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Consequences for Broken Political Promises: Lawyer-Politicians and the Rules of Professional Conduct

*Andrew Flavelle Martin**

INTRODUCTION

Politicians sometimes break their promises. Courts will not enforce these promises or penalize those who made them. Canadian law and political practice are clear that the appropriate recourse, indeed the only recourse, is for voters at the ballot box.¹ However, politicians who happen to be lawyers are ostensibly governed by an additional set of rules — the rules of professional conduct. Under these rules, certain promises, termed undertakings, are special. Courts and law societies will enforce these promises and/or impose consequences for their breach against practicing lawyers. This article considers how the rule on undertakings should apply to political promises made by lawyer-politicians.

In Part 1, I provide a brief summary of the rules of professional conduct as they apply to lawyer-politicians and to lawyers' undertakings. In Part 2, I consider some typical kinds of promises made — and broken — by politicians, and how these situations are addressed by courts. I then go on in Part 3 to consider how the rule on undertakings applies to lawyer-politicians in these situations. I conclude by suggesting that the ability to make political promises into undertakings may actually benefit lawyer-politicians.

1. BACKGROUND

To assess whether and how the rule on undertakings applies to lawyer-politicians' political promises, it is first necessary to consider the general

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¹ On the question of political accountability, see generally e.g. Megan Ma, "Effectual Linkages between Campaign Promises and Electoral Accountability" (2014) 8 JPPL 721. Ma provides a thorough review of the relevant literature on theories of campaign promises at 722-727.

application of the rules of professional conduct to lawyer-politicians, as well as the substantive law on undertakings.

(a) Lawyer-politicians and the rules of professional conduct

The rules of professional conduct themselves provide that they apply, at least ostensibly, to lawyers in public office, including lawyer-politicians: “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.”² (This rule applies even where the officeholder is not required to be a lawyer.)³ The commentary provides a justification for this rule — “[b]ecause such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by a failure to observe its ethical standards” — yet limits its application:

Generally, the Society is not concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely upon the lawyer’s integrity or professional competence may be the subject of disciplinary action.⁴

There has been some debate in recent years over whether this rule is wise. Adam Dodek has argued that it is inappropriate because the complaints and disciplinary functions of law societies could be misused as a political tool.⁵ While recognizing this potential for abuse, I have argued that law societies must nonetheless apply this rule to uphold the integrity of the profession.⁶

In some of the situations discussed below, the lawyer-politician may be merely a candidate for office and not yet an office-holder. Under a strict

² The Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: FLSC, 2009, last amended 2014, online, FLSC: <http://www.flsc.ca> [*FLSC Model Code*], r. 7.4. See Andrew Flavelle 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 4-5 [Martin, “Political Practices”]; 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 [Dodek, “Public Office”]. This quotation, and those in the rest of this paragraph, are quoted in Martin at 4-5 and in Dodek.

³ “The rule applies to a lawyer who is elected or appointed to a legislative or administrative office at any level of government, regardless of whether the lawyer attained the office because of professional qualifications.” *FLSC Model Code, ibid.*, r. 7.4, Commentary 1.

⁴ *FLSC Model Code, ibid.*, r. 7.4, Commentary 1 and 2.

⁵ Dodek, “Public Office”, *supra* note 2: “Law society disciplinary proceedings may be used to carry over battles from the political forum. We should be concerned about such ‘politicization of the disciplinary process’.” More recently, see “At the Bar: Kinsella v. Kid Kodak in LSUC Throwdown”, *Frank Magazine [Ottawa]* (November 2015), online: Frank <https://frankmag.ca/2015/11/at-the-bar-kinsella-v-kid-kodak-in-lsuc-throwdown/>.

⁶ Martin, “Political Practices”, *supra* note 2, at 23-26. (I could have made this point more explicitly.)

interpretation, the rule on lawyers in public office would not apply to candidates. However, a purposive interpretation would suggest that because the same considerations — the visibility of the lawyer and the potential impact of his or her conduct on the public reputation of the profession — apply, no distinction should be made.

