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# The Attorney General as Lawyer (?): Confidentiality Upon Resignation from Cabinet

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Andrew Flavelle Martin\*      The Attorney General as Lawyer (?):  
Confidentiality Upon Resignation from  
Cabinet

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*The unique role of the attorney general raises several special issues of legal ethics. This paper addresses one previously unaddressed: whether it is appropriate for the attorney general to publicly announce his or her reasons for resigning from Cabinet. Unlike other ministers, the attorney general is almost always a practicing lawyer and thus bound not only by Cabinet solidarity and Cabinet confidentiality, but also by the lawyer's professional duty of confidentiality and by solicitor-client privilege. The paper begins by canvassing a hierarchy of reasons for a principled resignation and the rare historical examples where these have occurred. It then turns to the roles of the attorney general, analyzing how the legal ethics implications of the primary role—legal advisor to Cabinet—may be affected by two more amorphous roles: legal advisor to the legislature and guardian of the public interest. Finally, it considers the special case of the non-lawyer attorney general and how these issues would apply, as well as the more common situation of lawyers with other portfolios.*

*Le rôle unique du procureur général soulève de nombreuses questions particulières au chapitre de l'éthique juridique. L'auteur examine une question jusqu'ici passée sous silence : est-il approprié que le procureur général annonce publiquement les motifs de sa démission du Cabinet. Au contraire des autres ministres, le procureur général est presque toujours un avocat en pratique. Il est par conséquent lié non seulement par la solidarité envers le cabinet et ses règles de confidentialité, mais également par le devoir de confidentialité et par le secret professionnel de l'avocat. L'auteur examine d'abord divers motifs d'une démission pour des raisons de principe et les rares exemples où cela s'est produit. Il se tourne ensuite vers les rôles du procureur général et analyse la façon dont les implications éthiques et juridiques de son rôle principal—conseiller juridique du cabinet—peuvent être touchées par deux rôles plus en retrait : conseiller juridique du législateur et gardien de l'intérêt public. Enfin, il examine le cas particulier de procureur général qui n'est pas un avocat et la façon dont ces questions se poseraient, ainsi que la situations plus fréquente d'avocats qui ont d'autres portefeuilles.*

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*Introduction*

- I. *Resignations from Cabinet*
  - II. *The attorney general on resignation*
    1. *As legal advisor to Cabinet*
    2. *As legal advisor to both Cabinet and legislature*
    3. *As both legal advisor to Cabinet and “guardian of the public interest”*
  - III. *The non-lawyer attorney general on resignation from Cabinet*
  - IV. *Lawyers with other portfolios on resignation from Cabinet*
- Conclusion*

*Introduction*

The provincial or federal attorney general is, among other things, the government’s lawyer and a member of Cabinet. These multiple roles can produce several dilemmas for the attorney general who seeks to honour his or her ethical obligations as a lawyer. While recent Canadian legal ethics literature has moved to focusing more on government lawyers than on the attorney general herself,<sup>1</sup> there remain unresolved issues of the lawyer as politician that uniquely affect that particular office. In this paper, I return to the attorney general and the implications of the rules of legal ethics upon a resignation from Cabinet—specifically, whether those rules allow the attorney general to publicly disclose the reason why he or she resigned.

While it is generally accepted that one function of a minister’s resignation is to free him from Cabinet solidarity and Cabinet confidentiality so as to allow him to publicly disagree with a decision he did not support,<sup>2</sup> there has been little examination of whether resignation

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1. 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) 33:1 Dal LJ 1 [Dodek, “Intersection”] and the articles cited by Dodek at 5, n 9. More recently see Malliha Wilson, Taia Wong & Kevin Hille, “Professionalism and the Public Interest” (2011) 38:1 Adv Q 1; Patrick J Monahan, “In the Public Interest’: Understanding the Special Role of the Government Lawyer” (2013) 63 SCLR (2d) 43; Michael H Morris & Sandra Nishikawa, “The Orphans of Legal Ethics: Why Government Lawyers Are Different—and How We Protect and Promote that Difference in Service of the Rule of Law and the Public Interest” (2013) 26 Can J Admin L & Prac 171.

2. See, e.g., Canada, Privy Council Office, *Accountable Government: A Guide for Ministers and Ministers of State* (Ottawa: Privy Council Office, 2011) at para I.2, online: Office of the Prime Minister <[www.pm.gc.ca/grfx/docs/guidemin\\_e.pdf](http://www.pm.gc.ca/grfx/docs/guidemin_e.pdf)>: “Ministers and Ministers of State cannot dissociate themselves from or repudiate the decisions of Cabinet or their Ministry colleagues unless they resign

is sufficient to allow the attorney general to do so. As a member of Cabinet and a lawyer, the attorney general is bound not only by Cabinet solidarity and Cabinet confidentiality, but also by solicitor-client privilege and the lawyer's professional duty of confidentiality. The existing literature on the modern role of the attorney general has two primary focuses. One is her role in advising Cabinet and Parliament on the constitutionality of government bills, and particularly the appropriate course of action if Cabinet rejects her advice.<sup>3</sup> The other is her role in litigation, particularly when, if ever, it is appropriate for her to make concessions and decline to appeal adverse decisions,<sup>4</sup> and to a lesser extent when it is appropriate for

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from the Ministry." See also Peter W Hogg, *Constitutional Law of Canada*, 5th ed supp (Toronto: Carswell, 2007) vol 1 (loose-leaf 2006, release 1), ch 9 at 14 [Hogg, *Constitutional Law*]:

All cabinet ministers collectively accept responsibility for cabinet decisions. This means that a cabinet minister is obliged to give public support to any decision reached by the cabinet, even if the minister personally opposed the decision within the cabinet and still disagrees with it. If the minister does decide to express dissent in public, then the minister should resign.

Hogg, *ibid*, further asserts that the resignation itself does not free the minister to announce why he resigned: "Even after a minister resigns or is dismissed, the obligations of [cabinet] confidentiality and unanimity continue, but the Prime Minister will normally give permission to the minister to publish his or her reasons for resignation." However, this assertion—for which Hogg provides no authority—is overly formalistic and appears to be contrary to actual practice.

3. Ian G Scott, "The Role of the Attorney General and the Charter of Rights" (1987) 29:2 Crim LQ 187 at 192-196 [Scott, "The AG & the Charter"]; The Honourable Ian Scott, "Law, Policy, and the Role of the Attorney General: Constancy and Change in the 1980s" (1989) 39:2 UTLJ 109 at 123-126 [Scott, "Constancy & Change"]; Grant Huscroft, "The Attorney General and *Charter* Challenges to Legislation: Advocate or Adjudicator?" (1995) 5 NJCL 125 at 135-141 [Huscroft, "Advocate or Adjudicator"]; Kent Roach, "The Attorney General and the Charter Revisited" (2000) 50:1 UTLJ 1 at 34-38 [Roach, "Revisited"]; Debra M McAllister, "The Attorney General's Role as Guardian of the Public Interest in *Charter* Litigation" (2002) 21 Windsor YB Access Just 47 at 57, 62-64; Kent Roach, "Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law" (2006) 31:2 Queen's LJ 598 at 620-626, 633-642 [Roach, "Not Just the Government's Lawyer"]; Lori Sterling, "The *Charter*'s Impact on the Legislative Process: Where the Real 'Dialogue' Takes Place" (2007) 23 NJCL 139 at 145-147; Lori Sterling & Heather Mackay, "The Independence of the Attorney General in the Civil Law Sphere" (2009) 34:2 Queen's LJ 891 at 894-902; Grant Huscroft, "Reconciling Duty and Discretion: The Attorney General in the *Charter* Era" (2009) 34:2 Queen's LJ 773 at 775-795 [Huscroft, "Duty & Discretion"]. On reporting under the *Canadian Bill of Rights*, SC 1960, c 44, s 3, reprinted in RSC 1985, Appendix III [*Bill of Rights*], see Elmer A Driedger, "The Meaning and Effect of the Canadian Bill of Rights: A Draftsman's Viewpoint" (1977) 9:2 Ottawa L Rev 303 at 306, 310-312. On reporting under the *Department of Justice Act*, RSC 1985, c J-2, s 4.1 [*DOJA*] for non-compliance with the *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 [*Charter*], see also Janet L Hiebert, "Parliamentary Engagement with the Charter: Rethinking the Idea of Legislative Rights Review" (2012) 58 SCLR (2d) 87 at 88-92 and Jennifer Bond, "Failure to Report: The Manifestly Unconstitutional Nature of the *Human Smugglers Act*" (2014) 51:2 Osgoode Hall LJ 377. Note that many of these sources (and those mentioned in the next two notes) are cited by Dodek, "Intersection," *supra* note 1 at 6, n 10.

