

# RULE OF LAW REPORT

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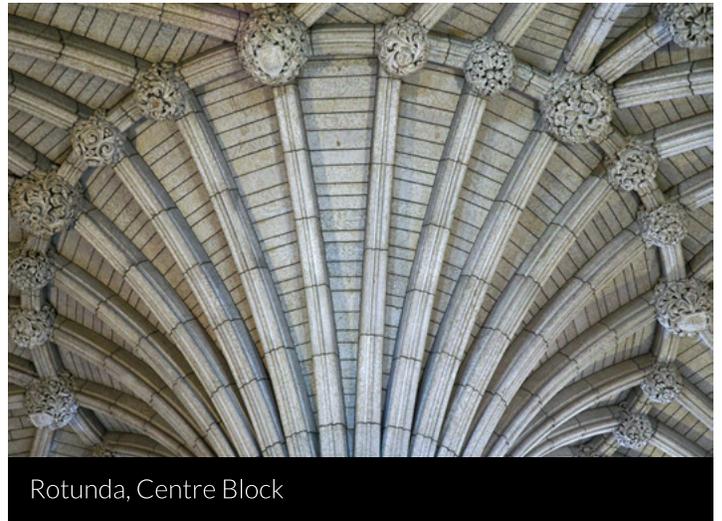
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The December 2018 issue of this Report celebrated the sixtieth anniversary of the Supreme Court of Canada ruling in *Roncarelli v. Duplessis*. Justice Rand's reasons in that case still reverberate in Canadian law. Quebec's Premier Duplessis, he wrote, sought to replace "an administration according to law" with "action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty". If allowed to stand, such behaviour portended "the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure".

In the 1998 *Secession Reference* the Supreme Court confirmed the rule of law as a foundational principle of Canada's constitution. A unanimous Court declared (at para. 54) that "Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations, which constitute substantive limitations upon government action."

Nonetheless, Canadian courts rarely grant remedies for free-standing violations of the rule of law. Exceeding statutory jurisdiction or denying procedural fairness can trigger a judicial remedy. Abusing discretion in the service of "arbitrary likes [and] dislikes", not so much. But an August 2018 decision from the Ontario Superior Court suggests that this might be changing (*Tesla Motors Canada ULC v. Ontario (Ministry of Transportation)*, [2018] O.J. No. 4394, 2018 ONSC 5062).



Rotunda, Centre Block

Shortly after taking office, Premier Doug Ford's Progressive Conservative government cancelled a subsidy program for purchasers of electric vehicles. The subsidy was extended for undelivered vehicles that had already been ordered or purchased – except vehicles made and sold by Tesla. The company filed an urgent application for judicial review.

Justice Myers found that Ontario's Minister of Transport had acted arbitrarily and for an irrelevant purpose by excluding Tesla Motors from the subsidy extension. The evidence established that members of the Ford Government had publicly expressed hostility toward Tesla. The Premier himself had complained about subsidizing Tesla's "millionaire buddies" at the expense of "the hardworking people of



Peace Tower Doorway

Ontario". While Justice Myers did not expressly rely on this evidence of animus, he pointedly cited *Roncarelli* in holding that the Minister's exercise of discretion was unlawful because it had been "taken for an improper purpose". To make matters worse, the government never gave Tesla "any opportunity to be heard or any fair process whatsoever". The offending legal instruments were set aside and Tesla was awarded \$125,000 in costs. The Government did not appeal.

As the *Tesla* case reminds us, politics should not distort – let alone override – the application of statutes or unwritten constitutional principles. When that happens, governments risk violating the rule of law. This issue features a story by Cristin Schmitz, Ottawa Bureau Chief of the *Lawyer's Daily*, concerning the allegations against the federal government in relation to Quebec-based engineering firm SNC-Lavalin. On February 21, 2019 the then-clerk of the Privy Council told the House of Commons Justice Committee that he had expressed concerns to then-Attorney General Jody Wilson-Raybould about the potential economic consequences of prosecuting the company for bribing Libyan officials. The Prime Minister's Office seems to have wanted the Public Prosecution Service to negotiate a remediation agreement instead of proceeding to a trial which could bar the company from bidding for federal government contracts for ten years after a conviction.