There are two significant legal constraints on law societies' discipline of lawyer-politicians. First, anything said in the House of Commons (or Senate) or a provincial legislature will be protected by parliamentary privilege.⁷ Second, there is a Quebec precedent holding that ministers of the Crown, acting in their duties of office, are immune to law society discipline.⁸

Besides disagreement and uncertainty over whether the rules of professional conduct can or should apply to lawyer-politicians, it is also unclear which of those rules would be applicable.⁹ The few reported decisions in this area tend to concern criticism of the judiciary, under the rule that “[a] lawyer must encourage public respect for and try to improve the administration of justice”.¹⁰ I have suggested elsewhere that perhaps campaign promises could qualify as undertakings.¹¹

(b) Undertakings

Curiously, the rules of professional conduct do not define the term ‘undertaking’. The Superior Court of Justice has adopted the following definition:

An undertaking is the promise given by a solicitor through a written statement, a verbal communication or inferred from his acts, or any combination thereof, in reliance on which promise the recipient of the undertakings gives up to the solicitor or to another party, a document or right, or performs an act which that recipient would not have done were it not for the receipt of the promise from that solicitor.¹²

⁷ *Canada (House of Commons) v. Vaid*, 2005 SCC 30, 2005 CarswellNat 1272, [2005] 1 S.C.R. 667, as discussed in Martin, “Political Practices”, *ibid.*, at 17.

⁸ *Barreau (Montréal) c. Wagner*, 1967 CarswellQue 253, [1968] B.R. 235 (C.A.), as discussed e.g. in Martin, “Political Practices”, *ibid.*, at 17-18 and in Dodek, “Public Office”, *supra* note 2.

⁹ See e.g. Martin, “Political Practices”, *ibid.*, at 32-34; Andrew Flavelle Martin, “The Attorney General as Lawyer (?): Confidentiality upon Resignation from Cabinet” (2015) 38:1 Dal LJ 147 at 169-170.

¹⁰ *FLSC Model Code*, *supra* note 2, r. 5.6-1. As Dodek mentions (“Public Office”, *supra* note 2), the commentary to this rule advises that “[a] lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations.” See the matters of Claude Wagner (Quebec Minister of Justice) and John Morgan (Mayor of Cape Breton), mentioned in Dodek, *ibid.*, and in Martin, “Political Practices”, *ibid.*, at 18 and at 11-12, and of Roger Kimmerly (Yukon Minister of Justice), mentioned in Martin at 18.

¹¹ Martin, “Political Practices”, *ibid.*, at 32.

¹² *Hudson v. Andros*, 2010 ONSC 3417, 2010 CarswellOnt 3911 at para. 20, leave to appeal to Div. Ct. refused 2010 ONSC 5144, 2010 CarswellOnt 7475 [*Hudson*],

Under this definition, an undertaking may be written or oral, and implicit or explicit.¹³ One of the unusual qualities of undertakings is that they are binding with or without consideration — that is, while the person receiving the undertaking must rely on it in some way, they do not need to give the lawyer anything in exchange.¹⁴ Undertakings are typically used to advance transactions,¹⁵ and are a common compliance mechanism used by law societies in their regulation of lawyers.¹⁶ They are also commonly used during examinations for discovery.¹⁷ Deemed or implied undertakings also restrict the use of information obtained in the course of litigation.¹⁸ Undertakings may be made to lawyers and non-lawyers.¹⁹ A lawyer may qualify an undertaking by committing only to his or her best efforts, i.e. making merely a “best efforts” undertaking.²⁰

The rule on undertakings is strict and absolute: “A lawyer must not give an undertaking that cannot be fulfilled and must fulfill every undertaking given”.²¹ While undertakings may be oral or implicit, as discussed above, the

quoting from Beverley G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 1989) at 203. Smith’s definition is cited with approval in Adam M Dodek, ed, *Canadian Legal Practice: A Guide for the 21st Century* (Toronto: LexisNexis Canada, 2009) (looseleaf revision 42, March 2016), at para. 9.227 [Dodek, *Canadian Legal Practice*]. Note that this passage is repeated in Smith’s subsequent book: Beverley G. Smith, *Professional Conduct for Lawyers and Judges* (Fredericton: Maritime Law Book, 1998) at chapter 9, para. 38. See now Beverley G. Smith, *Professional Conduct for Lawyers and Judges* (Fredericton: Maritime Law Book, 2011) (looseleaf, January 2011) at Chapter 9, para. 36.

¹³ See also Dodek, *Canadian Legal Practice, ibid.*, at para. 9.230.

¹⁴ See e.g. *Hudson, supra* note 12, at paras. 21 and 24. See also Dodek, *Canadian Legal Practice, ibid.*, at para. 9.232.

¹⁵ See e.g. Dodek, *Canadian Legal Practice, ibid.*, at para. 9.227.

¹⁶ See e.g. Stephen E. Traviss, ed, *Ontario Discipline Summaries, 1972-1992* (Toronto: Law Society of Upper Canada, 1997) at xlii.

¹⁷ See e.g. *Pummo v. Gossi*, 1999 CarswellOnt 73 (S.C.J. Master) at para. 19: “Undertakings given on an examination are an acknowledgement that the question is a proper one and a commitment to provide the answer or document which is not available at the time.”