4. See The Honourable Justice Ian Binnie, "Mr. Attorney Ian Scott and the Ghost of Sir Oliver Mowat" (2004) 22:4 Advocates' Society J 4 at 10; Huscroft, "Duty & Discretion," *supra* note 3 at 795-810; Huscroft, "Advocate or Adjudicator," *supra* note 3 at 141-161; McAllister, *supra* note 3 at 73-90;

her to appear in court.<sup>5</sup> Within this first focus, there is substantial attention given to the circumstances under which the attorney general should resign from Cabinet.<sup>6</sup> However, rarely do these commentators address whether the resigning attorney general can publicly announce her reasons for resignation, as could the typical Cabinet member. There are indeed a few exceptions. In discussing the career of former Ontario Attorney General Ian Scott, Justice Ian Binnie implicitly raised the possibility: “Much will be said at today’s symposium about the ‘independence of the attorney general.’ Does he have the obligation to speak out publicly if his colleagues fail to accept his advice? Should he resign?”<sup>7</sup> Similarly, Grant Huscroft discusses a signalling function of resignation, but is unclear about whether the attorney general publicly stating the reason for the resignation is part of that signalling:

If the Attorney General considers that a bill is not even arguably consistent with the *Charter*—if, in other words, the Attorney General considers that the government is repudiating its *Charter* obligations—the Attorney General should resign in order to signal that the government is not committed to respecting the constitution.... Good faith disagreement between the Attorney General and the government about the interpretation and application of the *Charter* is possible, but even in these circumstances it is not tenable for the Attorney General to continue in office; there is no room for public disagreement between the Crown and its Chief Law Officer about the requirements of the constitution.<sup>8</sup>

Presumably, without a public disclosure there could be little effective signalling, and the prime minister or premier or other members of Cabinet should not be expected to objectively characterize the reason for the

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Roach, “Revisited,” *supra* note 3 at 22-25; Roach, “Not Just the Government’s Lawyer,” *supra* note 3 at 605-615; Scott, “The AG & the Charter,” *supra* note 3 at 196-197; Sterling & Mackay, *supra* note 3 at 906-913; Graeme Mitchell, “The Role of the Attorney General in Litigation under the *Canadian Charter of Rights and Freedoms*: Reflections on Where We Are After Twenty Years and Where We May Be Going” in *2002 Isaac Pitblado Lectures: The Charter: Twenty Years and Beyond* (Winnipeg: Law Society of Manitoba, 2002) VI-1 at VI-9–VI-19.

5. The Honourable Marc Rosenberg, “The Attorney General and the Administration of Criminal Justice” (2009) 34:2 *Queen’s LJ* 813 at 846-849, discussing in part the contrary view in The Honourable Brian RD Smith, “The Role of the Attorney General—or Walking the Tightrope” (1988) 46 *Advocate* 255. See especially Rosenberg at 847: “Their intervention in important constitutional cases is proper and welcomed. I would be concerned, however, if the Attorney General appeared in more mundane cases, and especially in any criminal case.”

6. As discussed further below (see *infra* notes 13-20 and accompanying text), there are at most a few of these situations. Foremost is Cabinet’s attempted interference with the attorney general’s carriage of criminal proceedings. Less unanimous is Cabinet’s rejection of the attorney general’s advice that a proposed law or other action is unconstitutional.

7. Binnie, *supra* note 4 at 9.

8. Huscroft, “Duty & Discretion,” *supra* note 3 at 794-795. (Professor Huscroft is now Justice Huscroft of the Ontario Court of Appeal.)

resignation.<sup>9</sup> Huscroft's last sentence in this passage can also be read as suggesting that resignation might allow public disagreement, i.e., that there is room for public disagreement between the Crown and its *former* chief law officer. Similarly, Kent Roach characterizes Peter Hogg's view as that "the Attorney General is bound by the convention of 'collective responsibility' of Cabinet and would have to resign the office *if he or she wished to continue to oppose the policy*."<sup>10</sup>

Most explicit have been Justice Marc Rosenberg and John Edwards, in the context of Cabinet interference with prosecutions. Rosenberg writes that "[t]he resignation of the Attorney General would *expose any attempted interference by the premier or the cabinet both to the public and especially to the press*, and would further entrench the convention of institutional independence."<sup>11</sup> Rosenberg also quotes Edwards to similar effect:

It must be emphasised that to recognise the inevitability of dismissal or resignation in these circumstances in no sense represents a weakening of the Attorney General's constitutional position. What it entails is *the removal of the issue from the confidential environment of Cabinet deliberations and its exposure to the full glare of public attention*.<sup>12</sup>

Both of these statements necessarily assume that solicitor-client privilege and the lawyer's professional duty of confidentiality do not preclude such publicity.

The primary purpose of this paper, then, is to explore the special responsibilities of the attorney general as a member of Cabinet and as a lawyer, specifically by addressing how the rules of legal ethics apply to the attorney general announcing the reasons for his resignation from Cabinet. To the extent that those rules appear to preclude such an announcement, it will also examine whether there is a way to reconcile or otherwise overcome this conflict where the announcement seems appropriate or necessary. It will also address how the relevant issues apply to an attorney

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9. In the rest of this paper, the prime minister (at the federal level) and the premier (at the provincial level) are interchangeable. For clarity and brevity, I will use the phrase prime minister to mean the prime minister or the premier.

10. Roach, "Not Just the Government's Lawyer," *supra* note 3 at 606-607 [emphasis added], citing Peter W Hogg, *Constitutional Law of Canada*, 3rd ed (Scarborough: Carswell, 1992) at 1265 and n 16. The corresponding text in the current edition is Hogg, *Constitutional Law*, *supra* note 2, vol 2 (loose-leaf 2009, release 1), ch 36 at 20-20.1 and n 83e. Although Hogg states that the attorney general who did not resign would have to support the Cabinet decision, it does not necessarily follow, as Roach suggests, that this is the same as saying that the attorney general could *oppose* the policy—in contrast to merely remaining silent—after resigning.

11. Rosenberg, *supra* note 5 at 819-820 [emphasis added].

12. John L J Edwards, *The Attorney General, Politics and the Public Interest* (London, UK: Sweet & Maxwell, 1984) at 379 [Edwards, *The AG*], cited in Rosenberg, *supra* note 5 at 820 [emphasis mine].

general who is not a lawyer, as well as to ministers other than the attorney general who happen to be lawyers.

### I. *Resignations from Cabinet*

While there are no circumstances under which an attorney general would be legally required to resign, there are a few situations in which he or she would be expected to resign by convention or otherwise. The clear convention is where Cabinet attempts to interfere in the attorney general's conduct of criminal proceedings:

[A]lthough the Attorney General is a cabinet minister, he or she acts independently of the cabinet in the exercise of the prosecution function. This [constitutional] convention is now so firmly entrenched in the Canadian political system that any deviation would likely lead to the resignation of the Attorney General or would, at the very least, spark a constitutional crisis.<sup>13</sup>

While short of a convention, there is a consensus in the literature that an attorney general should resign, or at least seriously consider resignation, when Cabinet rejects his or her legal advice that a proposed bill or other action would be unconstitutional. Edwards frames the mildest version of this consensus, that this rejection “should lead the Attorney General to question seriously his commitment to serve the Government as its chief legal adviser.”<sup>14</sup> Huscroft argues that the attorney general “should” resign in these circumstances.<sup>15</sup> In the strongest take, Sossin describes resignation as the attorney general's “obligation” where Cabinet rejects advice of unconstitutionality.<sup>16</sup> (Alternately, it has been proposed that an attorney general could also respond to the rejection of advice of unconstitutionality by litigating *against* the government—which would

13. Rosenberg, *supra* note 5 at 820, citing Edwards, *The AG*, *supra* note 12 at 379-388. See also *Krieger v Law Society of Alberta*, 2002 SCC 65 at para 3, [2002] 3 SCR 372 [Krieger]: “It is a constitutional principle that the Attorneys General of this country must act independently of partisan concerns when exercising their delegated sovereign authority to initiate, continue or terminate prosecutions.”

14. J L I J Edwards, “The Attorney General and the Charter of Rights” in Robert J Sharpe, ed, *Charter Litigation* (Toronto: Butterworths, 1987) 45 at 53 [Edwards, “The AG & the Charter”]. See also Roach, “Not Just the Government's Lawyer,” *supra* note 3 at 604: “In such a case [(rejection of advice of unconstitutionality)], an Attorney General would have to weigh his or her own commitment to the rule of law against his or her own interests in remaining in Cabinet.” See also McAllister, *supra* note 3 at 62-64, and Sterling & Mackay, *supra* note 3 at 898-902, neatly summarizing the relevant literature.

15. Huscroft, “Advocate or Adjudicator,” *supra* note 3 at 138, and Huscroft, “Duty & Discretion,” *supra* note 3 at 794-795.

