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# Resolute Advocacy, the Notwithstanding Clause, and Counsel's Conundrum: A note on *Toronto (City) v Ontario (Attorney General)*

Andrew Flavelle Martin
*Allard School of Law at the University of British Columbia*, martin@allard.ubc.ca

# Resolute advocacy, the notwithstanding clause, and counsel's conundrum: A note on *Toronto (City) v Ontario (Attorney General)*

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A lawyer's duties to the client must be balanced against, among other things, his or her duties to the court. There are some instructions that counsel should not follow. In *Toronto (City) v Ontario (Attorney General)*, counsel for Ontario followed problematic instructions that I argue he should have refused. Ontario, while seeking leave pending appeal from a decision striking down legislation as an unjustifiable infringement of the *Canadian Charter of Rights and Freedoms*, had begun the process of passing a corresponding bill that invoked the *Charter*'s notwithstanding clause or override. During the stay hearing, counsel for Ontario stated that he had been instructed to inform the court that, if the stay were granted, the new bill would not proceed. In this note, I argue that counsel, in following this instruction, likely acted contrary to at least the spirit of two of his professional obligations as a lawyer. The first obligation was to not attempt to influence the court through legally irrelevant means. The second was to encourage respect for the administration of justice. I also argue that counsel following these instructions represents a failure of the Attorney General as chief law officer of the Crown. While expecting this level of compliance with the letter and spirit of the rules of professional conduct may appear – and even be – unrealistic, the legal profession should aspire to it nonetheless.

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Resolute advocacy and commitment to the client's cause must be balanced against counsel's duties to the court. But beyond the duty not to mislead,[1] the duty to raise adverse binding authority,[2] and the duty of civility,[3] the content of these duties to the court is largely undefined and unexplored.[4] In presenting a very particular combination of facts, the case of *Toronto (City) v Ontario (Attorney General)* illuminates another dimension of these duties and provides a cautionary tale for government litigators.[5]

This note is organized in four parts. In Part 1, I set out the necessary background for my discussion. In Part 2, I identify the ethical problem facing counsel for Ontario in this case. Then, in Part 3, I identify and evaluate the options open to him in the circumstances. In Part 4, I consider the role and responsibility of the Attorney General for Ontario in this matter. I then conclude with reflections on the lessons to be learned from this case.

In making this argument, I recognize that both counsel for Ontario and the Attorney General were faced with difficult circumstances. I do not suggest that their actions amounted to professional misconduct. Neither do I suggest that most lawyers, or certainly I myself, would have done anything differently in their place. Expecting this level of compliance with the spirit of the rules is arguably unrealistic or at least idealistic – or, more charitably, aspirational.[6] However, as I will demonstrate, there are valuable lessons to take from these events.

## 1. Background

In *Toronto v Ontario*, a judge of the Superior Court of Justice struck down parts of the *Better Local Government Act, 2018* as unjustifiable infringements of section 2(b) of the *Canadian Charter of Rights and Freedoms*.[7] These provisions would, in the judge's words, "radically redra[w] the City of Toronto's electoral districts, in the middle of the City's election" – reducing the number of districts to match those used to elect the provincial legislature.[8] Shortly after the judge released his reasons, the Premier announced that he would introduce a new version of the

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[1] See e.g. Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2009, last amended 2017), r 5.1-2(e), (f), online: Federation of Law Societies of Canada <www.flsc.ca> [*FLSC Model Code*]: "When acting as an advocate, a lawyer must not: … (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct; (f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority".

[2] *FLSC Model Code*, *ibid*, r 5.1-2(i): "When acting as an advocate, a lawyer must not: … (i) deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party".

[3] *FLSC Model Code*, *ibid*, r 5.1-1: "When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect."

[4] But see also *FLSC Model Code, ibid*, r 5.6-3 (duty to warn regarding security of court facilities).

[5] *Toronto (City) v Ontario (Attorney General)*, 2018 ONCA 761 [*Toronto v Ontario* (CA)], staying pending appeal 2018 ONSC 5151 [*Toronto v Ontario* (SC)].