On the one hand, no one wants to see thousands of Canadian employees and shareholders of SNC-Lavalin lose their livelihoods and investments. On the other hand, s. 715.32(3) of the *Criminal Code* expressly prohibits a prosecutor from considering "the national economic interest" or "the identity of the organization or individual involved" when deciding whether a deferred prosecution agreement would be appropriate in a case brought under the *Corruption of Foreign Public Officials Act*. And as the *Lawyer's Daily* story points out, the common law is supposed to shield the Attorney General from political pressure in the exercise of his or her prosecutorial functions. It is not clear whether the Federal Court would assert jurisdiction over any of the alleged actions of federal officials in this matter. But if it did, the *Tesla* case points to possible consequences if the court held that the rule of law had been compromised.

# NO 'INAPPROPRIATE' PRESSURE IN SNC-LAVALIN CASE: WERNICK; LAMETTI SAYS AG INDEPENDENT BUT 'NOT AN ISLAND'

Cristin Schmitz,  
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Architectural detail, Parliament Hill

(February 22, 2019, 9:18 AM EST) – Canada's top civil servant says that, in his view, no "inappropriate pressure" was ever exerted by the Prime Minister's Office (PMO) on the former attorney general of Canada to shelve a criminal fraud prosecution of SNC-Lavalin in favour of a deferred prosecution agreement (DPA) – although Clerk of the Privy Council Michael Wernick predicted that Jody Wilson-Raybould will nevertheless publicly "express concern" next week about her interactions with the PMO in the SNC-Lavalin matter.

In more than 90 minutes of testimony before the House of Commons Justice Committee Feb. 21, Wernick disclosed new information on communications about SNC-Lavalin among officials at the highest level of the government. The clerk of the Privy Council, who has served several prime ministers of different political stripes, also provided the Liberal government's first detailed defence to the anonymously sourced allegation in a Feb. 7 Globe and Mail story that the PMO put pressure on Jody Wilson Raybould to offer SNC-Lavalin a DPA or remediation agreement when she was attorney general.

Wernick assured MPs that he had never witnessed, in his role as Ottawa's top public servant, "inappropriate pressure" being applied by the prime minister or his officials to the former attorney general on remediation agreements or any other issue.

"No," he said. "At every opportunity, verbally, and in writing in December [in a letter to Wilson-Raybould], the prime minister made it clear that this was the decision for the minister of Justice to take. She was the decision maker."

Wernick went on to "predict," however, that Wilson-Raybould will "express concern" when she appears at the justice committee (expected to be next week) about communications at three "events" in 2018 – (1) between Wernick, Prime Minister Justin Trudeau and Wilson-Raybould Sept. 17; (2) between

the former attorney general's chief of staff and unnamed PMO staff Dec. 18; and (3) a telephone conversation between Wernick and Wilson-Raybould Dec. 19.

"How she interprets or perceives those conversations, she can tell you next week," he said. "I can tell you my view, very firmly, is that they were entirely appropriate, lawful, legal. I'm prepared to submit to the judgment of the Ethics Commissioner on that." (The Ethics Commissioner is looking into how the SNC-Lavalin matter was handled by government officials.)

In respect of the Sept. 17 discussion between the prime minister and Wilson-Raybould (which took place after the Director of Public Prosecutions (DPP) had already decided — and informed SNC Lavalin Sept. 4 — that no remediation agreement would be negotiated with the company), Wernick said the purpose of that meeting was to resolve a dispute among cabinet ministers about whether the government should roll out a recognition of Indigenous rights framework, or proceed first with bills on Indigenous language rights and child and family services. SNC-Lavalin was discussed only for "a couple of minutes," he recalled. "The prime minister's characterization of that conversation is entirely the one that I recall," Wernick told Conservative MP Michael Cooper, vice-chair of the justice committee.

"And what is that? That it was her choice, and her [decision] to make" about offering a DPA? Cooper asked.

"He indicated that it was entirely her call to make, that she was the decider," Wernick confirmed. And that is a message ... that the prime minister conveyed to the minister on every situation that I am aware of, when it came up ... I think she advised the prime minister of her view that a DPA was not a good course and she had no intention of intervening. And indeed, she never has intervened" to overturn the DPP's decision to proceed instead with a criminal trial (The Federal Court is currently judicially reviewing the DPP's decision, at the instance of SNC-Lavalin.)