16. Lorne Sossin, “Speaking Truth to Power? The Search for Bureaucratic Independence in Canada” (2005) 55:1 UTLJ 1 at 45.

be essentially equivalent to, or even more dramatic than, resignation.<sup>17</sup> Indeed, Roach refers to resignation and such litigation as the two “drastic options” in that situation, and acknowledges that such litigation may well result in the attorney general’s dismissal.<sup>18</sup>) The case for resignation is even stronger in the federal context, where the attorney general is required by statute to inform the House of Commons if a bill is contrary to the *Canadian Charter of Rights and Freedoms* or the *Canadian Bill of Rights*, and resignation might be preferable to making such a report.<sup>19</sup> A similar argument for resignation would apply where Cabinet rejects legal advice that a proposal is otherwise unlawful.<sup>20</sup>

However, it would be unlikely for an attorney general to give such absolute advice that a proposal is unconstitutional, as opposed to positioning a proposal on a spectrum between low-risk and high-risk.<sup>21</sup> Nonetheless, there is certainly some threshold level of risk that equates with unconstitutionality, above which resignation is necessary or appropriate and below which the attorney general may pursue other options.<sup>22</sup> At present, the federal department of justice reportedly uses a “no credible argument” or “manifestly unconstitutional”<sup>23</sup> threshold for determining whether a bill is “inconsistent with”<sup>24</sup> the *Charter*. Similarly, Huscroft has argued that resignation is appropriate only when “a bill is

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17. See, e.g., Scott, “The AG & the Charter,” *supra* note 3 at 197, discussing a then-unpublished speech by John Edwards: “It has also been suggested that, in exceptional circumstances, the Attorney General could use legal proceedings against one of his or her Cabinet colleagues to stop activity that would contravene the Charter of Rights.” See also Roach, “Not Just the Government’s Lawyer,” *supra* note 3 at 608-609, citing Scott, “The AG & the Charter,” *supra* note 3 and Edwards, “The AG & the Charter,” *supra* note 14 at 53: “the extraordinary demonstration of the Attorney General’s independent status and independent responsibilities by way of active representation in the courts, in his own person if that is necessary, to argue the case on behalf of the public interest.”

18. Roach, “Not Just the Government’s Lawyer,” *supra* note 3 at 633.

19. See, e.g., Driedger, *supra* note 3 at 311: “The Government could not politically afford to put itself in a position in which the Minister of Justice would resign over the issue or make an adverse report against the Government in the House of Commons as required by section 3 of the Bill of Rights.” Hiebert has described this excerpt as Driedger “speculat[ing] that if cabinet insisted on approving a bill that violated rights, the Minister of Justice would likely feel compelled to resign rather than risk being put in the position of having to make a report to Parliament that the government knowingly was introducing legislation inconsistent with rights”: Hiebert, *supra* note 3 at 89.

20. See, e.g., Sterling, *supra* note 3 at 147 [emphasis in original]: “*In extremis*, the Attorney General might resign if he or she believes that government action is being taken illegally or unconstitutionally.”

21. See, e.g., Sterling & Mackay, *supra* note 3 at 901: “it is rare for the Attorney General, or his or her constitutional lawyers, to opine that a particular piece of legislation is ‘constitutional’ or ‘unconstitutional.’ Instead, they provide a risk analysis, based on existing case law, which assesses the likelihood that the law would not be upheld due to a contravention of the *Charter*.”

22. See, e.g., Roach, “Not Just the Government’s Lawyer,” *supra* note 3 at 634-642, where Roach discusses appropriate alternatives to resignation.

23. See Bond, *supra* note 3 at 384, 385, n 29; Alice Woolley, “The Lawyer as Advisor and the Practice of the Rule of Law” (2014) 47:2 UBC L Rev 743 at 743-744.

24. *DOJA*, *supra* note 3, s 4.1.

not even arguably consistent with the *Charter*—if, in other words, the Attorney General considers that the government is repudiating its *Charter* obligations.<sup>25</sup> These are very high thresholds, and there can be reasonable disagreement over what threshold is appropriate.

These rare situations should be contrasted with the more likely and less problematic situation where Cabinet rejects the attorney general's policy advice, or legal advice other than unconstitutionality or unlawfulness. For example, Cabinet may not support the attorney general's proposed reforms to the court system, or accept the attorney general's advice on litigation strategy in a civil proceeding, such as pursuing a settlement. Resignation would not be necessary in such circumstances.<sup>26</sup> An attorney general who feels strongly about such a matter may decide that resignation is appropriate. I note, however, that Roach has criticized the distinction between legal advice and policy advice as inconsistent with the role of policy considerations in the determination of *Charter* compliance.<sup>27</sup> Thus, to be more precise, the rejection of policy advice that goes to constitutionality would be akin to rejection of legal advice of unconstitutionality.

Several other situations, though less common in the literature, could also prompt a principled resignation. The attorney general might resign because he or she had lost confidence in the prime minister. More specifically, this could involve the attorney general losing confidence in the prime minister as a leader, as could happen to any minister, or as a client, which would be unique to the attorney general. For example, the attorney general may feel obliged to disassociate himself from comments or actions by other ministers that genuinely threaten respect for the administration of justice. This could involve a minister publicly questioning the integrity of the judiciary,<sup>28</sup> or attempting to contact or influence a judge regarding an ongoing proceeding.<sup>29</sup>

25. Huscroft, "Duty & Discretion," *supra* note 3 at 794-795. See also Huscroft, "Advocate or Adjudicator," *supra* note 3 at 138 [emphasis in original]: "In my view, the Attorney General should resign only if the government has rejected his or her advice that its proposed legislation is *clearly* inconsistent with the *Charter*—if, in other words, the Attorney General considers that the proposed legislation is not even arguably constitutional." For a critique of Huscroft's position, see Bond, *supra* note 3 at 386-390.

26. See, e.g., Scott, "The AG & the Charter," *supra* note 3 at 193-195.

27. See Roach, "Revisited," *supra* note 3 at 35, critiquing Scott, "The AG & the Charter," *supra* note 3 at 196 and Scott, "Constancy & Change," *supra* note 3 at 126.

28. For example, Prime Minister Harper's 2015 criticism of Chief Justice McLachlin: see, e.g., Sean Fine, "Harper, MacKay should apologize to Chief Justice McLachlin, commission says," *The Globe and Mail* (25 July 2014), online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)>. Resignation was arguably more appropriate than an apology for the Attorney General in this situation, particularly given the Prime Minister's refusal to apologize.

29. It is clear that the minister who does so should certainly resign—consider, for example, the 1990 resignation of Sports Minister Jean Charest: see, e.g., "When a minister calls a judge," Editorial,

These situations of potential resignation are reinforced by the rules of professional conduct, and specifically those on withdrawal from representation. Withdrawal would presumably also mean resignation,<sup>30</sup> as the attorney general would no longer be able to fulfill his duties. Withdrawal from representation is mandatory where, among other things, “a client persists in instructing the lawyer to act contrary to professional ethics.”<sup>31</sup> Similarly, withdrawal is also mandatory for a “lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally, or illegally...if the organization, despite the lawyer’s advice, continues with or intends to pursue the proposed wrongful conduct.”<sup>32</sup> These descriptions would apply, in the context of an attorney general, where Cabinet rejects advice that a proposal is unconstitutional or otherwise unlawful, or where there is interference with the attorney general’s decisions regarding criminal proceedings. Withdrawal is permissible “[i]f there has been a serious loss of confidence between the lawyer and the client,”<sup>33</sup> which includes where “a lawyer is deceived by his client, the client refuses to accept and act upon the lawyer’s advice on a significant point, [or] a client is persistently unreasonable or uncooperative in a material respect.”<sup>34</sup> These descriptions would apply where Cabinet rejects the attorney general’s policy advice (or legal advice other than unconstitutionality or unlawfulness), where the attorney general has lost confidence in the prime minister, and where the attorney general feels it necessary to dissociate himself from the actions of Cabinet or the prime minister.

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*The Globe and Mail* (25 January 1990) A6. An attorney general might feel obliged to resign if the prime minister made such a call, and/or any minister made such a call despite the attorney general’s admonition not to do so.

30. Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: FLSC, 2014, r 3.2-8, commentary 5, online: FLSC <flsc.ca> [*FLSC Model Code*]: “In some but not all cases, withdrawal means resigning from his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter.” A withdrawing lawyer’s firm would also ordinarily withdraw from the representation. See *ibid*, r 3.7-9, commentary 1: “If the lawyer who is discharged or withdraws is a member of a firm, the client should be notified that the lawyer and the firm are no longer acting for the client.” However, the attorney general’s ministry or department, as an entity, is inextricably linked to the government and cannot likewise withdraw. Thus, any other lawyers involved in the matter, including the deputy attorney general, would presumably also have to determine whether they must or should withdraw as well. Any replacement attorney general would have to make the same determination.

31. *Ibid*, r 3.7-7(b).

32. *Ibid*, r 3.2-8(c). See also, e.g., Roach, “Not Just the Government’s Lawyer,” *supra* note 3 at 610, arguing that the attorney general has a broader responsibility than does a lawyer in private practice “not to follow unlawful instructions.”

33. *FLSC Model Code*, *supra* note 30, ch 3.7-2.

34. *Ibid*, r 3.7-2, commentary 1.

Like other ministers, the attorney general might also resign as penance for his own personal or professional misconduct, or as vicarious penance of ministerial responsibility, i.e., for some failure or misconduct by his ministry or department. However, these situations would seem unlikely to invoke confidentiality or privilege, particularly because the rest of Cabinet and the prime minister would be unlikely to object to the public ritual including the identification of the wrongdoing. For this reason, I will not discuss these further.

In summary, there are several principled bases on which an attorney general must or might resign. The attorney general must resign if Cabinet attempts to interfere in decisions regarding criminal proceedings, and arguably must resign if Cabinet rejects his advice that a proposed action would be unconstitutional or otherwise unlawful. In contrast, the attorney general might resign where Cabinet rejects his policy or legal advice (other than unconstitutionality or other unlawfulness), where he loses confidence in the prime minister as leader, or where he wishes to disassociate himself from actions by the prime minister or other ministers.