[6] I do note that a competent lawyer follows the rules in both letter and spirit: *FLSC Model Code*, *supra* note 1, r 3.1-1, definition of "competent lawyer", subsection (g).

[7] *Better Local Government Act, 2018*, SO 2018, c 11; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[8] *Toronto v Ontario* (SC), *supra* note 5 at para 3.

bill invoking the override or notwithstanding clause in section 33 of the *Charter*.[9] Reaction in the media and among the legal profession was swift and largely critical,[10] to the effect that this was an inappropriately trivial and premature use of the override.

As the new bill, Bill 31,[11] worked its way through the legislature, the province also sought a stay of the application judge's order pending appeal. The motion was heard by a Court of Appeal panel on September 18, 2018. The second reading debate on Bill 31 had begun the previous day.[12] On the nineteenth, the panel released its reasons granting the stay. Buried in the middle of the reasons was an extraordinary paragraph:

> In oral argument, counsel for the Attorney General stated that he had been instructed to advise this court that if a stay were granted, the government would not take Bill 31, the *Efficient Local Government Act, 2018*, currently before the Legislature, to a final vote at this time. Bill 31 would replace Bill 5 and include an override declaration pursuant to s. 33 of the *Charter*. We note that this undertaking was given, but add that it plays no part in our decision.

Like the reasons themselves, the paragraph was succinct.[13] This statement by counsel for the province was also included in media reports.[14]

## 2. The Problem

Why was this paragraph extraordinary? Ontario, through its counsel, was essentially making an improper offer or inducement or threat to the court: Give us the result we want, and we will

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[9] See e.g. Jennifer Pagliaro & Robert Benzie, "Ford plans to invoke notwithstanding clause for first time in province's history and will call back legislature on Bill 5" *The Toronto Star* (10 September 2018), online: <https://www.thestar.com/news/toronto-election/2018/09/10/superior-court-judge-strikes-down-legislation-cutting-the-size-of-toronto-city-council.html>.

[10] See e.g. Alex Ballingall, "Charter of Rights architects — including Jean Chrétien — condemn Doug Ford's use of notwithstanding clause" *The Toronto Star* (14 September 2018), <https://www.thestar.com/news/canada/2018/09/14/charter-of-rights-architects-including-jean-chrtien-condemn-doug-fords-use-of-notwithstanding-clause.html>.

[11] Bill 31, *An Act to amend the City of Toronto Act, 2006, the Municipal Act, 2001, the Municipal Elections Act, 1996 and the Education Act and to revoke two regulations*, 42nd Parl, 1st Sess, Ontario, 2018.

[12] Ontario Legislature <https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-31>.

[13] See *Toronto v Ontario* (CA), *supra* note 5 at para 1: "In the unusual circumstances of this case, we have decided to announce our decision without delay and with briefer reasons than otherwise might be expected for a matter of this importance."

[14] See e.g. Jennifer Pagliaro, "Court to rule Wednesday morning on whether to allow 25-ward Toronto election" *The Toronto Star* (18 September 2018), <https://www.thestar.com/news/toronto-election/2018/09/18/city-province-in-court-again-this-morning-in-council-cut-fight.html>: "It came from provincial lawyer [counsel for Ontario], who said he was given instructions to say newly-introduced legislation, Bill 31, would not be brought to a vote at Queen's Park if the province got its way in court." See also e.g. Christie Blatchford, "Ontario will scrap using notwithstanding clause if appeals court stays earlier ruling on council-cutting bill" *The National Post* (18 September 2018), <https://nationalpost.com/news/politics/ontario-will-scrap-using-notwithstanding-clause-if-appeals-court-stays-earlier-ruling-on-council-cutting-bill>: "If the court does that, [counsel for Ontario] told the three judges, "the government will not bring Bill 31 forward for a vote…in the result, Bill 31 would not be enacted."" See also e.g. Jeff Gray, "Ford government will not exploit override clause if stay is granted, provincial lawyer says" *The Globe & Mail* (18 September 2018), <https://www.theglobeandmail.com/canada/toronto/article-ontario-government-to-hold-off-on-notwithstanding-clause-if-it-wins/>: "And, at a daylong hearing on Tuesday, a lawyer for the Ontario Attorney-General said if the three-judge appeal panel grants the province its requested stay order, Mr. Ford would not push ahead with his plan to use the Constitution's notwithstanding clause to get his way – at least for now."

forego doing something drastic that we presume you would like to avoid.[15] There is no other reasonable, or unreasonable, explanation for why Ontario would instruct counsel to inform the court of this intention. In doing so, Ontario put its counsel in a difficult position.

