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CONTRIBUTORS OPINION

# Mistakes, misinterpretations and irrelevant facts mar the ethics commissioner's report on Trudeau

By **David Hamer** Contributor

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Ethics Commissioner Mario Dion's report released last week examining Prime Minister Justin Trudeau's actions in attempting to defer the potential prosecution of SNC-Lavalin misinterprets the commissioner's statutory mandate as well as the Shawcross doctrine, leading to a predetermined conclusion.

The report deploys irrelevant facts, some wrong, and ignores relevant facts, all in a way calculated to predispose the reader.

The Conflict of Interest Act is meant to prevent the improper furthering of private interests by elected politicians, not to control interactions between politicians and attorneys general, in this case former AG Jody Wilson-Raybould. The latter are governed by the doctrine laid down in 1951 in Sir Hartley Shawcross's famous speech to the U.K. Parliament, now widely accepted as a constitutional convention.

The Shawcross doctrine specifically allows politicians to engage in conversations with attorneys general about particular prosecutions when they overlap with public policy concerns. At the same time, Shawcross explicitly recognizes the rare possibility of an attorney general unreasonably refusing to consult with her cabinet colleagues when she ought to.

The doctrine simply gives the AG the power and duty, regardless of what may have been discussed in consultations with cabinet colleagues, to disregard all partisan political considerations.

The commissioner makes his finding under section 9 of the Conflict of Interest Act: "No public office holder shall ... seek to influence a decision of another person so as to further the public office holder's private interests or those of the public office holder's relatives or friends or to improperly further another person's private interests."

The word "*improperly*" is key — it modifies the words "further another person's private interests," not the phrase "seek to influence a decision."

On the commissioner's interpretation, it is as if the word "improperly" were moved, so as to read: "No office holder shall use his position *to seek improperly to influence* a decision so as to further another person's private interests."

All internal government discussions around public policy concerns will involve furthering, or not furthering, particular private interests. When it comes to third parties, like SNC (unlike friends and relatives), the act catches only "improper furtherance," not all "furtherance" and never the discussions.

The report then finds incorrectly that the communications between the Prime Minister's Office (PMO) and the AG "seeking to influence" the AG were "improper" because of the Shawcross doctrine.

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The commissioner's reading of the doctrine ignores its mention of the unique situation of an AG who unreasonably refuses to consult with her cabinet colleagues, or to use Sir Hartley's term, plays the "fool." Shawcross did not say explicitly what should happen in such a case. But we can be confident that if asked, he would have said something like, "Of course the PM is entitled to raise the matter with the AG, within the bounds I have stated."

It was open to Trudeau and his cabinet colleagues to consider that they had an unreasonable attorney general on their hands. To take a few examples:

- As the commissioner tells us, this AG didn't like the new Deferred Prosecution Agreement (DPA) legislation from the beginning.

- Before it came formally into force, she had her staff tell the PMO that she would not use it, for the untenable reason "that no AG had ever issued a (DPA) directive in a specific case."

- When the suggestion of independent legal advice was put to her, again she focused on the question of whether this had ever been done before — in relation to new legislation.

- She objected that an external legal adviser would need to be "trusted to safeguard information of a sensitive nature" — as if appropriate arrangements could not have been made with a former chief justice of Canada.

The biggest stretch in the piece comes when the commissioner simply skates around the hard-to-define Shawcross distinctions among consultation, pressure, and direction, rolling everything into the catch-all phrase "tantamount to political direction." This, despite his admission in the very same paragraph of his report "*that Ms Wilson-Raybould was not directed to intervene*."

Throughout, the report uses irrelevant facts to cast his target in a negative light, ignoring others relevant to the analysis.

It relates at length the history of SNC's lobbying for the enactment of the Deferred Prosecution Agreement provisions. This has nothing to do with whether Trudeau breached the Conflict of Interest Act. The commissioner then refuses to take into account anything about the manner in which the AG conducted herself, thereby forestalling any consideration of whether the government found itself faced with an AG acting unreasonably.

The most egregious shade-casting comes with the commissioner's irrelevant claim that the suggestion of independent advice from former chief justice of Canada was made to the AG "all the while knowing the advice that would be given."

This is false. There is no evidence whatsoever that Ms McLachlin had given any advice to anyone — the only "known" advice came from former justices Iacobucci and Major, and not from their former chief at all.

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