Few of these hypothetical situations have occurred. Many commentators cite the example of Brian Smith's 1988 resignation as attorney general for British Columbia.<sup>35</sup> In his resignation speech, Smith emphasized the special nature of the office and cited interference by the premier:

This is an office of great sensitivity and neutrality in the administration of justice. I now find that I can no longer carry out my duties, as I clearly do not have the support of the Premier and his office, who do not appreciate the unique independence that is the cornerstone of the Attorney-General's responsibilities in a free parliamentary democracy....

In removing myself from this office now it is my hope that I may protect its unique independence. I believe that there is a strong danger that the Premier wishes to bring the conduct of the office of the Attorney-General under closer control by his office and so weaken the independence of the Attorney-General....

Only by stepping down, only by speaking out now, can I hope to prevent a course which will weaken the independence and erode the tradition of the office of the Attorney-General....

35. On Brian Smith's resignation, see Roach, "Revisited," *supra* note 3 at 21, n 94; Roach, "Not Just the Government's Lawyer," *supra* note 3 at 633, n 88; see also Sterling & Mackay, *supra* note 3 at 901, n 30; see also Sossin, *supra* note 16 at 45-46, quoting in part from Smith's resignation speech. But see especially Rosenberg, *supra* note 5 at 819, n 19 [citation omitted]: "in fairness, the reasons for Smith's resignation continue to be somewhat obscure and there exists a body of opinion that his resignation was driven as much by politics as by concern for the Premier's interference in the Attorney General's office." Thanks to Adam Dodek for bringing Smith's resignation to my attention.

[D]uring my term of office I have tried to give sound advice. I have always striven to protect the honesty and integrity of the administration....

For me to have acted differently and to have done what I was requested to do would not only have dishonoured my office but also would have placed in peril the office of the Premier. I explained my position on several occasions to the Premier when those events occurred. I fervently hoped that I had established and explained the importance of the neutrality and independence of my office to the Premier. I now believe that I have failed to make that impression....

But by speaking out now, and stepping down now, I may still deter these plans and save the integrity of the office of the Attorney-General....

I am resigning as an act of honour.<sup>36</sup>

There have been suggestions that Smith also had other reasons for resigning.<sup>37</sup> Smith himself indicated that his resignation was prompted by his pending likely replacement, although he objected specifically to the identity of his likely successor.<sup>38</sup>

The Smith situation can be contrasted with a more recent development. In November 2014, Attorney General Andrew Swan of Manitoba resigned from Cabinet, along with four other ministers, because of non-confidence in the premier.<sup>39</sup> While Swan's comments were not reported in the media, the resigning finance minister was quoted, apparently on behalf of the five: "The Premier is no longer listening to our advice and you can't continue in cabinet if that's [the case]."<sup>40</sup> There was no indication given that it was Swan's legal advice, as opposed to policy advice, that was disregarded.

Having canvassed the situations in which an attorney general might resign for principled reasons, I now turn to how the rules of professional conduct would apply to her public disclosure of those reasons.

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36. British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 34th Parl, 2nd Sess (28 June 1988) at 5498-5499 (Hon BR Smith) [Smith, *Hansard*].

37. See, e.g., Rosenberg, *supra* note 5 at 819, n 19.

38. See Smith, *Hansard*, *supra* note 36 at 5498-5499:

[D]uring the past week, amid speculation of cabinet reorganization, I have had a chance to review some of the comments that have been made by the Premier and others concerning who might occupy the office of Attorney-General....I can only conclude that it is because of the way that I independently carried out my duties that I am slated to be removed from those duties.

39. See, e.g., Joe Friesen, "Manitoba Premier Selinger appoints five new ministers after revolt," *The Globe and Mail* (4 November 2014), online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)>.

40. *Ibid* [brackets in original].

## II. *The attorney general on resignation*

I begin by assessing the obligations of the attorney general solely as lawyer to Cabinet and the prime minister. I then consider how additional obligations, still as a lawyer, might complicate the situation.

### 1. *As legal advisor to Cabinet*

The attorney general is commonly referred to as “[the] Chief Law Officer of the Crown,”<sup>41</sup> or more casually as “the government’s lawyer.”<sup>42</sup> (Other descriptions in statute are “the official legal adviser of the Governor General and the legal member of the Queen’s Privy Council for Canada,”<sup>43</sup> or “the Law Officer of the Executive Council.”<sup>44</sup>) She and her department or ministry provide legal advice to ministers and their departments or ministries.<sup>45</sup> Thus, the attorney general is, among other things, the lawyer to Cabinet,<sup>46</sup> and is bound by client confidentiality: “A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship,” subject to limited exceptions.<sup>47</sup> The obligation of confidentiality continues after the termination of the relationship.<sup>48</sup> Some factors relevant to resignation, such as the prime minister or Cabinet’s rejection of legal

41. See, e.g., *Ontario v Criminal Lawyers’ Association of Ontario*, 2013 SCC 43 at para 35, [2013] 3 SCR 3. See also Scott, “Constancy & Change,” *supra* note 3 at 122: “It is understood in our province that the attorney general is first and foremost the chief law officer of the Crown.” See also, e.g., Roach, “Not Just the Government’s Lawyer,” *supra* note 3 at 601, 639, 640. See also *Krieger*, *supra* note 13 at para 25, where the Supreme Court refers to her as “the official legal advisor to the Crown.”

42. See, e.g., McAllister, *supra* note 3 at 50: “the Attorney General is the chief law officer of the Crown or, as it is often put, the government’s lawyer.” (Note that McAllister makes this statement in the context of distinguishing between the roles of attorney general and minister of justice at the federal level.) But see Roach, “Not Just the Government’s Lawyer,” *supra* note 3.

43. *DOJA*, *supra* note 3, s 4. For present purposes, I do not distinguish between the minister of justice and the attorney general.

44. *Ministry of the Attorney General Act*, RSO 1990, c M.17, s 5(a) [*MAGA*].

45. See, e.g., *DOJA*, *supra* note 3, s 4(a): “see that the administration of public affairs is in accordance with law”; s 4(c): “generally advise the Crown on all matters of law referred to the Minister by the Crown”; s 5(b): “shall advise the heads of the several departments of the Government on all matters of law connected with such departments.” See also s 5(d): “shall have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada.” For parallel provisions at the provincial level, see, e.g., *MAGA*, *supra* note 44, ss 5(b), (e), (g), (h). See also McAllister, *supra* note 3 at 50; Mark J Freiman, “Convergence of Law and Policy and the Role of the Attorney General” (2002) 16 *SCLR* (2d) 335 at 338-339.

46. The formal distinction between the Cabinet and the Governor in Council is not relevant for my purposes.

47. *FLSC Model Code*, *supra* note 30, r 3.3-1. See also *British Columbia (Securities Commission) v CWM*, 2003 BCCA 244 at para 45, 226 DLR (4th) 393 [*CWM*], leave to appeal to SCC refused, 29847 (22 January 2004): “There is no doubt that lawyers are under an obligation to keep confidential all documents and other communications made to them by their clients.”

48. See *FLSC Model Code*, *supra* note 30, r 3.3-1, commentary 3: “The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.”

advice (and the nature of that advice), would not only be confidential, but also covered by solicitor-client privilege.

As set out above, there are several principled reasons for which an attorney general must or might resign. However, regardless of the reason(s) for resigning, and thus for ending the solicitor-client relationship, there is no allowance under the rules of professional conduct for the attorney general—or any other lawyer—to publicly state the specific reason. None of the recognized exceptions would apply: authorization by the client; requirement by law, the courts, or the law society<sup>49</sup>; future harm<sup>50</sup>; defence against allegations of negligence or malpractice or misconduct<sup>51</sup>; fee collection<sup>52</sup>; solicitation of legal or ethical advice<sup>53</sup>; or addressing conflicts of interest.<sup>54</sup> (Note however that the New Brunswick *Code of Professional Conduct* does recognize an additional mandatory exception to confidentiality “when the national interest makes disclosure imperative.”<sup>55</sup> However, in the absence of reported disciplinary or court decisions on this rule, the intended scope of the exception is unclear.) A more amorphous and intangible harm, such as harm to the office of the attorney general, would not qualify. In particular, the exception for future harm is narrow and has a high threshold, applying only “when the lawyer believes *on reasonable grounds* that there is an *imminent* risk of *death or serious bodily harm*, and disclosure is *necessary* to prevent the death or harm.”<sup>56</sup> In addition, the confidentiality exceptions generally require that the lawyer “must not disclose more information than is required.”<sup>57</sup> Even if the resignation is

49. *Ibid*, r 3.3-3.

50. *Ibid*, r 3.3-1. See also r 5.6-3 on the security of court facilities. Note however that that rule requires disclosure, whereas the future harm exception only allows it.

51. *Ibid*, r 3.3-4.

52. *Ibid*, r 3.3-5.

53. *Ibid*, r 3.3-6.

54. *Ibid*, r 3.3-7.

