute promesse ou ordonnance de mise en liberté afférente est annulée.

[22] From what I can tell, Ms. Wood does not seem to take issue with the historical roots of the AGC's prosecutorial discretion to stay criminal proceedings; however, she cites *Black v Canada (Prime Minister)*, 2001 CanLII 8537 (ON CA) [*Black*] at paragraphs 25 to 27 for the proposition that subsection 579(1) of the Criminal Code displaced the Crown's prerogative power to do so, and caused the prerogative to go into abeyance:

> [25] To put these submissions in context, I will briefly review the nature of the Crown's prerogative power. According to Professor Dicey, the Crown prerogative is "the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown": Dicey, Introduction to the Study of the Law of the Constitution, 10th ed. (London: Macmillan, 1959) at p. 424. Dicey's broad definition has been explicitly adopted by the Supreme Court of Canada and the House of Lords. See Reference re Effect of Exercise of Royal Prerogative of Mercy Upon Deportation Proceedings, 1933 CanLII 40 (SCC), [1933] S.C.R. 269 at pp. 272-73, 59 C.C.C. 301, and Attorney General v. De Keyser's Royal Hotel, [1920] A.C. 508 at p. 526, [1920] All E.R. Rep. 80 (H.L.). See also Peter Hogg and Patrick Monahan, Liability of the Crown, 3rd ed. (Toronto: Carswell, 2000) at p. 15.
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> [26] The prerogative is a branch of the common law because decisions of courts determine both its existence and its extent. In short, the prerogative consists of "the powers and privileges accorded by the common law to the Crown": Peter Hogg, Constitutional Law in Canada, loose-leaf ed. (Toronto: Carswell, 1995) at 1.9. See also Proclamations Case (1611), 12 Co. Rep. 74, 77 E.R. 1352 (K.B.). The Crown prerogative has descended from England to the Commonwealth. As Professor Cox has recently observed, "it is clear that the major prerogatives apply throughout the Commonwealth, and are applied as a pure question of law": N. Cox, The Dichotomy of Legal Theory and Political Reality: The Honours Prerogative and Imperial Unity, 14 Australian Journal of Law and Society (1998-99) 15 at 19.
>
> [27] Despite its broad reach, the Crown prerogative can be limited or displaced by statute. See Parliament of Canada Act, R.S.C. 1985, c. P-1, s. 4. Once a statute occupies ground formerly occupied by the prerogative, the prerogative goes into abeyance. The Crown may no longer act under the prerogative, but must act under and subject to the conditions imposed by the statute: Attorney General v. De Keyser's Royal Hotel, supra. In England and Canada, legislation has severely curtailed the scope of the

> Crown prerogative. Dean Hogg comments that statutory displacement of the prerogative has had the effect of "shrinking the prerogative powers of the Crown down to a very narrow compass" (supra). Professor Wade agrees:
>
> > [I]n the course of constitutional history the Crown's prerogative powers have been stripped away, and for administrative purposes the prerogative is now a much-attenuated remnant. Numerous statutes have expressly restricted it, and even where a statute merely overlaps it the doctrine is that the prerogative goes into abeyance.
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> E.C.S. Wade, Administrative Law, 6th ed. (Oxford: Clarendon Press, 1988) at pp. 240-41.)
>
> Nonetheless, as I will discuss, the granting of honours has never been displaced by statute in Canada and therefore continues to be a Crown prerogative in this country.
>
> [Emphasis added.]

[23] I should mention that *Black* dealt with both the issues of justiciability and jurisdiction; the principal issue in *Black* was whether the exercise of honours prerogative of the Crown—in that case, the advice by the Prime Minister of Canada to the Queen regarding the appointment of Conrad Black as a peer—was justiciable; the Ontario Court of Appeal found that it was not. However, and as was the case in *Knol* and *Joe*, the Court was also tasked with determining whether the Federal Court, to the exclusion of the Superior Court of Ontario, had jurisdiction to review the exercise of a prerogative power of the Crown. In *Black*, the Ontario Court of Appeal found that although such exercise by the Prime Minister in advising the Queen about the conferral of an honour on a Canadian citizen is not reviewable by any court, had such exercise of a prerogative power of the Crown been justiciable, the Superior Court would, to the exclusion of the Federal Court, have had jurisdiction to grant declaratory relief, because the Prime Minister, in doing as he did, was not "exercising or purporting to exercise jurisdiction or powers conferred

by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown". In other words, as the exercise of prerogative power by the Prime Minister was conferred neither by or under an Act of Parliament, nor by or under an order made pursuant to a prerogative of the Crown, the Prime Minister was not "a federal board, commission or other tribunal" as defined in subsection 2(1) of the FC Act (*Black* at para 76).