Senate Chamber, Parliament Hill

Wernick said he was not present, nor aware of what was discussed, at a meeting between PMO officials Dec. 18 and Wilson-Raybould's chief of staff.

But during the Dec. 19 call that Wernick said he initiated with Wilson-Raybould, he "checked in with the minister of Justice on the SNC-Lavalin issue, and where it was likely to go, and whether a deferred prosecution agreement was still an option," he said. "I conveyed to her that a lot of her colleagues, and the prime minister, were quite anxious about what they were hearing and reading in the business press about the future of the company — the options that were being openly discussed in the business press about the company moving or closing."



Parliament Hill from the Ottawa River

“I can tell you, with complete assurance,” he continued, “that my view of those conversations is that they were within the boundaries of what’s lawful and appropriate. I was informing the minister of context. She may have another view of the conversation, but that’s something the Ethics Commissioner could sort out.”

“There was no inappropriate pressure put on the minister at any time,” Wernick opined. “If you boil it down for Canadians as to what is going on here, with the facts that

we have and all of the facts that I know from my participation in meetings and conversations, we are discussing lawful advocacy that the minister take a lawful decision, which in the end she did not take,” he said, alluding to Wilson-Raybould’s decision not to overturn the DPP by offering to SNC-Lavalin the legal option of DPA.

Asked how one can know when the line between proper and improper communications with the attorney general on a criminal matter is crossed — and whether that standard is subjective or objective, Wernick responded, “I think that any communication or conversation, whether it be verbal, text message, e-mail, can be subject to interpretation as to its purpose, its intent, whether there was subtext, whatever. I’m not sure it’s ever entirely objective. You can read the same transcript and attribute motive or intent or purpose or whatever.”

Asked by a Liberal MP “is it appropriate for the prime minister and officials in PMO to talk to the minister of Justice and attorney general about an active case?” Wernick replied “the appropriate boundaries of those conversations are exactly the issue of the Shawcross doctrine, and I would point everybody in the committee to “Open and Accountable Government” — the prime minister’s “playbook” which spells out his instructions on dealing with legal matters.

(The prime minister’s guidance to cabinet ministers states, for example, that “the attorney general and the DPP are bound by the constitutional principle that the prosecutorial function be exercised independently of partisan concerns. However, it is appropriate for the attorney general to consult with cabinet colleagues before exercising his or her powers under the DPP Act in respect of any criminal proceedings, in order to fully assess the public policy considerations relevant to specific prosecutorial decisions.”)

“Because there are appropriate conversations to have with the attorney general in this kind of matter — and that is exactly the Shawcross line — I think you will have to come to a view as to whether the Shawcross line was crossed or not,” Wernick told MPs.

In his view, “the role of the minister of Justice in the case of prosecutions is incredibly clear in Canada. There is a statutory legal

forcefield around the prosecution function in Canada – that doesn't exist in the U.K., by the way. We have the strongest protection of independent prosecution that I can think of.”

In respect of the prosecutorial function, he remarked, “I've worked very, very closely, for three years, on almost a daily basis with the current government, the current cabinet and the current Prime Minister's Office. In my observation, in my experience, they have always, always conducted themselves to the highest standards of integrity. You may not like their politics, or their policies, or their tweets – but they have always been guided by trying to do the right thing, in their own view, the right way.”