55. Law Society of New Brunswick, *Code of Professional Conduct*, Fredericton: LSNB, 2003, ch 5, commentary 8(c), online: LSNB <lawsociety-barreau.nb.ca> [LSNB, *Professional Conduct*], discussed in Adam M Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis Canada, 2014) at paras 8.54-8.55 [Dodek, *Solicitor-Client Privilege*], and in Michel Proulx & David Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at 252-253. Dodek and Proulx & Layton are quite critical of this exception. (Thanks to Jeanette Bosschart for bringing the Proulx & Layton passage to my attention. Note that this discussion is omitted from the second edition of Layton & Proulx: David Layton & Michel Proulx, *Ethics and Criminal Law*, 2nd ed (Toronto: Irwin Law, 2015). Note as well that this exception in the New Brunswick *Code* is mandatory, not permissive.)

56. *FLSC Model Code*, *supra* note 30, r 3.3-3 [emphasis added]. Some jurisdictions merely refer to disclosure being “necessary to prevent a crime that involves violence”: see, e.g., LSNB, *Professional Conduct*, *supra* note 55, ch 5, commentary 8(b): mandatory not permissive. There is a corresponding exception to solicitor-client privilege where “an identifiable individual or group is in imminent danger of death or serious bodily harm”: *Smith v Jones*, [1999] 1 SCR 455 at para 85, 169 DLR (4th) 485.

57. *FLSC Model Code*, *supra* note 30, ch 3.3-3–3.3-5.

for reasons unrelated to the attorney general's role as lawyer, such as the rejection of pure policy advice or for non-confidence in the prime minister as leader (and not as client), the attorney general by resigning is still withdrawing from *all* of his roles, including legal representation. Thus, although the reason for resignation would not be covered by solicitor-client privilege, it would be covered by confidentiality.

While the attorney general, as a lawyer, is certainly bound by the rules of professional conduct, including those on confidentiality, it is unclear and uncertain whether he could be disciplined by his respective law society for their breach. The rules explicitly provide that they apply to lawyers in public office: "A lawyer who holds public office must, in the discharge of official duties, adhere to standards of conduct as high as those required of a lawyer engaged in the practice of law."<sup>58</sup> However, a 1967 precedent from Quebec held that the attorney general cannot be disciplined for actions taken in the course of his professional duties.<sup>59</sup> Similar disciplinary immunity is granted in Ontario under the *Law Society Act*, which provides that "[n]o person who is or has been the Attorney General for Ontario is subject to any proceedings of the Society or to any penalty imposed under this Act for anything done by him or her while exercising the functions of such office."<sup>60</sup> Arguably, disclosing the reason for resignation is properly considered conduct *after* holding office, but the strength of such an argument is uncertain. An argument could also be made that federalism grounds require such protection for federal attorneys general from the jurisdiction of provincial law societies.<sup>61</sup> Moreover, any remarks made in the House of Commons or the legislatures would be protected under parliamentary privilege from disciplinary proceedings.<sup>62</sup> Thus, for better

58. *Ibid*, r 7.4.

59. *Barreau (Montréal) c Wagner*, [1968] BR 235 (BR). Note that this decision was not followed in *Kimmerly v Law Society (Yukon)* (1987), 3 YR 54 (SC). (See Andrew Flavell Martin, "Legal Ethics versus Political Practices: The Application of the Rules of Professional Conduct to Lawyer-Politicians" (2013) 91:1 Can Bar Rev 1 at 18, n 87.)

60. *Law Society Act*, RSO 1990, c L.8, s 13(3). For discussion of this provision, see, e.g., John LI J Edwards, "The Office of Attorney General: New Levels of Public Expectations and Accountability" in Philip C Stenning, ed, *Accountability for Criminal Justice: Selected Essays* (Toronto: University of Toronto Press, 1995) 294 at 303 [Edwards, "Expectations and Accountability"].

61. I have previously dismissed this issue of state or provincial disciplinary jurisdiction over federal lawyers as a quirk of federalism (as opposed to a problem), at least in the context of politicians who are not lawyers: Martin, *supra* note 59 at 20. As I noted there, in *Krieger*, *supra* note 13, the Supreme Court rejected the suggestion that provincial law societies do not have jurisdiction over federal prosecutors (Martin, *supra* note 59 at 20, citing *Krieger*, *supra* note 13 at para 56). Moreover, as discussed below, the attorney general is not required to be a lawyer, and so a lawyer wanting to serve as federal attorney general unbound by such concerns could resign his licence. Nonetheless, Canadian courts have yet to rule on this point.

62. See *Canada (House of Commons) v Vaid*, 2005 SCC 30, [2005] 1 SCR 667.

or worse,<sup>63</sup> an attorney general is unlikely to face professional discipline for publicly disclosing his reasons for resignation. However, the rules of professional conduct nonetheless apply.

## 2. *As legal advisor to both Cabinet and legislature*

A complicating factor for this analysis, however, is that attorneys general also have obligations to provide legal advice to Parliament or the legislatures.<sup>64</sup> While this duty is not explicitly specified in the statutes setting out the powers and duties of the attorney general, those statutes incorporate the powers and duties of the attorney general of England,<sup>65</sup> which included this duty.<sup>66</sup> However, this role is not well characterized,<sup>67</sup> the exception at the federal level being the minister of justice's statutory reporting duties to the House of Commons where government bills or regulations do not comply with the *Bill of Rights* or the *Charter*.<sup>68</sup> That reporting does seem contrary to the attorney general's obligations to Cabinet.<sup>69</sup> Huscroft has argued that the attorney general's responsibility

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63. Adam Dodek has suggested that this is a good thing, i.e., that law societies should not regulate the conduct of lawyers in public office: see Adam Dodek, "Public Office and Standards of Conduct" (April–May 2013) *National Magazine*, online: Canadian Bar Association <[www.nationalmagazine.ca/Articles/Recent4/Public\\_office\\_and\\_standards\\_of\\_conduct.aspx](http://www.nationalmagazine.ca/Articles/Recent4/Public_office_and_standards_of_conduct.aspx)> [Dodek, "Public Office"]. For a contrary view, although specifically dealing with lawyer-politicians other than the attorney general, see Martin, *supra* note 59. With reference to s 13(3) of the *Law Society Act*, *supra* note 60, see Edwards, "Expectations and Accountability," *supra* note 60 at 303: "In my opinion, the Ontario provision cited above, or any parallel enactments, should be totally removed from the statute book."

64. See, e.g., Huscroft, "Advocate or Adjudicator," *supra* note 3 at 128:

[T]he Attorney General is also the Legislature's lawyer, and is responsible for the drafting of private members' Bills. Similarly, the Attorney General provides advice to the Cabinet, but is also responsible for the provision of advice to the Legislature and legislative committees about proposed legislation. In these and other regards, it is clear that the Attorney General's duties as Chief Law Officer of the Crown extend beyond the government to the legislature as a whole.

See also The Honourable R Roy McMurtry, "The Office of the Attorney General" in Derek Mendes da Costa, ed, *The Cambridge Lectures: Selected Papers Based upon Lectures Delivered at the Cambridge Conference of the Canadian Institute for Advanced Legal Studies, 1979* (Toronto: Butterworths, 1981) 1 at 1: "This responsibility to give legal advice to the legislature remains part of my role in Ontario even today." Note that, for my purposes, the formal distinction between a legislative assembly and a legislature (a legislative assembly plus the Lieutenant Governor) is not relevant. Similarly, at the federal level, the formal distinction between the House of Commons and Senate, on the one hand, and Parliament (the House of Commons and the Senate plus the Governor General/Queen) is not relevant.

65. *DOJA*, *supra* note 3, s 5(a); *MAGA*, *supra* note 44, s 5(d).

66. See, e.g., *Krieger*, *supra* note 13 at para 27: "As in England, [attorneys general] serve as Law Officers to their respective legislatures."

67. See, e.g., Huscroft, "Advocate or Adjudicator," *supra* note 3 at 128, n 12, citing Edwards, *The AG*, *supra* note 12 at 217-218: "Although, as Edwards notes, the extent of the Attorney General's duty to the Legislature is not clear, and has seldom been discussed."

68. *Bill of Rights*, *supra* note 3, s 3; *DOJA*, *supra* note 3, s 4.1; *Charter*, *supra* note 3. For a detailed critique and case study, see Bond, *supra* note 3.

69. See, e.g., Roach, "Not Just the Government's Lawyer," *supra* note 3 at 622-623:

An Attorney General acting as the government's Minister of Justice may be reluctant

to support government legislation in court comes from his “constitutional duty to the legislative branch.”<sup>70</sup>

If the attorney general is also the lawyer to the legislature—certainly at the federal level with respect to rights-violating government bills and regulations, and possibly for other matters and at the provincial level—then conceivably, at least for some matters, the attorney general is jointly retained by Cabinet and the legislature. As such, in those matters there can be no confidentiality as between Cabinet and the legislature.<sup>71</sup> Thus the attorney general could arguably, in some circumstances, advise the legislature of the reason for his resignation. However, a distinction could be made between disclosing something *to* the legislature, which could be done confidentially, and disclosing something *in* the legislature, which is necessarily public. The provisions on reporting bills and regulations that are contrary to the *Bill of Rights* or the *Charter* conflate the two, and any reporting to the legislature is clearly understood as meaning reporting in the legislature.<sup>72</sup> But as a matter of professional conduct under the rule on confidentiality, the distinction is important: the information would still be confidential to Cabinet and the legislature as against all others, including the public. Thus the public disclosure of the information would violate that joint confidentiality. Under this approach, the attorney general would be able to confidentially share the reason for his resignation with the legislature.<sup>73</sup> However, as described above, the attorney general who disclosed the reasons in the legislature would be immune to disciplinary proceedings under parliamentary privilege.