[24] As she did before the Associate Judge, Ms. Wood relies upon the Supreme Court of Yukon rulings in *Knol* as well as *Joe*, where it was in fact the AGC who successfully argued that the Federal Court, and not the Supreme Court of Yukon, had jurisdiction to hear judicial review applications relating to the use of prosecutorial discretion to stay proceedings provided for under subsection 579(1) of the Criminal Code; in both cases, the Supreme Court of Yukon agreed with the AGC and found that when staying proceedings on behalf of the AGC, Crown counsel is exercising powers conferred by subsection 579(1) of the Criminal Code and that, consequently, the AGC is thus acting as a "federal board, commission or other tribunal" within the meaning of subsection 18(1) of the FC Act. In *Knol*, Justice Gower indicated:

> [15] I am satisfied that the Crown prosecutor, Mr. Sinclair, was acting as counsel for the Attorney General when he directed a stay of the private indictment on July 3, 2013, and therefore fell within the definition of "federal board, commission or other tribunal" in s. 18(1)(a) of the [*Federal Courts Act*]. In doing so, I am further satisfied that he was, pursuant to s. 2 of the [*Federal Courts Act*], "exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament", i.e. s. 579(1) of the [Criminal Code]. Accordingly, s 18(1)(a) of the [*Federal Courts Act*] applies, giving the Federal Court "exclusive original jurisdiction" to deal with Mr. Knol's application to quash the Attorney General's decision to direct the stay. Thus, Mr. Knol's application for judicial review is not one which can be pursued in this Court.
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> [16] I find support for my decision here in *Joe v. Canada (A.G.)*, 2008 YKSC 68. Although that case predated [*Canada*

> *(Attorney General) v. TeleZone Inc.*, 2010 SCC 62], it is otherwise on all fours with the case at bar. After Mr. Joe swore a private information against two RCMP officers, the Attorney General intervened and directed a stay of proceedings. Mr. Joe sought to have the stay quashed and the criminal proceedings resumed by way of an application for judicial review filed in this Court. The Attorney General made a preliminary motion to strike Mr. Joe's application on the basis that an application of that kind was within the exclusive jurisdiction of the Federal Court pursuant to s. 18(1) of the *Federal Courts Act*. Deputy Justice Groberman, as he then was, agreed and struck Mr. Joe's application. At para. 9, he stated:
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> > "The current proceedings are proceedings in the nature of *certiorari* to quash the decision of the Attorney General of Canada to direct a stay of proceedings. In directing a stay, the Attorney General was exercising powers conferred under the Criminal Code. A plain reading of the statutory provisions supports the position put forward by the applicant. The Attorney General was a "federal board, commission or other tribunal", and is subject to judicial review only in the Federal Court."
>
> [Emphasis added.]

[25] It was therefore the Federal Court, argued the AGC, to the exclusion of the Supreme Court of Yukon, which had exclusive jurisdiction to determine an application to quash the AGC's exercise of prosecutorial discretion to enter a stay of private prosecutions.

[26] Consequently, Ms. Wood submits that the Associate Judge erred in finding that the Crown prosecutor exercised his discretion to stay her private informations pursuant to the common law and the Constitution—and in doing so was not a federal board, commission or tribunal—because any prosecutorial discretion that may have resided in the Crown prerogative as part of its "residue of discretionary or arbitrary authority … accorded by the common law to the Crown" has now been displaced by subsection 579(1) of the Criminal Code, pursuant to which

the Crown prosecutor was acting in exercising his discretion to stay the private criminal proceedings which she had engaged (*Black* at paras 25–27). Ms. Wood argues that the test for this Court's jurisdiction set out by the Supreme Court in *ITO-Int'l Terminal Operators v Miida Electronics*, 1986 CanLII 91 (SCC), [1986] 1 SCR 752 [The *Buenos Aires Maru*], has been met: (1) the statutory grant of jurisdiction by Parliament is section 18.1 of the FC Act; (2) the existing body of federal law, essential to the disposition of the case, which nourishes the statutory grant of jurisdiction is the Criminal Code; and (3) the law on which the case is based—in this case subsection 579(1) of the Criminal Code—is in fact "a law of Canada" as the phrase is used in section 101 of the Constitution (The *Buenos Aires Maru* at 766).

[27] There seems little doubt that in entering stays of proceedings in Ms. Wood's private prosecutions before the Territorial Court of Yukon, the Crown prosecutor made a decision that falls squarely within prosecutorial discretion. In addition, there also seems little doubt, as found by the Associate Judge, that decisions made within the ambit of prosecutorial discretion are generally not justiciable; they are entitled to deference and are immune from review by any court save in the case of abuse of process in the exercise of such discretion (*Anderson* at para 48; *Krieger* at para 32; *Miazga v Kvello Estate*, 2009 SCC 51 [*Miazga*] at para 46). In his initial written material, the AGC did not raise the issue of justiciability as regards the prosecutorial discretion exercised by the Crown prosecutor in deciding to stay the private prosecutions in question, nor was the fact that Ms. Wood is claiming abuse of process mentioned. Rather, before the Associate Judge, and before me, the AGC limits himself to the issue of jurisdiction, and argues that the Yukon line of jurisprudence has been displaced by the Supreme Court of Canada's decision in *Mikisew Cree*, which endorsed the source-based test for jurisdiction as the

principal determinant of whether a decision-maker is a board, commission or other tribunal (*Mikisew Cree* at paras 106–109); as an aside, nor might I add did the AGC seem to raise the issue of justiciability in *Knol* and *Joe*.