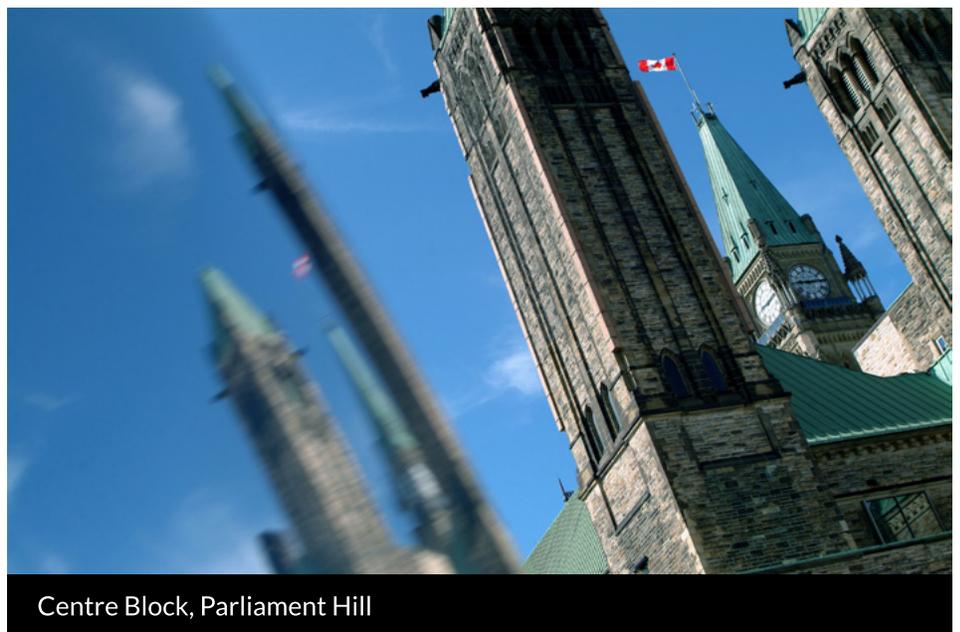
Wernick said Wilson-Raybould had “recourse” if she felt she was being improperly pressured by the PMO. “There were multiple, multiple, multiple occasions where the minister could have expressed concern to the prime minister, and every single day could have picked up the phone and called the Ethics Commissioner,” he advised.

Prior to Wernick's testimony, MPs spent more than an hour questioning Montreal MP and McGill University law professor David Lametti, who succeeded Wilson-Raybould as attorney general and minister of Justice Jan. 14 when she was shuffled into the Veterans Affairs portfolio. (She has since resigned from cabinet.)

Lametti told the justice committee that the Shawcross doctrine, which aims to preserve the independence of the attorney general in criminal prosecutions, provides that “an attorney general can speak with cabinet colleagues about a variety of different considerations that might be pertinent to his or her decision in any particular case. What is clear in the Shawcross doctrine is that, subsequent to those discussions, when an attorney general puts on his or her hat as attorney general, then only the appropriate considerations that the attorney general, he or she, himself or herself, has in mind will be the basis for that decision.”

Lametti emphasized that “while the attorney general must be able to make decisions independent of partisan considerations or direction, the attorney general is also not an island. ... These are not easy decisions that face any attorney general, and his or her ability to get the answer right on behalf of all Canadians is only improved through discussion and debate with the rest of cabinet and the experiences and views that they reflect.”

Asked if it would be appropriate for the prime minister and his officials to discuss a matter with the AG in which the DPP had decided to proceed to a criminal trial, but there was still an option for the AG to order the DPP to enter into negotiations or a remediation



Centre Block, Parliament Hill



Library of Parliament Interior

agreement (the SNC-Lavalin scenario), Lametti remarked “I think, once again, the Shawcross doctrine would apply. Those kinds of conversations would be appropriate to the attorney general contemplating a decision on whether or not to direct a remediation agreement, but it is up to the attorney general to make that decision himself or herself.”

Lametti assured the committee that he has never experienced inappropriate pressure from the prime minister, or anyone else in the PMO, on the issue of remediation agreements, or any other legal issue.

Lametti and Wernick both addressed the issue of solicitor-client privilege in the current context, with the attorney general declining to disclose his legal opinion as to whether Wilson-Raybould can publicly speak about the allegation that she was pressured in her role as AG.

Notably, however, Wernick said he doesn’t believe that privilege applies to gag the former attorney general from addressing whether she believes there is truth to The Globe and Mail’s anonymously sourced allegation that the PMO put pressure on her to reverse the DPP’s decision not to offer a remediation deal to SNC-Lavalin.

Wernick noted that it was Wilson-Raybould herself who first suggested that she was barred from all comment due to solicitor-client privilege – a position since challenged by several legal experts, and about which she has sought legal advice from her counsel, former Supreme Court of Canada Justice Thomas Cromwell.