¹⁸ See e.g. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 30.1; Dodek, *Canadian Legal Practice, supra* note 12, at para. 17.111.

¹⁹ See e.g. *Hudson, supra* note 12, at para. 23: “While undertakings are typically exchanged by lawyers, I conclude that an undertaking given in the lawyer’s professional capacity may be enforced by the court when it is given to a non-lawyer, in order to underscore the professionalism of the bar.” See also e.g. *Hammond v. Law Society of BC*, 2004 BCCA 560, 2004 CarswellBC 2539, 34 B.C.L.R. (4th) 73 at para. 55 [*Hammond*], as quoted in e.g. *Dent (Re)*, 2015 LSBC 37 (Hearing Panel) at para. 101 [*Dent*]: “promises made by lawyers, not only to one another, but also to members of the public with whom they communicate in the context of legal matters”.

²⁰ *Towne v. Miller*, 2001 CarswellOnt 3828, 56 O.R. (3d) 177 (S.C.J.) at para. 12 [*Towne*]. See also Dodek, *Canadian Legal Practice, supra* note 12, at para. 9.246.

²¹ *FLSC Model Code, supra* note 2, r. 7.2-11. See also r. 5.1-6: “A lawyer must strictly and scrupulously fulfill any undertakings given and honour any trust conditions accepted

corresponding commentary provides that “[u]ndertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms.”²² The commentary also emphasizes that an undertaking binds the lawyer personally unless clearly stated otherwise.²³ A lawyer is bound by undertakings made by staff working on his or her behalf.²⁴ This is consistent with the more general rule that “[a] lawyer has complete professional responsibility for all business entrusted to him or her and must directly supervise staff and assistants to whom the lawyer delegates particular tasks and functions”.²⁵

The breach of an undertaking may have serious consequences. Law societies will discipline lawyers for breaching undertakings,²⁶ and courts will enforce undertakings.²⁷ However, courts will only enforce undertakings made by a lawyer as a lawyer, i.e. in the course of the practice of law.²⁸

The breach of undertakings is a serious issue for both courts and law societies for two reasons. One is that undertakings are necessary for the efficient practice of law and the efficient regulation of the legal profession. For example, the British Columbia Court of Appeal has noted that “[r]eliance on undertakings is essential to the practice of law”,²⁹ and “particularly ... in the

in the course of litigation.” See also e.g. Dodek, *Canadian Legal Practice, ibid.*, at para. 3.27.

²² *FLSC Model Code, ibid.*, r. 7.2-11, Commentary 1. See also e.g. Dodek, *Canadian Legal Practice, ibid.*, at paras. 3.28 and 9.230.

²³ *FLSC Model Code, ibid.*, r. 7.2-11, Commentary 1. See also e.g. Dodek, *Canadian Legal Practice, ibid.*, at paras. 9.228-9.229.

²⁴ *FLSC Model Code, ibid.*, r. 6.1-3, Commentary 1. The rules bar a lawyer from allowing non-lawyer staff to “give or accept undertakings or accept trust conditions, except at the direction of and under the supervision of a lawyer responsible for the legal matter”: r. 6.1-3(c).

²⁵ *FLSC Model Code, ibid.*, r. 6.1-1.

²⁶ See e.g. Dodek, *Canadian Legal Practice, supra* note 12, at para. 9.249, as well as the discipline decisions cited below at note 33.

²⁷ See e.g. Dodek, *Canadian Legal Practice, ibid.*, at para. 9.251.

²⁸ See e.g. Dodek, *Canadian Legal Practice, ibid.*, at paras. 9.252 and 9.262. See also e.g. Hudson, *supra* note 12 at para. 23: “However the court will not compel the performance of an undertaking simply because it is made by a lawyer in a non-professional context”, citing *Wilson v. Beatty* (1885), 12 O.A.R. 252, [1885] O.J. No. 23 (C.A.). See also *Bank of British Columbia v. M*, 1981 CarswellBC 1, 24 B.C.L.R. 49, 120 D.L.R. (3d) 177 (C.A.) at 180-181 [D.L.R.], Nemetz CJBC for the panel: “However, the undertaking must be his personally, given by him *qua* solicitor and must be clear on its terms.” [*Bank v. M*; citation omitted.] See also *Thomas Gold Pettingill LLP v. Ani-Wall Concrete Forming Inc.*, 2012 ONSC 2182, 2012 CarswellOnt 5802, 349 D.L.R. (4th) 431 at para. 49: “for the court to exercise its jurisdiction, the lawyer must give the undertaking while he or she is acting in a professional capacity. For example, if a lawyer borrows money in his or her personal capacity and promises to repay, that promise is not an undertaking in his or her capacity as a lawyer that is enforceable summarily by the court” [*Thomas Gold*; citation omitted].