[28] As neither party had raised the issue of justiciability or the fact that Ms. Wood was indeed claiming abuse of process, I asked the parties for further written submissions so as to clarify the issue. In his supplementary submissions, the AGC seems to concede that justiciability is not in play in the case before me given Ms. Wood's assertion of abuse of process, but argues that "while the exercise of prosecutorial discretion may be subject to review given the abuse of process allegation", the issue before this Court is, rather, one of jurisdiction, and of whether this Court, as opposed to the Supreme Court of Yukon, has jurisdiction to hear Ms. Wood's claim; the AGC relies on *Miazga* for the position that the AGC's independence is so important as to be constitutionally entrenched, and he asserts that the Associate Judge correctly found that the source of the power to stay criminal proceedings was the common law and the Constitution, not the Criminal Code (*Miazga* at para 46; *Krieger* at paras 26, 31–32; *SNC-Lavalin* at paras 166–170).

[29] The AGC also argues, as stated earlier, that Ms. Wood has conflated the creation of a duty or power with its codification. The AGC cites the following cases as examples of situations in which courts have found that the codification of a power did not change the fact that the power was rooted in the common law, Crown prerogative, or the Constitution: *Canada (Deputy Commissioner, Royal Canadian Mounted Police) v Canada (Commissioner, Royal Canadian Mounted Police)* (FC), 2007 FC 564 (CanLII), [2008] 1 FCR 752 [*RCMP*] at paras 44–46;

Ochapowace First Nation v Canada (Attorney General) (FC), 2007 FC 920 [*Ochapowace*] at para 56; *Southam Inc v Canada (Attorney General)* (CA), 1990 CanLII 13006 (FCA) [*Southam*] at 479; *Galati v Canada (Governor General)*, 2015 FC 91 [*Galati*] at paras 59–60.

[30] One of the difficulties I have with the AGC's submissions is that he seems to be arguing the issue of jurisdiction on the strength of case law dealing with justiciability; the two concepts are quite different (*Galati* at para 50). It was justiciability which was the question at issue in *Krieger*, *Anderson*, and *Miazga*, and not whether the Crown counsel exercising prosecutorial discretion was a federal board, commission or tribunal. I find the AGC's proposition that the source-based test designed to assess justiciability in areas of prosecutorial discretion also informs the determination of the source of that discretion for the purposes of section 18.1 of the FC Act to be an unjustified stretch. It was in the context of justiciability that the Supreme Court in *Krieger* discussed the source of prosecutorial discretion being in the Constitution. On the other hand, the test for Federal Court jurisdiction, i.e., whether the AGC exercising prosecutorial discretion is a federal board, commission or other tribunal, focuses on the source of the power under which the decision-maker *purports* to act, not the *historical* source of that power (see *Anisman* at paras 32–33).

[31] I begin with *Krieger*. The AGC relies on a line of decisions citing *Krieger* for the proposition that the source of prosecutorial discretion is in the common law and the Constitution, not the Criminal Code; the *Krieger* decision also forms a significant part of the analysis of Madam Justice Kane in *SNC-Lavalin*. *Krieger* dealt with whether the Law Society of Alberta [LSA] had the jurisdiction under the *Legal Profession Act* to review improper conduct of a

Crown prosecutor in the exercise of prosecutorial discretion during a murder trial. The Supreme Court of Canada held that the usual exercise of prosecutorial discretion is entitled to deference and is not reviewable by the LSA—i.e., this was an issue of justiciability. However, the Court also held that professional conduct can be regulated by the LSA, and an act of bad faith (in that case, the withholding by the Crown prosecutor of highly relevant information from defence counsel) is outside the scope of prosecutorial discretion, and therefore reviewable by the LSA as a breach of professional conduct. It is against that background that the Supreme Court made its statements that prosecutorial discretion finds its source in the Constitution and is not reviewable except in cases of allegations of abuse of process.

[32] There is no doubt that the office of the AGC "is one with constitutional dimensions recognized in the [Constitution]" (*Krieger* at para 26). It is also clear that the "independence of the [AGC] is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched. The principle of independence requires that the [AGC] act independently of political pressures from government and sets the Crown's exercise of prosecutorial discretion beyond the reach of judicial review, subject only to the doctrine of abuse of process" (*Miazga* at para 46). However, the point that was being made in those cases was that on account of the deference accorded to the proper exercise of prosecutorial discretion, except in cases of abuse or bad faith, exercises of discretion are not reviewable by any court (federal or provincial); it was in that context that Justices Iacobucci and Major, writing for the majority in *Krieger*, commented at paragraph 32:

> The court's acknowledgment of the Attorney General's independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution. Subject to the abuse of

> process doctrine, supervising one litigant's decision-making process — rather than the conduct of litigants before the court — is beyond the legitimate reach of the court. …

[33] The Supreme Court was not discussing the source of prosecutorial discretion in the context of a determination as to whether the Federal Court or a section 96 superior court had jurisdiction to hear the matter, but rather as it related to the issue of justiciability, i.e., whether the exercise of prosecutorial discretion was reviewable at all, by any court. In addition, the issue of jurisdiction in *Krieger* related to the LSA's ability to review or sanction conduct which arises out of the exercise of prosecutorial discretion.