A slight variation on the facts may make the situation clearer. Imagine that the Premier had not announced that the government intended to use the override and, instead, the first mention of the override had been during the hearing of the stay motion. That is, imagine that counsel for Ontario had told the court, my client has instructed me to advise you that if you do not grant the stay, the government will introduce a bill that invokes the override. While the order of events is different, the purpose and the meaning of the "information" is perhaps clearer. However, the problem is the same under either the actual facts or these varied facts.

I acknowledge here that the strongest argument for informing the court of this intention, but one I argue still fails, is mootness.[16] Where legislative amendments have solved or removed the target of a *Charter* claim, that issue will be moot.[17] If Bill 31 had received royal assent or passed third reading before the hearing of the motion for the stay, there would be at least a viable argument that the appeal itself and the stay were moot, as arguably there "there [was] no longer a live controversy or concrete dispute" between the parties.[18] However, since Bill 31 had not passed second reading, and its ultimate enactment was likely but not certain, the stay and appeal were not yet potentially moot.

While the rules of professional conduct cannot address every situation,[19] I will argue that they provide sufficient guidance for this situation – despite the rarity and the peculiarity of this constellation of facts. Two rules are relevant. The first, and the more specific, is one of the prohibitions from the rule on advocacy: "When acting as an advocate, a lawyer must not: … (d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open

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[15] See e.g. Pagliaro, *ibid*: "That was a troubling position for the province to take, city lawyer Diana Dimmer argued. "It's almost in the nature of a threat — if everybody doesn't back off the province will continue with this chaos," she said, adding — "the chaos that they're responsible for."" See also Gray, *ibid*: "But his surprise offer to hold off on using the notwithstanding clause, not included in any of the province's written arguments, was quickly condemned by lawyers for the City of Toronto and candidates for council who have been challenging Mr. Ford's move. They dismissed the offer as a "threat" and an "affront," and warned they could appeal any such stay order."

[16] See e.g. *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353, 57 DLR (4th) 231, cited with approval in e.g. *R v Oland*, 2017 SCC 17 at para 17, [2017] 1 SCR 250: "The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case.… The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. "

[17] See e.g. *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at para 78, [2015] 3 SCR 250: "I note that to the extent that the legislative amendments addressed both the "warn" and "fail" aspects of the programme, this issue is moot."

[18] *Borowski*, *supra* note 5 at 357.

[19] See e.g. *FLSC Model Code*, *supra* note 1, preface at 6: "Some circumstances that raise ethical considerations may be sufficiently unique that the guidance in a rule or commentary may not answer the issue or provide the required direction."

persuasion as an advocate".[20] While reported decisions on violations of this rule are rare,[21] the rule does arguably apply to these circumstances. This offer – to forego the override if the stay was granted – was open and public, but not "open persuasion". The plans for the use of the override had absolutely no legal relevance. Using legally irrelevant factors to influence the court is not a legitimate means of persuasion. (Arguably, by following these instructions, counsel was potentially also engaging the prohibition against "knowingly assist[ing] or permit[ting] a client to do anything that the lawyer considers to be dishonest or dishonourable", but in the circumstances that rule does not add anything to the prohibition on attempting to improperly influence the court.[22])

The second relevant rule is that "[a] lawyer must encourage public respect for and try to improve the administration of justice."[23] This rule is most often infringed by undue public criticism of courts,[24] but it is sometimes used more generally.[25] By making this statement – this offer – during the hearing, counsel for Ontario was creating or supporting a public perception that the judges of the Court of Appeal could be manipulated by legally irrelevant matters. I, like many lawyers, have absolute confidence that the offer, as the panel stated in its reasons, "play[ed] no part in our decision".[26] However, I am far less sure that the general public shares that confidence. The only reason to make such an offer is the expectation that it will impact the result – or to create the public perception that it will affect the result.