²⁹ *Law Society of BC v. Heringa*, 2004 BCCA 97, 2004 CarswellBC 3280 at paras. 10-11,

area of real estate transactions as a means of expediting and simplifying those transactions”;³⁰ “undertakings are given daily in commercial transactions and ... unless they are honoured those transactions would be fettered”.³¹ Similarly, the BC Supreme Court has stated that “[u]ndertakings as employed by the legal profession are a means to an end: the efficient dispatch of legal services”.³² Harvey Strosberg, who would go on to be treasurer of the Law Society of Upper Canada, held in a commonly-cited discipline decision that

[t]he practice of law would become infinitely more complicated and costly and the public interest could not be as well protected if solicitors were not scrupulous about fulfilling their undertakings. The Society’s governing of its members would be infinitely more complicated and costly if solicitors were not strictly required to abide their undertakings to the Society.³³

In this respect, the rule on undertakings serves a very practical role. However, the breach of undertakings is serious not only for practical purposes but also as a matter of honour and integrity. Thus the BC Court of Appeal has also stated that “undertakings are regarded as solemn, if not sacred, promises”,³⁴ and the Superior Court of Justice has referred to them as “matters of the utmost good faith.”³⁵ Similarly, Strosberg stated that “[a]n undertaking is a solemn promise A solicitor’s undertaking is his or her bond.”³⁶ As a matter of integrity, misconduct by one lawyer impugns all lawyers: “When a lawyer’s undertaking is breached, it reflects not only on the integrity of that member,

quoting with approval from the reasons of the panel, as quoted in e.g. *Dent*, *supra* note 19, at para. 100.

³⁰ *Hammond*, *supra* note 19, at para. 55, as quoted in e.g. *Dent*, *ibid.*, at para. 101.

³¹ *Bank v. M*, *supra* note 28, at para. 7.

³² *Dr. Morgan Campbell Inc. v. Towers*, 2006 BCSC 1030, 2006 CarswellBC 1673, 57 B.C.L.R. (4th) 363 at para. 25.

³³ *Re: William Donald Gray, Toronto* (25 January 1990) (LSUC Discipline Committee, adopted by Convocation), online: LSUC www.lsuc.on.ca [Minutes of Special Convocation, pages 11-23] at 21 [*Gray*]. Quoted with approval in e.g. *Law Society of Upper Canada v. Kosar*, [1996] L.S.D.D. No. 192 (LSUC Discipline Committee); *Law Society of Upper Canada v. Hunter*, [1997] L.S.D.D. No. 177 (LSUC Discipline Committee); *Law Society of Upper Canada v. Fenik*, [2000] L.S.D.D. No. 75 (LSUC Hearing Panel, chair alone) at para. 2; *Law Society of Upper Canada v. Beneteau*, [2000] L.S.D.D. No. 67 (LSUC Hearing Panel); *Law Society of Upper Canada v. Brisebois* (2006), [2006] L.S.D.D. No. 115, 2007 ONLSHP 8 at para. 11. For more quaint language, see *Re: Arthur Chung, Toronto* (22 October 1992) (LSUC Discipline Committee, adopted by Convocation), online: LSUC www.lsuc.on.ca [Minutes of Special Convocation, pages 25-36] at 35: “It is only by the prompt fulfilment of appropriate undertakings sparingly given that the profession is able to carry on the practice of law in a responsible and civilized manner.”

³⁴ *Hammond*, *supra* note 19, at para. 55, as quoted in e.g. *Dent*, *supra* note 19, at para. 101.

³⁵ *Towne*, *supra* note 20, at para. 11.

³⁶ *Gray*, *supra* note 33, at 21.

but also on the integrity of the profession as a whole.”³⁷ Thus, courts will enforce undertakings “in order to uphold the honour of the bar”.³⁸

In summary, courts and law societies takes a strict approach to undertakings for two different reasons — efficiency and integrity. It is the duty of lawyers to ensure that neither they, nor their staff, make undertakings that cannot be met. Courts will enforce undertakings made by a practicing lawyer, and breach of an undertaking is grounds for professional discipline.

2. LAWYER-POLITICIANS’ POLITICAL PROMISES

Against this background, I now consider some of the kinds of political promises that politicians — including lawyer-politicians — commonly make and break. I also refer to the relevant case law, which all holds that courts will not enforce these promises. Note that while I use real cases as models, I do not mean to suggest that the lawyer-politicians involved acted unethically under the rules of professional conduct as they were understood at the time. Instead, I am arguing that, moving forward, the rules should be understood differently.