[34] This is also true of *Miazga* and *Anderson*—two other cases cited by the AGC for the proposition that the source of prosecutorial discretion is in the Constitution. In fact, *Anderson* dealt with whether the Newfoundland and Labrador trial court had the power to shorten a prison sentence under section 7 of the *Canadian Charter of Rights and Freedoms*, based on the Crown's decision not to serve a notice that it intended to seek a longer sentence. The Supreme Court (citing *Krieger*) held that the decision was a matter of "core" prosecutorial discretion and, absent evidence that the decision was an abuse of process, it was entitled to deference and immune from review; again, the issue was justiciability, not jurisdiction. Similarly, on the topic of the "source" of prosecutorial discretion, *Miazga* cites *Krieger* with regard to the independence of the AGC from judicial review (again, by *any* court) being a constitutionally entrenched principle (*Miazga* at para 46). At issue was a tort action for malicious prosecution before the Saskatchewan Court of Queen's Bench. The question of whether the Crown prosecutor was as a federal board, commission or tribunal was not before the Court; again, the issue was one of justiciability, not jurisdiction.

[35] I do not doubt that the core elements of prosecutorial discretion—examples of which are set out in *Krieger* at paragraph 46—have their historical roots in the royal prerogative "accorded by the common law to the Crown", and although the AGC cites case law confirming such a proposition in the context of assessing whether the particular exercise of discretion in question was subject to court oversight, such case law is of little assistance on the issue of this Court's jurisdiction under subsection 18(1) of the FC Act.

[36] Getting to the meat of the AGC's submissions, as stated earlier, the AGC argues that the line of jurisprudence reflected in *Knol* and *Joe* has been displaced by the Supreme Court of Canada's decision in *Mikisew Cree*, which endorsed the source-based test for jurisdiction as the principal determinant of whether a decision-maker is a board, commission or other tribunal. In *Mikisew Cree*, the Supreme Court was considering whether this Court had jurisdiction to review the actions of ministers in developing legislation. The Supreme Court found that as the ministers were exercising legislative and not executive power, their decisions were not reviewable by the Federal Court (*Mikisew Cree* at paras 109–115). In reaching this conclusion, the Supreme Court relied on the fact that the Senate and the House of Commons are explicitly excluded from the definition of "federal board, commission or other tribunal" by virtue of subsection 2(2) of the FC Act (*Mikisew Cree* at para 108).

[37] The passage from *Mikisew Cree* that relates to the source-based test for Federal Court jurisdiction reads as follows:

> [109] Taken together, ss. 2(1) and 2(2) identify the source of "the jurisdiction or powers" being exercised as the principal determinant of whether a decision-maker falls within the definition of a "federal board, commission or other tribunal" (*Anisman v.*

> *Canada Border Services Agency*, 2010 FCA 52, 400 N.R. 137, at paras. 29-31; *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, at para. 47; D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at topic 2:4310). And, the removal of legislative actors from the definition of "federal board, commission or other tribunal" statutorily affirms the general principle, to which I return below, that where the source of authority for exercising jurisdiction or powers is found in the law governing the legislative process, such an exercise is not judicially reviewable.
>
> [Emphasis added.]

[38] As noted by the AGC, the Supreme Court is here adopting the source-based test from *Anisman* at paragraphs 29 to 31.

[39] The Federal Court of Appeal's decision in *Anisman* involved an application for judicial review of a decision by the Canada Border Services Agency [CBSA] not to refund a provincial alcohol mark-up on wine brought into Canada by the appellant, a mark-up that was collected by the CBSA on the strength of its authority in the Ontario *Liquor Control Act* and the relevant by-law enacted thereunder. As determined by the Federal Court of Appeal, the CBSA did not purport to collect the mark-up under any federal legislation nor under any order made pursuant to a prerogative power of the federal Crown (mirroring the language in section 18.1 of the FC Act); the Federal Court of Appeal determined that the "source" of the CBSA's authority was rather provincial legislation. I reproduce paragraphs 29 to 31 from *Anisman* as cited by the Supreme Court in *Mikisew Cree*:

> [29] The operative words of the s. 2 definition of "federal board, commission or other tribunal" state that such a body or person has, exercises or purports to exercise jurisdiction or powers "conferred by or under an Act of Parliament or by or under an Order made pursuant to a prerogative of the Crown…". Thus, a two-step