“I think you should ask her directly,” advised Wernick, who said it will be up to Wilson-Raybould to decide how to answer the committee’s questions in the light of how she sees solicitor-client privilege in the circumstances. “It’s not a question of being allowed to speak or [the prime minister] waiving any confidences,” Wernick opined. “She can come here next week and answer your questions with her sense of where to draw the line on the answers.”

Asked by NDP MP Murray Rankin, a vice-chair of the justice committee, to give his take on the nature of solicitor-client privilege in the light of the clerk’s more 37 years as a public servant serving both Liberal and Conservative governments, Wernick said “I’ve spent a lot of time reading material on the topic of this, the Shawcross convention, and all of these issues and legal doctrines. I’m not a lawyer,” he remarked. “My conclusion, as somebody who spends a lot of time in governance, is I do not see where the former attorney general was a solicitor. The [SNC-Lavalin prosecution] matter was never discussed at cabinet. Never. So she was not giving advice to cabinet. She was not advising the prime minister. The prime minister said at every occasion – verbally and in writing – she was the decider so she was not giving legal advice to the prime minister. She was the decider. The full and final decider. She can’t be the fettered solicitor and the battered decider ... at the same time. It’s one or the other.”

“So therefore solicitor client privilege couldn’t” apply? queried Rankin.

“That is my conclusion, not my advice,” Wernick responded.

As the statutorily mandated guardian and umpire of cabinet confidentiality, Rankin also asked Wernick whether a meeting between a political staffer and the attorney general, in which a prosecution was discussed, could be subject to cabinet confidentiality (e.g. Wilson-Raybould and Gerald Butts, who recently resigned as principal secretary to the prime minister, discussed SNC-Lavalin).

“It is, and I know this sounds a bit evasive, a bit murky,” answered Wernick. “It generally applies to conversations among ministers, and it generally applies to conversations among ministers about matters before cabinet, or about to go to the cabinet. But there is law that says that intermediaries and representatives of ministers may be caught in that. ... It certainly could be advice to ministers, and it potentially could be covered by cabinet confidence because those staffers would be representatives of the minister, and the prime minister, for these purposes, is a minister. But that’s as far as I think I can go before I’m giving legal advice, which I shouldn’t.”

In his opening remarks to the committee, Lametti set out the basic rule that “privileged conversations will only occur between a lawyer and a client, when the purpose of the conversation is to seek or give legal advice, and the communication is intended to be confidential.

“In my view, there will be many instances where a conversation between an attorney general and his or her cabinet colleagues will not necessarily be in the framework of a solicitor-client relationship, and therefore not be protected by this privilege,” he explained.

“In particular, the Shawcross doctrine contemplates that where the attorney general and not cabinet is the final decision maker, he or she may consult his cabinet colleagues,” he elaborated. “Conversations of this nature are not inherently privileged by solicitor-client privilege. There is a range of opinions, in both case law and academic commentary, as to what aspects of these conversations might be covered by solicitor-client privilege.”

Lametti said he was not suggesting “that there should be a rush to a comprehensive waiver of privilege, without the benefit of details and regardless of any impact on ongoing legal proceedings — as some on the opposition benches have suggested should be the case. What I am saying, however, is that a policy debate between an attorney general and a colleague at cabinet concerning a decision that the attorney general must make is not inherently covered by solicitor-client privilege — whatever other protections may apply, depending on the facts of the case.”

Lametti declined to say whether his legal advice on solicitor-client privilege, which Trudeau has said he solicited, will be offered to the prime minister before Wilson-Raybould appears at the Commons justice committee.

Wernick argued that a public inquiry into the SNC-Lavalin affair is not necessary because the Ethics Commissioner, who has the powers of a superior court, can provide the answers the public seeks. “This is a relatively simple matter in its essence,” he opined. “If you strip away all of the hyperbole and the rhetoric, it’s about whether a minister felt inappropriate pressure. And that can

be traced to specific conversations and meetings, and I think that the Ethics Commissioner could get to the bottom of this fairly quickly.”

Rankin asked Wernick whether a meeting between Wilson-Raybould and the prime minister’s former principal secretary, weeks after the attorney general had already decided to leave intact the DPP’s decision not to offer remediation in the SNC-Lavalin case, gave rise to an inference of “improper pressure.”