Perhaps, one might argue, counsel for Ontario was in fact being extraordinarily wise. By making the offer, he was providing the panel with the opportunity to disassociate itself from any suggestion that it could be so influenced. However, the subtlety of this manoeuvre, if in fact this is what counsel for Ontario intended, was such that it might be lost on the general public.

Indeed, government litigators – particularly those in high-profile *Charter* cases – arguably need to be especially aware of their duty to encourage respect for the administration of justice. Ontario law is adamant that government lawyers are not held to a higher threshold under the rules of professional conduct.[27] However, those lawyers' high visibility gives them a heightened ability to encourage, or discourage, respect for the administration of justice. Similarly, they arguably have a heightened responsibility to educate their clients about the detrimental impact of such instructions.

The suggestion that the government's intention to use the override would influence the court is also problematic from a separation of powers perspective. The decision to introduce a bill

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[20] *FLSC Model Code*, *ibid*, r 5.1-2(d).
[21] See e.g. *Nova Scotia Barristers' Society v Murrant*, 2004 NSBS 12, [2004] LSDD No 2 (QL) (inappropriate private letters to the Associate Chief Justice trying to influence his decision-making in an ongoing matter).
[22] *FLSC Model Code*, *supra* note 1, r 5.1-2(b).
[23] *FLSC Model Code*, *ibid*, r 5.6-1.
[24] Andrew Flavelle Martin, "Legal Ethics and the Political Activity of Government Lawyers" (2018) 49:2 Ottawa L Rev 263 at 291.
[25] See e.g. *The Law Society of Newfoundland and Labrador v Brian D Wentzell*, 2017 CanLII 54199 (NLLS) ("being intoxicated in Court and drinking alcohol in Court"), as mentioned in Martin, *ibid* at 291, n 106.
[26] *Toronto v Ontario* (CA), *supra* note 5 at para 8.
[27] See *Everingham v Ontario* (1992), 8 OR (3d) 121 at 125-126, 88 DLR (4th) 755 (Div Ct): "[a]ll lawyers in Ontario are subject to the same single high standard of professional conduct.… [i]n respect of their liability under the Rules of Professional Conduct."

invoking the override is a matter for the executive, and the decision to pass such a bill is a matter for the legislature. The use of the override is generally not a matter the court can legitimately consider.[28] It is for the courts to determine the legal question (in both the application and the stay) and then it is for the legislature in response to make the political decision to invoke the notwithstanding clause. To state that the override would be used if the stay were denied – in an attempt to influence the decision – is to publicly muddle the court's proper role.

As it happens, the panel granted the stay with what might be fairly characterized as strong criticism of the reasons of the application judge. In particular, the panel emphasized the distinction between unfairness and unconstitutionality:

> The application judge was understandably motivated by the fact that the timing of Bill 5 changed the rules for the election mid-campaign, which he perceived as being unfair to candidates and voters. However, unfairness alone does not establish a *Charter* breach. The question for the courts is not whether Bill 5 is unfair but whether it is unconstitutional. On that crucial question, we have concluded that there is a strong likelihood that [the] application judge erred in law and that the Attorney General's appeal to this court will succeed.[29]

The panel was also highly critical of the application judge's *Charter* analysis, noting, "[t]he application judge's interpretation appears to stretch both the wording and the purpose of s. 2(b) beyond the limits of that provision."[30] Indeed, in considering the public interest component of the test for a stay, the panel referred to the application judge's ruling as "dubious": "It is not in the public interest to permit the impending election to proceed on the basis of a dubious ruling that invalidates legislation duly passed by the Legislature".[31]

Given these observations, one might reasonably infer that the decision was not a close one and so counsel's offer would not have changed the result even if the court did take it into consideration. But the making of the offer risks creating public doubt in the integrity and independence of the court. The fact that making the offer turned out to be unnecessary does not change that.