> enquiry must be made in order to determine whether a body or person is a "federal board, commission or other tribunal". First, it must be determined what jurisdiction or power the body or person seeks to exercise. Second, it must be determined what is the source or the origin of the jurisdiction or power which the body or person seeks to exercise.
>
> [30] In *Judicial Review of Administrative Action in Canada*, Vol. 1, looseleaf (Toronto: Canvasback Publishing, 1998) at para. 2:4310, the learned authors, D.J.M. Brown and J.M. Evans, state that in determining whether a body or person is a "federal board, commission or other tribunal", one must look at "the source of a tribunal's authority". They write as follows:
>
> > In the result, the *source* of a tribunal's authority, and not the *nature* of either the power exercised or the body exercising it, is the primary determinant of whether it falls in the definition. The test is simply whether the body is empowered by or under federal legislation or by an order made pursuant to a prerogative power of the federal Crown. […]
>
> [31] That approach, in my view, was correctly accepted by Madam Justice Tremblay-Lamer in *Canadian Restaurant and Foodservices Association, supra*, at paragraph 48.
>
> [Emphasis added.]

[40] The passage from Brown and Evans relied on by the Federal Court of Appeal in *Anisman* and earlier in *Canadian Restaurant and Foodservices Assn v Canada (Dairy Commission)* (TD), 2001 FCT 34 (CanLII), [2001] 3 FC 20 at paragraph 48 clarifies that:

> The test is simply <u>whether the body is empowered by or under federal legislation or by an order made pursuant to a prerogative power</u> of the federal Crown.
>
> [Emphasis added.]

[41] Thus, the question posed in *Anisman* was not about the historical source of the power being exercised, but rather about whether the body exercising the power did so pursuant to

statutorily vested authority or authority vested through an order made under the prerogative power, consistent with, it seems to me, the determination by the Court of Appeal for Ontario in *Black* at paragraph 76 as set out above and section 18.1 of the FC Act. This is clearly emphasized a little further on in *Anisman*, where the Federal Court of Appeal held at paragraphs 32 to 33:

> [32] Turning to the present matter, there can be no doubt that in collecting the mark-up on the wine brought into Canada by the appellant and his wife, the CBSA found its authority in the Ontario *Liquor Control Act* and the relevant by-law enacted thereunder. The CBSA clearly did not purport to collect the mark-up under any federal legislation nor under any order made pursuant to a prerogative power of the federal Crown. In other words, the source of the CBSA's authority was neither federal legislation nor an order made pursuant to a prerogative power of the federal Crown, but rather provincial legislation.
>
> [33] Thus, when it collected the mark-up on January 7, 2007, the CBSA was not acting as a "federal board, commission or other tribunal" within the meaning of s. 2 of the Act. I hasten to add that in determining this question, it is irrelevant whether the CBSA was authorized or not by federal legislation to enter into the Agreement with the LCBO. Whether the CBSA was authorized or not, it collected the mark-up on wine from persons returning to Canada, including the appellant and his wife, during the period 1993 to 2007. In collecting the mark-up, the CBSA purported to act as the agent of the LCBO and relied on the provisions of the *Liquor Control Act* and the relevant by-law. It was not purporting to act under any federal legislation. Consequently, it is my view that the CBSA was not acting as a "federal board, commission or other tribunal" and the Federal Court does not have jurisdiction regarding the collection of the mark-up and the CBSA's refusal to refund it.
>
> [Emphasis added.]

[42] The historical source of the AGC's prosecutorial discretion to stay criminal proceedings is not in doubt; as stated earlier, such discretion is found in the residue of discretionary or arbitrary authority accorded to the Crown by the common law. But that is not the "source" of the exercise of that discretion as was meant by the Federal Court of Appeal in *Anisman*. The

problem that I have with the AGC's submissions is that they refer to *Anisman* at paragraphs 29 to 31 for the creation of a "source-based" test for Federal Court jurisdiction, but they ignore the passages of *Anisman* that actually explain what is meant by "source". As is clear from paragraphs 32 and 33 of *Anisman*, "source" in *Anisman* meant the source under which the decision-maker purports to act—in that case, the Ontario *Liquor Control Act*. In short, the comments in *Krieger* are not relevant for the purposes of the *Anisman* test; *Krieger* was dealing with a question of justiciability, not one of jurisdiction, and it seems to me that the comments of Justices Iacobucci and Major related to the historical source of prosecutorial discretion, not to the source of power under which the AGC purports to act when exercising prosecutorial discretion.

[43] In the present case, it appears that the Crown prosecutor, in staying the five new informations sworn by Ms. Wood, was both purporting to act and acting pursuant to section 579 of the Criminal Code. The reasons for the Yukon Territorial Court's pre-enquete hearing state at paragraph 9 that ""[t]he authority to stay relies on s.579 (1) of the *Code*". At paragraph 10, the reasons begin as follows: ""[t]he authority to stay an information pursuant to s.579 may be exercised even prior to commencement of a pre-enquete hearing …" (see *Knol* at paras 7–16). In addition, it is subsection 579(1) of the Criminal Code which "authorizes the [AGC] or instructed counsel to direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed … [and] permits the [AGC] or instructed counsel to direct entry of a stay 'at any time after *any* proceedings *in relation to* an accused or defendant are commenced …'" (*Glegg* at paras 38 and 44). Interestingly, of the core elements of prosecutorial discretion, i.e., of the delegated sovereign authority peculiar to the office of the AGC, identified by the Supreme Court in *Krieger* at paragraph 46, only the discretion to enter a stay of proceedings in

either a private or public prosecution has been noted to have been codified, leading to the prerogative which formed its historical roots going into abeyance (*Black* at para 27).