### 3. *As both legal advisor to Cabinet and “guardian of the public interest”*

A different complicating factor for the analysis is the role of the attorney general as the “guardian of the public interest.”<sup>74</sup> The role has been

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to report that a bill is inconsistent with the *Charter* for reasons relating to respecting solicitor-client privilege, Cabinet confidences, and solidarity. Nevertheless, the Minister of Justice does have an explicit statutory duty to report on such inconsistencies and this explicit statutory duty should prevail.

70. Huscroft, “Advocate or Adjudicator,” *supra* note 3 at 143, as quoted e.g. in Roach, “Not Just the Government’s Lawyer,” *supra* note 3 at 607.

71. *FLSC Model Code*, *supra* note 30, r 3.4-5(b).

72. *Bill of Rights*, *supra* note 3, s 3 (“shall report any such inconsistency to the House of Commons”); *DOJA*, *supra* note 3, s 4.1 (“shall report any such inconsistency to the House of Commons”).

73. It is unclear who represents the legislature in these circumstances—presumably the Speaker.

74. See, e.g., McAllister, *supra* note 3 at 49; see also Huscroft, “Duty & Discretion,” *supra* note 3 at 797, identifying this as a “term popularized by John Edwards.” See also Gordon F Gregory, “The Attorney-General in Government” (1987) 36 UNBLJ 59 at 64: “The Attorney-General also has a role in civil issues before the courts, in which he acts not as counsel to government but fulfills his own independent role as what is sometimes referred to as ‘guardian of the public interest.’ In that capacity

defined with reference to the dual focuses described above—the attorney general in litigation on behalf of the government and in advising on the constitutionality of bills and regulations<sup>75</sup>—as well as the more longstanding roles of seeking injunctions in the public interest against nuisances and non-compliance with the law.<sup>76</sup> It is unclear what the phrase might mean in other contexts.<sup>77</sup> Indeed, Edwards noted that “the parliamentary debates, public journals and newspapers of the respective Commonwealth countries exhibit little of substance by way of public explanation of the Attorney-General’s special responsibilities as the avowed guardian of the public interest.”<sup>78</sup> Courts have applied the term in relation to functions such as the regulation of the legal profession by the law society,<sup>79</sup> and the pursuit of complaints of judicial misconduct.<sup>80</sup> Huscroft has criticized the phrase

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he may apply, and is ordinarily extended the right, to intervene *ex officio* in private litigation.”

75. See especially Roach, “Not Just the Government’s Lawyer,” *supra* note 3; McAllister, *supra* note 3.

76. See, e.g., Sterling & Mackay, *supra* note 3 at 914-922. See also John LI J Edwards, *The Law Officers of the Crown: A Study of the Offices of Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (London, UK: Sweet & Maxwell, 1964) at 286 [Edwards, *Crown’s Law Officers*], as described by Huscroft, “Duty & Discretion,” *supra* note 3 at 797.

77. See, e.g., Huscroft, “Duty & Discretion,” *supra* note 3 at 797, citing the 1964 description of that term as “wide-ranging and still somewhat undefined” from Edwards, *Crown’s Law Officers*, *supra* note 76 at 286.

78. John LI J Edwards, “The Charter, Government and the Machinery of Justice” (1987) 36 UNBLJ 41 at 43.

79. See the *Law Society Act*, *supra* note 60, s 13(1): “The Attorney General for Ontario shall serve as the guardian of the public interest in all matters within the scope of this Act or having to do in any way with the practice of law in Ontario or the provision of legal services in Ontario.” This provision may seem fairly explicit, but see *LaBelle v Law Society of Upper Canada* (2001), 56 OR (3d) 413 (CA) [*LaBelle*], aff’d 52 OR (3d) 398 (Sup Ct), leave to appeal to SCC refused, 29120 (5 December 2002). In *LaBelle* at para 4, the Court of Appeal expressed “reservations about his [(the motion judge’s)] interpretation” of the provision:

It is sufficient to dispose of this appeal to find, as we do, that the Attorney General is not charged by the Act with the responsibility to investigate complaints against lawyers in this province. That role has been given by the legislature to the Law Society of Upper Canada. The function assigned to the Attorney General by s. 13 of the Act—to serve as guardian of the public interest—does not obligate the Attorney General to direct such investigations or to cause them to be directed, nor does it confer upon the appellant, in the circumstances of the present case, a cause of action against the Attorney General for failing to direct or to compel the direction of such investigations.

80. See, e.g., *Mackin v New Brunswick (Judicial Council)* (1987), 82 NBR (2d) 203 at para 31, 44 DLR (4th) 730 (CA), Ryan JA, dissenting:

The Attorney General is the guardian of the public interest. He, above all ministers, is charged with responsibility for the administration of justice. It is his duty to concern himself with matters of a public nature because the people of this province have a continuing interest in seeing that laws are obeyed; and that all officers of the law, within the different levels of the justice system, do not abrogate their responsibilities or defy the tenets of their appointment or position. In matters related purely to the administration of justice, the Attorney General, because of the strength of his office, is an appropriate person to bring his concerns about the conduct of any provincial court judge, before the Judicial Council.

“guardian and protector of the public interest” as “misleading,” because “[t]here is no independent, value-neutral public interest to be protected,” at least in the *Charter* context.<sup>81</sup> However, in doing so he quoted with approval Gerard Carney’s position that “it would be more accurate to describe the Attorney as a guardian of the *administration of justice*.”<sup>82</sup> Adam Dodek has argued that the “guardian of the public interest” role, alongside the concept of the attorney general as the “defender of the [r]ule of [l]aw,”<sup>83</sup> supports what he argues is a “higher duty of government lawyers as custodians of the rule of law.”<sup>84</sup> However, Roach and Dodek largely identify these special responsibilities as inward-looking. Roach describes the attorney general as “defender of the rule of law *within government*,”<sup>85</sup> and identifies the publicly visible options of resignation and litigation as a last resort.<sup>86</sup> Similarly, Dodek states that “[g]overnment lawyers are involved in protecting the rule of law *from the inside*.”<sup>87</sup>

Revisiting the above hierarchy of reasons for an attorney general’s resignation, the question is this: are there any actions that are so wrongful and harmful to the public interest, the rule of law, or public confidence in the administration of justice, that the attorney general should not only advise against them, refuse to follow associated instructions, and resign, but also publicly announce and denounce those actions? This would seem to be what Rosenberg and Edwards are implying where Cabinet attempts to interfere with prosecutorial decisions.<sup>88</sup> Similarly, Allan Hutchinson has argued that government lawyers are not only “under a less onerous obligation to keep work-related communications and information confidential” but “might well have a professional duty in some circumstances to disclose publicly certain communications and information.”<sup>89</sup> Similarly, Dodek has argued that governments should be more willing to waive privilege.<sup>90</sup>

81. Huscroft, “Duty & Discretion,” *supra* note 3 at 797, 798.

82. Gerard Carney, “Comment: The Role of the Attorney General” (1997) 9:1 Bond L Rev 1 at 6 [emphasis in original].

83. See, e.g., Roach, “Not Just the Government’s Lawyer,” *supra* note 3. See Dodek, “Intersection,” *supra* note 1 where he mentions these two roles together at 18 and discusses them at 18-20. Dodek cites these phrases to, inter alia, Edwards and Roach. See also Morris & Nishikawa, *supra* note 1 at 175, using the phrase “guardian of the rule of law.”

84. Dodek, “Intersection,” *supra* note 1 at 18, 25.

85. Roach, “Not Just the Government’s Lawyer,” *supra* note 3 at 600 [emphasis added].

86. *Ibid* at 633.

87. Dodek, “Intersection,” *supra* note 1 at 23 [emphasis added].

88. See Rosenberg, *supra* note 11 and Edwards, *supra* note 12 and accompanying text.

89. Allan C Hutchinson, “In the Public Interest’: The Responsibilities and Rights of Government Lawyers” (2008) 46:1 Osgoode Hall LJ 105 at 118.

90. Dodek, “Intersection,” *supra* note 1 at 44, 45.

Although any potential abrogation of confidentiality has a serious impact on the client, the solicitor-client relationship, and the quality of legal advice provided<sup>91</sup>—and it would be particularly worrisome were Cabinet hesitant to obtain legal advice—the recognized exceptions discussed above demonstrate that such an impact is acceptable in some circumstances. Given these exceptions to confidentiality, including public safety, one could compellingly argue that making public the reason for resignation serves the public interest in defending the rule of law. Indeed, Smith’s resignation speech seems to make this implication. The fact that the situation has almost never arisen suggests that the absence of such an exception in the rules of professional conduct should not be determinative. As stated in the preface to the *FLSC Model Code*, “[s]ome 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.”<sup>92</sup> Where the government is clearly acting unlawfully, i.e., refusing advice of clear unconstitutionality or attempting to interfere with the attorney general’s prosecutorial discretion, such a disclosure could arguably be an ethical obligation instead of an ethical violation. That is, the two situations that arguably require an attorney general’s resignation are the situations in which disclosing the reasons for resignation is most defensible. Nonetheless, presumably the attorney general would, as with other exceptions to confidentiality, be required to disclose only as much information as necessary.<sup>93</sup> A corresponding exception could be recognized to solicitor-client privilege.<sup>94</sup> Arguably, a third situation also makes disclosure defensible: where the attorney general feels it necessary, as a lawyer, to disassociate himself from the actions of the prime minister or Cabinet that threaten public confidence in the administration of justice.