3. Counsel's Conundrum

What options were open to counsel receiving these instructions to make an improper offer to the Court of Appeal panel? It is worth emphasizing here that explicit instructions from the client cannot absolve a lawyer of his or her ethical obligations to the court. Instructions are not an excuse or a justification. In this respect, "[c]ounsel cannot be a mere mouthpiece" of the client, "bound to make submissions as instructed without regard to established legal principles and doctrine and no matter how foolish or ill-advised."[32]

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[28] *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 at 740, 54 DLR (4th) 577: "Section 33 lays down requirements of form only, and there is no warrant for importing into it grounds for substantive review of the legislative policy in exercising the override authority in a particular case."

[29] *Toronto v Ontario* (CA), *supra* note 5 at para 11.

[30] *Toronto v Ontario* (CA), *ibid* at para 12.

[31] *Toronto v Ontario* (CA), *ibid* at para 20.

[32] *Law Society of Upper Canada v Napal*, 2014 ONLSTH 109 at para 1, [2014] LSDD No 130 (QL). See also *R v Samra* (1998), 41 OR (3d) 434 at 447, 129 CCC (3d) 144 (CA), Rosenberg JA, quoting with approval from Arthur Maloney, "The Role of the Independent Bar", in Law Society of Upper Canada, ed, *Special Lectures of the Law Society of Upper Canada, 1979: The Abuse of Power and the Role of an Independent Judicial System in its Regulation and Control* 49 at 61-62 (Toronto: R De Boo, 1979): "It is clear that there are some decisions that the

One option, which counsel may well have pursued internally, was to attempt to persuade Ontario to rescind these instructions by explaining why and how they were inappropriate and unethical. Indeed, this inward-looking client education and advocacy role is a common theme in the literature on government lawyers.[33] Another option was to deliberately refrain from following the instructions. A third was to withdraw from the matter. Indeed, the rules of professional conduct provide that a lawyer "must withdraw if: … a client persists in instructing the lawyer to act contrary to professional ethics."[34] A fourth option, and the one apparently chosen, was to follow the instructions and hope for the best and trust in the court.

What should counsel have done? The most forthright and appropriate action would have been to advise the client that he would not follow the particular instructions, with an explanation as to why, and offer to withdraw if this was not satisfactory to the client. An alternative, though less fair to the client and damaging to client autonomy, would be to refuse to follow the instructions without notifying the client that he planned to do so.

It is also worth noting that, in communicating Ontario's offer to the court, counsel ran the risk of personal responsibility to the court if Ontario had proceeded with Bill 31 despite a stay. The panel appears to have interpreted this information as an undertaking: "*We note that this undertaking was given,* but add that it plays no part in our decision."[35]

What if the panel had asked counsel in argument about the status of the government's plan to invoke the override? For the reasons I have given above, this would put counsel in a difficult situation. The best answer, would be no answer: i.e., for counsel to uphold his obligations to the court by failing to answer a direct question from the panel. Another, more realistic option would be to answer the question, but explicitly acknowledge that the plans were irrelevant to the court's decision and would not influence the court.

4. The Role of the Attorney General

As chief law officer of the Crown, the Attorney General bears the ultimate responsibility for the conduct of government litigation.[36] To adopt the fitting language of Brent Cotter, this case

client must make -- such as whom to hire and what to plead. However, a lawyer must never allow himself to become a mere mouthpiece of his client."

[33] See e.g. Adam M Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law" (2010) 33 Dal LJ 1 at 23; Patrick J Monahan, " "In the Public Interest": Understanding the Special Role of the Government Lawyer" (2013) 63 Sup Ct L Rev (2d) 43 at 55.

[34] *FLSC Model Code*, *supra* note 1, r 3.7-7(b).

[35] *Toronto v Ontario* (CA), *supra* note 5 at para 8 [emphasis added]. See *FLSC Model Code*, *supra* note 1, r 7.2-11: "A lawyer must not give an undertaking that cannot be fulfilled and must fulfill every undertaking given and honour every trust condition once accepted." See also commentary 1: "If a lawyer giving an undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking itself. In the absence of such a statement, the person to whom the undertaking is given is entitled to expect that the lawyer giving it will honour it personally."