[44] In short, if I am to accept the position of the AGC, any codification of the exercise of prosecutorial discretion leading to the prerogative which formed the historical roots of that discretion going into abeyance can never result in the AGC acting as a "federal board, commission or other tribunal" as defined in section 2 of the FC Act in the exercise of such discretion, even where, as determined by the Supreme Court in *Krieger*, an act of bad faith or abuse of process takes the decision outside the scope of prosecutorial discretion; I read neither *Anisman* nor *Mikisew Cree* as going as far as that. From what I can tell, the source-based test for jurisdiction of this Court as set out in *Mikisew Cree* relates to the source under which the Crown prosecutor was purportedly acting—here being subsection 579(1) of the Criminal Code—and not to the historical source or roots of the Crown prerogative accorded by the common law to the Crown which was codified in that subsection. Consequently, I cannot agree with the AGC that the line of jurisprudence reflected in *Knol* and *Joe* has been displaced by the Supreme Court of Canada's decision in *Mikisew Cree*.

[45] I think it appropriate to comment on the remaining cases cited by the AGC. To begin with, I note that with the exception of *SNC-Lavalin*, every decision relied upon by the AGC in support of either his interpretation of the source-based test for jurisdiction or the proposition that prosecutorial discretion has its roots in the common law, the Crown prerogative or the Constitution predates the Supreme Court's decision in *Mikisew Cree*. Of these cases, four deal with the definition of a federal board, commission or other tribunal within the meaning of the

FC Act: *RCMP*, *Ochapowace*, *Southam*, and *Galati*. All four cases are distinguishable and of little assistance in this case.

[46] *RCMP* dealt with the power of police officers to initiate criminal investigations as well as the jurisdiction of the Federal Court to entertain an application for judicial review in the course of a criminal investigation by the RCMP; in other words, in deciding not to criminally investigate an individual, was a police officer exercising powers conferred upon him or her by an Act of Parliament so as to bring him or her within the scope of a "federal board, commission or other tribunal" as defined by subsection 2(1) of the FC Act and pursuant to section 18.1 of the FC Act (as it then read)? Madam Justice Tremblay-Lamer, as she then was, recognized that the powers of peace officers were incorporated into the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [RCMP Act]; however, "when peace officers conduct criminal investigations they are acting pursuant to powers which have their foundation in the common law *independent* of any Act of Parliament or Crown prerogative [emphasis added]. In other words, the RCMP Act imports and clothes with statutory authority police powers, duties and privileges which remain largely defined by common law" (*RCMP* at para 44). In *RCMP*, the Federal Court relied on the Supreme Court's decision in *R v Campbell*, 1999 CanLII 676 (SCC), [1999] 1 SCR 565 [*Campbell*], for the proposition that a police officer investigating a crime is independent of the executive (*RCMP* at para 45). Paraphrasing Justice Binnie in *Campbell*, Justice Tremblay-Lamer stated: "when investigating crimes peace officers are not subject to political direction; rather they are answerable to the law and, no doubt, to their conscience" (*RCMP* at para 46; *Campbell* at para 33). Although the case does involve the codification of some of the powers of police officers historically rooted in the common law, the power in question, being the ability of a

police officer to initiate criminal investigations, was not specifically codified, i.e., it was not "conferred by or under an Act of Parliament" (see definition of "federal board, commission or other tribunal" in subsection 2(1) of the FC Act). It also seems clear that this Court in *RCMP* was not dealing with any element of Crown prerogative nor, more importantly, with whether the codification of such prerogative leading to it going into abeyance has invited the prospect of oversight by the courts.

[47] In *Ochapowace*, Mr. Justice de Montigny, as he then was, relied on *RCMP* for the same proposition in dismissing, for lack of jurisdiction, an application for judicial review of a Royal Canadian Mounted Police decision not to lay charges in relation to activities on, and affecting, the First Nations' reserve lands (*Ochapowace* at paras 55–56). Again, the Court was not dealing with any element of Crown prerogative nor with whether the codification of such prerogative has invited oversight by the courts.