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91. See, e.g., *Smith v Jones*, *supra* note 56 at para 46, Cory J discussing the parallel importance of solicitor-client privilege:

Clients seeking advice must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent. . . . The privilege is essential if sound legal advice is to be given in every field. . . . Without this privilege clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients.

Consider also the newly recognized principle of fundamental justice, “the lawyer’s duty of commitment to the client’s cause”: *Canada (AG) v Federation of Law Societies of Canada*, 2015 SCC 7 at paras 8, [2015] 31 SCR 401. Public disclosure of the attorney general’s reasons for resignation would appear to be inconsistent with such commitment.

92. *FLSC Model Code*, *supra* note 30 at Preface.

93. *Ibid*, rr 3.3-3–3.3-5: “must not disclose more information than is required.”

94. The Supreme Court has explicitly recognized that the categories of exceptions to privilege are not closed: *Solosky v R*, [1980] 1 SCR 821 at 836.

It might seem risky for an attorney general to unilaterally claim this unrecognized exception to confidentiality, but as described above professional discipline is unlikely if not impossible. It is also unrealistic to expect the law societies to amend their respective rules to address such a rare situation. The assertion and assessment of such an exception could, in itself and regardless of the outcome, serve the public interest.<sup>95</sup>

The difficulty with identifying this previously unrecognized exception, however, is how it would apply in less extreme situations. Given the narrowness of the existing exceptions, especially that for future harm or public safety,<sup>96</sup> a similarly high threshold and narrow scope would seem appropriate and necessary for any new exception. Thus, in the situations where an attorney general might resign—where Cabinet rejects advice of only possible, not certain, unconstitutionality, or policy advice or legal advice not going to constitutionality or unlawfulness, or the attorney general loses confidence in the prime minister as leader—the attorney general would not be justified in violating confidentiality to disclose his reasons for resignation.

### III. *The non-lawyer attorney general on resignation from Cabinet*

It is generally accepted that the attorney general, although typically a lawyer, is not required to be a lawyer.<sup>97</sup> While the effectiveness of such an attorney general has been questioned,<sup>98</sup> the legality of such an appointment has recently been confirmed by the British Columbia Court of Appeal.<sup>99</sup>

95. Without encouraging illegality, I do note that such a test case would appear to be ethical: see *FLSC Model Code*, *supra* note 30, r 3.2-7, commentary 4.

96. *Ibid*, r 3.3-3.

97. See, e.g., Huscroft, “Advocate or Adjudicator,” *supra* note 3 at 134 [footnotes omitted]: “There is no requirement that a Canadian Attorney General be a lawyer, and there is ample precedent for the appointment of non-lawyers as Attorneys General, even when such appointments were not made of necessity.” See also Dodek, *Solicitor-Client Privilege*, *supra* note 55 at paras 4.28-4.34.

98. See, e.g., Huscroft, “Advocate or Adjudicator,” *supra* note 3 at 135 [emphasis added]: [T]he increased importance of litigation decisions made by Attorneys General in the *Charter* era raises real concerns about the appropriateness of the political Attorney General model. *Those concerns are in my view heightened when it comes to the appointment of non-lawyers to the position of Attorney General.*

See also Smith’s resignation speech—Smith, *Hansard*, *supra* note 36 at 5498:

Clearly the Premier believes that this office can be well filled by someone who does not have legal training. This observation is hard to accept when there are four members of the government caucus who have legal training. I know from my experience that the Attorney-General requires considerable legal and constitutional sensibility in giving advice to government, or else the Attorney-General will simply be repeating, without understanding, the legal advice of others.

99. *Askin v Law Society of British Columbia*, 2013 BCCA 233, 363 DLR (4th) 706 [*Askin*], aff’d 2012 BCSC 895, [2012] BCJ No 1216 (QL), leave to appeal to SCC refused, 35463 (7 November 2013). This was an (unsuccessful) petition for judicial review of the Law Society’s determination that it did not have jurisdiction over the appointee for practicing law without a licence. This case is

Specifically, the court held that provincial legislation, including the *Attorney General Act*, the *Legal Profession Act*, and the *Queen's Counsel Act* did not limit the Crown prerogative to appoint Cabinet members, including the attorney general.<sup>100</sup> The court also held that the provincial *Interpretation Act*, and specifically the provision that “[i]f in an enactment power is given to a person to do or enforce the doing of an act or thing, all the powers that are necessary to enable the person to do or enforce the doing of the act or thing are also deemed to be given,”<sup>101</sup> “gives the Attorney General and her deputy (and designates) the necessary powers to perform the duties required under the *Attorney General Act*.”<sup>102</sup> While the decision turns on specific provisions of B.C. legislation, corresponding legislation in other jurisdictions would be to similar effect.<sup>103</sup>

It is thus relevant to consider whether confidentiality or privilege would prevent a non-lawyer attorney general from publicly stating the reason for her resignation. In order to do so, it is first necessary to determine the status of the non-lawyer attorney general.

There appear to be three possible views on this question. Dodek has argued that because the non-lawyer attorney general is not a lawyer, her advice is not protected by solicitor-client privilege.<sup>104</sup> In doing so, he relies on the Supreme Court's 1927 adoption of Wigmore's criteria for that privilege, and specifically the requirement that advice be provided by “a professional legal adviser.”<sup>105</sup> Although Dodek does not explicitly address

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discussed in Adam Dodek, “The Curious Case of the Non-Lawyer Attorney General: White Tiger of the Legal System” (29 May 2013), *Slaw* (blog), online: <[www.slw.ca/2013/05/29/the-curious-case-of-the-non-lawyer-attorney-general-white-tiger-of-the-legal-system/](http://www.slw.ca/2013/05/29/the-curious-case-of-the-non-lawyer-attorney-general-white-tiger-of-the-legal-system/)> [Dodek, “Slaw I”], although Dodek focuses on the application judge's reasons. See also Adam Dodek, “Does Solicitor-Client Privilege Apply to an Attorney-General Who Is Not a Lawyer?” (6 August 2013), *Slaw* (blog), online: <[www.slw.ca/2013/08/06/does-solicitor-client-privilege-apply-to-an-attorney-general-who-is-not-a-lawyer/](http://www.slw.ca/2013/08/06/does-solicitor-client-privilege-apply-to-an-attorney-general-who-is-not-a-lawyer/)> [Dodek, “Slaw II”]; Dodek, *Solicitor-Client Privilege*, *supra* note 55 at para 4.31.

100. *Askin*, *supra* note 99 at paras 16 and 51; *Attorney General Act*, RSBC 1996, c 22; *Legal Profession Act*, SBC 1998, c 9; *Queen's Counsel Act*, RSBC 1996, c 393. The petitioner also argued (unsuccessfully) that the *Queen's Counsel Act* required the attorney general not only to be a lawyer but to have five years' membership in the provincial bar: *Askin*, *supra* note 99 at paras 11, 29, 46-47.

101. *Interpretation Act*, RSBC 1996, c 238, s 27(2).

102. *Askin*, *supra* note 99 at para 45, citing *Interpretation Act*, *supra* note 101, s 27. In respect of the deputy minister and other designates, the Court also relied on s 23(1) (authorizing a deputy minister and other designates to act on a minister's behalf).

103. See, e.g., *MAGA*, *supra* note 44, s 5 (functions of the attorney general); *Legislation Act, 2006*, SO 2006, c 21, Schedule F, s 78 (“If power to do or to enforce the doing of a thing is conferred on a person, all necessary incidental powers are included”).

104. Dodek, “Slaw II,” *supra* note 99. See also Dodek, *Solicitor-Client Privilege*, *supra* note 55 at paras 4.33-4.34.

105. *Howley v R*, [1927] SCR 529 at 533-534, citing John T McNaughton, ed, *Wigmore on Evidence: Evidence in Trials at Common Law*, revised ed (Toronto: Little, Brown & Co, 1961) vol 8 at 554, cited in Dodek, “Slaw II,” *supra* note 99.

confidentiality, presumably the same reasoning applies—if the adviser is not a lawyer, there can be no lawyer’s obligation of confidentiality.<sup>106</sup>

John Gregory, in contrast, has argued that solicitor-client privilege would apply to the advice because the non-lawyer attorney general is acting as a “conduit” for that advice from other lawyers.<sup>107</sup> Gregory’s position is attractive, given that the “channel of communication” extension of solicitor-client privilege has been recognized at common law: “where the third party serves as a channel of communication between the client and solicitor, communications to or from the third party by the client or solicitor will be protected by the privilege as long as those communications meet the criteria for the existence of the privilege.”<sup>108</sup> While Gregory does not specifically address confidentiality, his reasoning suggests that it would apply at a minimum to the lawyers providing the advice and would not be diminished because the advice was transmitted by a non-lawyer third party. It is unclear whether the non-lawyer attorney general would, however, be bound by this confidentiality, and there is no reason to think the respective law society would somehow have jurisdiction over that non-lawyer.