[36] *Ministry of the Attorney General Act*, RSO 1990, c M.17, s 5(h): "The Attorney General… (h) shall conduct and regulate all litigation for and against the Crown or any ministry or agency of Government in respect of any subject within the authority or jurisdiction of the Legislature".

represents "the Attorney General's failure of responsibility".[37] The Attorney General for Ontario at the time, Caroline Mulroney, is not a lawyer.[38] Her non-lawyer status, and her failure in this instance, raises the question of whether she knows and understands the obligations of Ontario lawyers towards the court, and is willing and able to successfully advocate for those obligations and those lawyers internally.[39] As Andrew Martin has observed, "there are shortcomings in what we can expect from her."[40]

It may well be that the Attorney General played her proper internal role by discouraging Cabinet from issuing this instruction, but her efforts were unsuccessful. However, for Cabinet to attempt to manipulate the court in this way, and to reject the Attorney General's advice to the contrary, would be a strong signal that Cabinet was not committed to ethical conduct in litigation and should have prompted the Attorney General to at least consider resignation.[41] In the alternative, if she did not make these efforts internally, she is arguably in the wrong portfolio.

Conclusion

In this note, I have explained why counsel's conduct in *Toronto v Ontario* was problematic. I do so not to suggest that it constituted professional misconduct, but as a cautionary tale for other government lawyers and for litigators generally. (Indeed, even if this amounted to professional misconduct, which is highly unlikely, there is absolutely no reason to believe it would be a regulatory priority for the Law Society of Ontario.) Moreover, there is no reason to assume that counsel did not explain to Ontario why these particular instructions were problematic and attempt to have them changed.

Nonetheless, by following Ontario's instructions, counsel failed to fully honour the spirit of his professional obligations to encourage public respect for the administration of justice and not to attempt to improperly influence the court. Ontario's intention to pass Bill 31 if the stay was denied was legally irrelevant to the matter before the court, and the only reason to communicate that intention was to attempt to improperly influence the court or to create the impression that the court could be improperly influenced, or both. This problematic choice by counsel was even more so a failure of the Attorney General as chief law officer of the Crown.

Moreover, while this improper offer may have served Ontario's interests in the short run, it is contrary to those interests in the long run. In the long run, Ontario – like all litigants – benefits most from an impartial court that commands public respect. Counsel for Ontario had a duty to serve Ontario's long-term interests as well as its short-term interests.

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[37] Brent Cotter, "The Prime Minister v the Chief Justice of Canada: The Attorney General's Failure of Responsibility" (2015) 18 Leg Ethics 73.

[38] I acknowledge that she is a lawyer in New York, but that is irrelevant to her status in Ontario.

[39] See Fatima Syed, "https://www.nationalobserver.com/2018/09/18/news/mulroneys-reputation-line-say-critics-if-she-wont-oppose-ford-notwithstanding-clause" *The National Observer* (18 September 2018) <https://www.nationalobserver.com/2018/09/18/news/mulroneys-reputation-line-say-critics-if-she-wont-oppose-ford-notwithstanding-clause>.

[40] Syed, *ibid*.

[41] For an analysis of when the Attorney General should resign or consider resignation, see e.g. Andrew Flavelle Martin, "The Attorney General as Lawyer (?): Confidentiality upon Resignation from Cabinet" (2015) 38:1 Dal LJ 147 at 152-156.

What, then, are the lessons to draw from *Toronto v Ontario*? The first and most important is that there are some instructions that counsel cannot, or at least should not, ethically follow. But a second point, closely intertwined with the first, is that counsel has a responsibility to educate the client as to lawyers' ethical obligations and the reasons why certain instructions are problematic – and to encourage the client to modify or abandon those instructions. When these inward-facing efforts are unsuccessful, counsel faces a difficult choice: to withdraw, or to remain in the hopes of mitigating the harm of the course of action to the administration of justice. In such circumstances, withdrawal warrants careful consideration as a legitimate step, and not merely a hypothetical. As both members of a self-regulating profession and servants of the Crown, government lawyers should actively embrace high expectations of themselves and each other.