[48] *Southam* dealt with the question of whether a standing committee of the Senate of Canada is a federal board, commission or tribunal so as to grant jurisdiction allowing for the judicial review by this Court of a decision of the committee to conduct a hearing *in camera*, to the exclusion of the media, pursuant to Rule 73 of the *Rules of the Senate*, which read, at the time: "Members of the public may attend any meeting of committee of the Senate, unless the committee otherwise orders". The Federal Court of Appeal determined that such a committee was not a federal board, commission or tribunal, as the relevant powers of the Senate were not conferred to it by any Act of Parliament—in that case, the *Parliament of Canada Act*, RSC 1985, c P-1 [PCA]—as required by the definition in subsection 2(1) of the FC Act, but were rather

conferred directly by section 18 of the Constitution. The Federal Court of Appeal determined that although the PCA may define or elaborate upon the privileges, immunities and powers of the Senate—thereby being the manifestation of Senate privileges—the PCA was not their source; the source remained section 18 of the Constitution. Consequently, the first test for jurisdiction set out in *Buenos Aires Maru*, being the need for there to be a statutory grant of jurisdiction, was not met.

[49] Section 18 of the Constitution reads:

18 The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.	18 Les privilèges, immunités et pouvoirs que posséderont et exerceront le Sénat et la Chambre des Communes et les membres de ces corps respectifs, seront ceux prescrits de temps à autre par loi du Parlement du Canada; mais de manière à ce qu'aucune loi du Parlement du Canada définissant tels privilèges, immunités et pouvoirs ne donnera aucuns privilèges, immunités ou pouvoirs excédant ceux qui, lors de la passation de la présente loi, sont possédés et exercés par la Chambre des Communes du Parlement du Royaume-Uni de la Grande-Bretagne et d'Irlande et par les membres de cette Chambre.

[50] Clearly section 18 of the Constitution contemplates privileges, immunities, and powers of the Senate being conferred by Act of Parliament, as long as such privileges, immunities, and powers do not exceed those "enjoyed, and exercised by the Commons House of Parliament of the

United Kingdom of Great Britain and Ireland, and by the members thereof" as at the passing of the relevant statute. I read *Southam* as saying that section 18 of the Constitution is the source of the Senate's power but also of the provision under which it purports to act. The PCA is just elaborating on a power conferred by section 18 of the Constitution. In that sense, section 18 of the Constitution would be the equivalent to section 579 of the Criminal Code in the present case. In fact, this is how the Federal Court interpreted the "source" question in *Galati* at paragraphs 50 to 60.

[51] The issue in *Galati* concerned whether the Governor General's power to give royal assent was based in the *Royal Assent Act*, in section 55 of the Constitution, or in the royal prerogative. The Court referred to both *Anisman* and *Southam* and found that while the Governor General's power to grant or withhold royal assent had its provenance in the Crown's prerogative power, it had since been embedded in section 55 of the Constitution (*Galati* at paras 50–56). Its "source" was therefore the Constitution and not the royal prerogative. The source was also not the *Royal Assent Act* because the *Royal Assent Act* prescribes the form and manner in which assent is given, i.e., the procedural dimensions. The Court in *Galati* does note that the prerogative power to assent predates the *Royal Assent Act*, and so the *Royal Assent Act* cannot be the source of the assent power; the Court goes on to find that the Governor General is exercising a constitutional responsibility vested in him or her under section 55 of the Constitution. As regards federal ministers, the Court found that members of the House of Commons are exempt from the definition of "federal board, commission or other tribunal" by virtue of subsection 2(2) of the FC Act—the same conclusion reached by the Supreme Court in *Mikisew Cree*.

[52] Nor do I think that the cases cited by the AGC in his supplemental submissions assist his position. Although I take no issue with the findings in the decisions of *Universal Settlements Int'l Inc v Duscio*, 2011 ONSC 41 and *Air Canada v Toronto Port Authority*, 2011 FCA 347 (CanLII), [2013] 3 FCR 605, I cannot see how they assist the AGC in this case.

[53] In the case before me, the AGC relies on *Krieger* for the proposition that the AGC's "independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution" (*Krieger* at para 32). However, as regards staying the five new informations sworn by Ms. Wood, the AGC is not exercising powers conferred by any particular provision of the Constitution, as do the Senate or the Governor General; the constitutional principle of the rule of law may entrench the prosecutor's independence from judicial scrutiny, just as the prerogative power is the provenance of royal assent, but it is not a provision that can confer a specific power to stay proceedings. In this case, the Criminal Code confers that specific power. In short, the distinction is that the independence of prosecutors exercising their discretion is protected by a constitutional principle—the rule of law—but the prosecutor's power to stay proceedings is not conferred by any specific constitutional provision (as was the case in *Southam*). Instead, it is conferred by the Criminal Code.

[54] Which brings me to *SNC-Lavalin*. The issue in that case involved a decision of the DPP not to issue to the defendant SNC-Lavalin, charged *inter alia* with fraud pursuant to subsection 380(1) of the Criminal Code, an invitation to negotiate a remediation agreement as provided for in section 715.32 of the Criminal Code. SNC-Lavalin (the applicant on judicial

review) argued that that decision should be characterized as an administrative decision attracting administrative law principles and subject to judicial review on a standard of reasonableness. Madam Justice Kane disagreed, and found that the source of prosecutorial discretion is derived from the common law and the constitutional principle of the rule of law, relying on the *Krieger* line of jurisprudence regarding the justiciability of exercises of prosecutorial discretion (*SNC-Lavalin* at paras 165–167). In so doing, Justice Kane determined that the decision in that case "is clearly an exercise of prosecutorial discretion" (*SNC-Lavalin* at para 117), and that "[i]t is a long established principle that the exercise of prosecutorial discretion is not subject to judicial review, except for abuse of process" (*SNC-Lavalin* at paras 86 and 179); that of course is an issue of justiciability, which is not at issue here.