In my view, a third position is preferable: the non-lawyer, by virtue of his appointment as attorney general, is uniquely entitled to practise law without membership in a law society. This entitlement would only apply to the exercise of the functions of the office and necessarily comes from the royal prerogative to select an attorney general and that appointee’s performance of official duties. This view is consistent with the decision of the British Columbia Court of Appeal, and specifically the remedial implication that the attorney general be given the authority to perform

106. Dodek, “Slaw II,” *supra* note 99. Dodek does address three other kinds of privilege and argues that they would be applicable: “Much of the legal advice that a non-lawyer Attorney General provides will be the subject of other privileges such as: crown privilege, litigation privilege and prosecutorial discretion.” See also Dodek, *Solicitor-Client Privilege*, *supra* note 55 at para 4.33.

107. John Gregory (6 Aug 2013 at 8:00 AM), comment on Dodek, “Slaw II,” *supra* note 99. Gregory is General Counsel, Justice Development Policy Branch, Ministry of the Attorney General (Ontario), but his comment was clearly not made in a professional capacity.

108. *General Accident Assurance Co v Chrusz* (1999), 45 OR (3d) 321 at 352 (CA), Doherty JA (dissenting on other grounds, but Rosenberg & Carthy JJA concurring on this point). See also the resignation speech of Brian Smith, who suggests that the non-lawyer attorney general could be no more than a conduit: “I know from my experience that the Attorney-General requires considerable legal and constitutional sensibility in giving advice to government, or else the Attorney-General will simply be repeating, without understanding, the legal advice of others.” (Smith, *Hansard*, *supra* note 36 at 5498 [emphasis added]). Dodek argues that this extension “is a restrictive one which should be applied to individuals but will have limited application to clients who are not individuals (i.e., partnerships, associations, corporations and governments)”: Dodek, *Solicitor-Client Privilege*, *supra* note 55 at para 6.21 [emphasis added].

those duties.<sup>109</sup> On this view, solicitor-client privilege would apply and could be claimed by Cabinet, whereas confidentiality would apply only nominally—while it would be appropriate for the resigning non-lawyer attorney general to protect confidentiality, the law societies would have no enforcement jurisdiction over that person. Oddly, this functionally reverses the typical rule that confidentiality is broader than privilege.<sup>110</sup>

Thus, under any of these three views, the non-lawyer attorney general may at most nominally be expected to honour confidentiality. Under two of these views, solicitor-client privilege would nonetheless apply.

#### IV. *Lawyers with other portfolios on resignation from Cabinet*

Having considered how the rules of professional conduct constrain the resigning lawyer and non-lawyer attorneys general, it is appropriate to briefly address how those rules apply to other resigning members of Cabinet who happen to be lawyers. As mentioned above, the rules of professional conduct explicitly apply to lawyers in public office,<sup>111</sup> including those politicians who happen to be lawyers.<sup>112</sup> To address the issue of confidentiality on resignation, it is however necessary to determine *which* of those rules apply to these lawyers.<sup>113</sup> A non-practicing lawyer does not have a client and is not in a solicitor-client relationship, and thus cannot have responsibilities to a client<sup>114</sup>; as she is presumably not marketing

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109. This is also consistent with another comment on Dodek's position: "If a non-lawyer AG requires a non-disclosure privilege equivalent to what a lawyer AG would have in order to allow the AG to perform the AG's function properly, that privilege will be found to exist by the courts if it does not already exist by statute." (David Cheifetz (6 Aug 2013 at 4:09 PM), comment on Dodek, "Slaw II," *supra* note 99.) Cheifetz is a litigator and author in BC.

110. See, e.g., *FLSC Model Code*, *supra* note 30 at r 3.3-1, commentary 2:

This rule [(on confidentiality)] must be distinguished from the evidentiary rule of lawyer and client privilege, which is also a constitutionally protected right, concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

See also *CWM*, *supra* note 47 at para 45: "There is no doubt that lawyers are under an obligation to keep confidential all documents and other communications made to them by their clients, but not all such communications are subject to solicitor-client privilege and a claim of privilege does not convert non-privileged documents into privileged documents."

111. *FLSC Model Code*, *supra* note 30, r 7.4.

112. See Martin, *supra* note 59. See also Dodek, "Public Office," *supra* note 63.

113. This question is briefly considered in Martin, *supra* note 59 at 30-34, with particular attention to the rules on integrity (*FLSC Model Code*, *supra* note 30, r 2.1-2), encouraging respect for the administration of justice (r 5.6-1), and protecting fair trial rights (r 7.5-2). At 32-33 I also raised the possibility that the rules on undertakings could apply to campaign promises, those on advertising to campaign advertisements, and those on responsibility for staff to political staff (rr 7.2-11, 4-2-1, 6.1-1). At 34, I described the rule on civility (r 7.2-1) as "[t]he elephant in the room for any discussion of the applicability of the rules of ethics to lawyer-politicians."

114. See *ibid*, r 3.1-3.7.

legal services, the rules on marketing do not apply.<sup>115</sup> (However, the non-practicing lawyer is arguably still subject to the general rule on integrity and maintains obligations to the administration of justice, in relationship to employees, and to the law society and the profession.<sup>116</sup>) Thus, so long as the lawyer-politician (other than the attorney general) is careful not to inadvertently create a solicitor-client relationship, and explicitly reminds Cabinet that he is not acting as their lawyer, he would not be subject to that particular confidentiality or to privilege.<sup>117</sup>

### *Conclusion*

Unlike other members of Cabinet, a resigning attorney general is subject to a lawyer's professional obligation of confidentiality and to solicitor-client privilege. He thus cannot publicly disclose his reasons for resignation under current law. However, he is certainly immune to law society discipline if the disclosure is made in the legislature and is potentially immune insofar as the disclosure can be considered an exercise of his public functions. Nonetheless, and partly for greater clarity and public confidence, a narrow exception to confidentiality and privilege in these circumstances should be asserted to protect the attorney general's role as "guardian of the public interest" by allowing him to disclose that Cabinet attempted to influence prosecutorial decisions or rejected his advice of clear unconstitutionality or unlawfulness. Arguably, this exception should also apply where the attorney general feels it necessary to disassociate himself from conduct by the prime minister or Cabinet that threatens public confidence in the administration of justice. However, this exception would be questionable where Cabinet rejects advice of only probable or possible unconstitutionality, where the legal advice does not go to constitutionality or unlawfulness, or where the attorney general loses confidence in the prime minister as leader.

In contrast, although the status of the non-lawyer attorney general is unclear, he is under the lawyer's obligation of confidentiality in at most a nominal sense—as he would not be subject to law society discipline—although solicitor-client privilege might apply. Cabinet members other

115. See *ibid.*, r 4.1-4.3. Note however that, if referring to herself as a lawyer, the politician who happens to be a lawyer could nonetheless be engaged in "marketing" and so could conceivably violate these rules, particularly the rule on referring to oneself as a "specialist" without holding a specialist designation from a law society: r 4.3-1.

116. *Ibid.*, rr 2.1, 5.1-5.7, 6.1-6.3, 7.1-7.8.

117. See *ibid.*, r 3.3-1, commentary 4: "A lawyer also owes a duty of confidentiality to anyone seeking advice or assistance on a matter invoking a lawyer's professional knowledge, although the lawyer may not render an account or agree to represent that person. A solicitor and client relationship is often established without formality."

than the attorney general who happen to be lawyers can disclose their reasons for resignation without violating the rules of professional conduct.

Four closing caveats are necessary. First, a principled resignation of an attorney general is rare. Second, an attorney general disclosing his reasons for resignation would, like any politician in any circumstances, be wise to do so in the legislature so as to gain the absolute protection of parliamentary privilege.<sup>118</sup> Third, even if a resigning attorney general did not himself disclose the reasons for his resignation, it would in all likelihood be leaked by someone else, or at least speculated on in the media.<sup>119</sup> Fourth, in reality an attorney general would be unlikely to face discipline from his respective law society, and such discipline might not even be possible. Nonetheless, even where the rules of professional conduct are merely aspirational or otherwise unenforceable,<sup>120</sup> attorneys general are uniquely positioned to encourage public respect for the legal profession and the administration of justice by attempting to follow—or otherwise honour—the text and spirit of those rules.

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118. See, e.g., Martin, *supra* note 59 at 37: “[T]he main effect of increased attention from law societies may be to extend a distinction recognized by all canny Canadian politicians: statements that could have legal consequences—such as defamation—should be made inside, not outside, the doors of the legislature.”

119. A serious disagreement in Cabinet may give rise to a leak regardless of whether or not it results in a resignation. See, e.g., Sossin, *supra* note 16 at 49 [footnote omitted]: “In rare instances, a leaked memo or document leads to some news coverage and perhaps the attention of opposition parties.”

120. See, e.g., *FLSC Model Code*, *supra* note 30 at Preface: “Some sections of the Code are of more general application, and some sections, in addition to providing ethical guidance, may be read as aspirational.” Obviously, the professional obligation of confidentiality is so fundamental as to not be aspirational. However, where the rules are unenforceable, confidentiality is surely as important as any other unenforceable rule.