“Doesn’t that strike you that in fact the system may not have worked? That there might have been continuing political pressure that Canadians might reasonably infer out of those circumstances?” Rankin queried. “It would appear to most people that our former attorney general certainly felt that pressure coming from someone — and it may not have been the prime minister but ... that could ... have been people in the PMO, with whom SNC-Lavalin met dozens of times,” Rankin remarked. “Don’t the dots connect, or at least can’t [people] reasonably infer that they connect in that fashion?”



Commons Chamber

“The question that I think you’re going to have to come to a view with, as will the Ethics Commissioner, is ‘inappropriate’ pressure,” Wernick answered.

He expanded that “there’s pressure to get it right on every decision — to approve, to not approve, to act or to not act. I am quite sure the [then-justice] minister felt pressured to get it right, and there were — part of my conversation with her on Dec. 19 [2018], was conveying context that there were a lot of people worried about what would happen, [i.e.] the consequences — not for her — the consequences for the workers, and the communities and the suppliers.”

Wernick said in his opening remarks that he worries that the reputations of honourable people, who have served their country, are “being besmirched and dragged through the market square.”

“Most of all I worry about people losing faith in the institutions of governance in this country, and that’s why these proceedings are so important,” he told MPs. “Should Canadians be concerned about the rule of law in this country? No. In the matter of SNC-Lavalin, it is now seven years since the first police raid on the company; four years since charges were laid by the RCMP; and during that entire time, and up to today, the independence of the investigative and prosecutorial function has never been compromised. The matter is proceeding to trial.”

He pointed to the DPP's Feb. 12 written statement that "I am confident that our prosecutors in ... every case exercise their discretion independently and free from any political or partisan considerations."

"The only communications with the DPP about the potential use of a deferred prosecution agreement, an instrument provided for by legislation, were conducted by the minister [of Justice] as is appropriate," Wernick stated. "In this matter, the laws that you, as parliamentarians, created around ethics in government are demonstrably working. The prosecutor is independent. The Lobbying Act worked as intended. The Ethics Commissioner self-initiated his own process [looking into the SNC-Lavalin matter] In other words, the shields held. The software that is supposed to protect our democracy is working."

"Is there two-tiered justice in Canada?" he continued. "No, demonstrably not. Despite the most extensive government relations [lobbying] effort in modern times, including meetings with officials, political staff, the opposition leaders, paid advertising, advocacy by two consecutive premiers of Quebec, the company did not get what it wanted, demonstrably, because they're seeking judicial review" of the DPP's decision not to offer a remediation agreement.

He added rhetorically, "are we soft on corporate crime?"

"No," he insisted. "Deferred prosecution agreements are an attempt to balance public policy interests. It's a legitimate concern for governments, and indeed for everyone, that the workers, suppliers, pensioners and communities in which a company operates suffer for the misdeeds of the corporate officers. A deferred prosecution agreement is not an acquittal, an amnesty, an exoneration, a get-out-of-jail-free card, or a slap on the wrist," Wernick asserted. "It is ... an agreement to defer prosecution. It is subject to compliance, and it can be revoked."

Wernick also argued DPAs were not "slipped into" Canadian law, pointing to a government consultation on the proposed measure which drew 370 participants and 75 written submissions, as well as an "extensive review" of the proposed legislation by a Senate committee.

Without going into specifics, Wernick stated that the Globe's Feb. 7 article "contains errors, unfounded speculation, and in some cases it's simply defamatory." He did, however, deny the allegation in the story, made by unnamed "sources," that he had privately "rebuked" Wilson-Raybould for comments she made in four speeches last fall that suggested politicians had engaged in doublespeak on Indigenous issues.

"That never happened," he flatly stated. "I have known the former attorney general for almost 15 years. I was the deputy minister at what was then called [the Department of] Indian and Northern Affairs for eight. We walked the path together for many years, through many episodes, in the journey towards Indigenous reconciliation. I considered her a partner, an ally and a friend. And I would have too much respect for a minister of the Crown to rebuke someone."

## RULE OF LAW REPORT

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