[55] Rather, the AGC's position in this appeal involves an issue of jurisdiction and subsection 18(1) of the FC Act: whether, in the exercise of prosecutorial discretion historically rooted in the prerogative of the Crown, the Crown prosecutor was acting as a "federal board, commission or other tribunal" as defined in section 2 of the FC Act. On that issue, the AGC argues that *Anisman* did not resolve the question of whether the DPP is a federal board, because the answer would depend on whether the power being exercised is characterized as prosecutorial discretion or an administrative decision (*SNC-Lavalin* at para 154). Madam Justice Kane acknowledged that *Anisman* did not resolve the issue of the characterization of the DPP's decision; however, she determined that the "key issue is whether the DPP is exercising prosecutorial discretion" (*SNC-Lavalin* at para 164). Justice Kane continued by stating that "[g]iven the Court's finding that the DPP's decision whether to invite an organization to enter into negotiations for a remediation agreement is an exercise of prosecutorial discretion, the only

conclusion that can be reached is that—with respect to this decision—the DPP is not a 'federal board, commission or other tribunal' within the section 2 definition and this Court does not have jurisdiction. The jurisprudence has found that the source of prosecutorial discretion is derived from the common law and the constitution" (*SNC-Lavalin* at paras 164 and 165).

[56] In the present matter, there is no dispute that the Decision is one of prosecutorial discretion, and the issue of whether it is an "administrative decision" is not in play; nor is the question of whether exercises of prosecutorial discretion, broadly speaking, are immune from judicial review absent allegations of abuse of process—a question of justiciability—as clearly they are. However, nor do I read Justice Kane's determination on the interplay between justiciability and this Court's jurisdiction under subsection 18(1) of the FC Act as suggesting that an exercise of prosecutorial discretion can never be subject to judicial review before this Court, or that a prosecutor exercising prosecutorial discretion can never be a "federal board, commission or other tribunal" as defined in section 2 of the FC Act. The questions before the Court in the present case are different. First, unlike in *SNC-Lavalin*, the parties in the present case agree that the Decision under review is an exercise of prosecutorial discretion. The question is whether the AGC, in exercising his or her prosecutorial discretion, is nonetheless acting as a federal board, commission or tribunal. That question was never put before the Court in *SNC-Lavalin*.

[57] It being clear that Ms. Wood's claim for abuse of process by the AGC in the exercise of discretionary power is justiciable, I agree that the primary determinant of whether the AGC is a "federal board, commission or other tribunal" in this case is to ask by what authority is that

power conferred on the body exercising it and by what authority does that body purport to exercise it (*Anisman* at paras 29–33; see also *Douglas v Canada (Attorney General)*, 2014 FC 299 at paras 80, 88 and 125); although the historical source of the Crown prosecutor's exercise of prosecutorial discretion in this case is indeed the common law and the Constitution, the source for the purpose of determining this Court's jurisdiction, in the *Anisman* sense of the word, is section 579 of the Criminal Code—the provision under which the AGC purported to act when exercising his discretion to stay a proceeding. When doing so, the AGC is acting as a "federal board, commission or other tribunal" within the meaning of subsection 18(1) of the FC Act, which gives this Court jurisdiction to entertain an application for judicial review of the Decision. It follows that Ms. Wood's motion pursuant to Rule 51 of the Rules should be allowed, as I come to the conclusion that, with respect, I cannot agree with the Associate Judge in her assessment of the source of the AGC's prosecutorial discretion to stay the private prosecutions initiated by Ms. Wood for the purpose of determining this Court's jurisdiction, an error in law as I see it.

ORDER in T-2504-22

THIS COURT ORDERS that:

1. The applicant's appeal is allowed and the Order of the Associate Judge dated February 17, 2023 is set aside.
2. The parties are to jointly provide to the Court a proposed timeline within 20 days of the present Order so that the underlying application for judicial review move forward.
3. Costs are in favour of the applicant, both here and with respect to the motion before the Associate Judge. If the parties cannot agree on costs, brief submissions on the issue not to exceed three pages are to be served and filed by the parties within 20 days of the present Order.
4. I will remain seized of the present matter for the purpose of determining costs and to issue the required scheduling order in accordance with the timeline to be proposed by the parties.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2504-22
STYLE OF CAUSE:	JUANITA WOOD v ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED AT EDMONTON, ALBERTA PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	PAMEL J
DATED:	FEBRUARY 5, 2024

WRITTEN REPRESENTATIONS BY:

Juanita Wood	FOR THE APPLICANT (ON HER OWN BEHALF)
William Lu	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Whitehorse, Yukon	FOR THE RESPONDENT