(a) The election campaign promise

The most common political promise is a campaign platform or commitment — if elected, I (or my government) will do (or not do) *x*. Courts have rejected claims under both contract and the tort of negligent misrepresentation when such promises are broken. For example, during the federal election campaign of 1984 Progressive Conservative party leader Brian Mulroney apparently made promises to “improve postal service” and not to enter a free trade agreement with the US.³⁹ A voter claimed damages in contract and negligent misrepresentation, on the basis that he relied on those promises in voting for a Progressive Conservative candidate.⁴⁰

The judge dismissed the contract claims for reasons of both contract law and public policy. The claim failed as a matter of contract because there was no consideration and no privity.⁴¹ The contract claim also failed on public policy grounds because it would unduly constrain the discretion of a winning candidate: “to allow an action in contract based on promises made during an election would be contrary to public policy and to the concept of representative democracy as we understand it.”⁴² To support this policy

³⁷ *Hammond*, *supra* note 19, at para. 56, as quoted in e.g. *Dent*, *supra* note 19, at para. 101.

³⁸ *Hudson*, *supra* note 12, at para. 23. See also *Thomas Gold*, *supra* note 28, at para. 49: “The court’s summary jurisdiction to enforce lawyers’ undertakings is rooted in the idea that the court should secure high standards of conduct, honesty, and integrity from its officers.”

³⁹ *Ruffolo v. Mulroney*, 1988 CarswellOnt 2939, [1988] O.J. No. 2670 (Prov. Ct.) at paras. 2, 6.

⁴⁰ *Ibid.*, at paras. 2-4, 6.

⁴¹ *Ibid.*, at para. 10.

⁴² *Ibid.*, at para. 9.

basis, the judge also referred to a provision of the *Canada Elections Act* forbidding candidates from making written pledges.⁴³ The negligent misrepresentation claim failed on similar grounds. Key elements of the tort were absent. There was no duty of care or special relationship between the plaintiff and Mulroney, any reliance was unreasonable, and the damages — a “wasted” vote and “disillusionment” — were not recognized in law.⁴⁴ (Any financial impact on the plaintiff from free trade was too remote.)⁴⁵ Similar policy reasons precluded such a duty.⁴⁶ In rejecting the claims against Mulroney, the judge also made several key observations about the nature of campaign promises. Such a promise was a statement of current intentions: “When an electoral candidate makes promises, he or she is simply reflecting an intention and a determination to do what he or she can within the concepts of the parliamentary system and the limits of party discipline.”⁴⁷ Moreover, such a statement “is often mere puffery” and should not even be believed.⁴⁸

Campaign commitments may also be expressed in more formal ways that borrow some features of legal documents. For example, during the Ontario election campaign of 2003, Liberal party leader Dalton McGuinty promised not to raise taxes (or create new taxes) or run a budget deficit.⁴⁹ He also signed a document including these commitments.⁵⁰ The document was titled a “Taxpayer Protection Promise”, and also signed by the federal director of the Canadian Taxpayer’s Federation as “[w]itnessed by”.⁵¹ The signings were performed at a press conference with much fanfare.⁵² The subsequent McGuinty government did indeed announce plans to introduce a new tax.⁵³

⁴³ *Ibid.*, at para. 9. This is now *Canada Elections Act*, S.C. 2000, c. 9, s. 550: “No candidate shall sign a written document presented by way of demand or claim made on him or her by any person or association of persons, between the issue of the writ and polling day, if the document requires the candidate to follow a course of action that will prevent him or her from exercising freedom of action in Parliament, if elected, or to resign as a member if called on to do so by any person or association of persons.”

⁴⁴ *Ruffolo, ibid.*, at paras. 16-25, 24-34, and 36-37.

⁴⁵ *Ibid.*, at para. 38.

⁴⁶ *Ibid.*, at para. 21.

⁴⁷ *Ibid.*, at para. 30.

⁴⁸ *Ibid.*, at para. 34: “The plaintiff ... is not justified in believing the statements nor is he justified in relying solely upon those representations without reference to other factors in casting his vote.”

⁴⁹ *Canadian Taxpayers Federation v. Ontario (Minister of Finance)*, 2004 CarswellOnt 5352, 73 O.R. (3d) 621 (S.C.J.) at paras. 10 and 12 [CTF]. Ma, *supra* note 1, discusses this case in detail at 744-745.

⁵⁰ *CTF, ibid.*, at para. 10. The document also committed him to “abide by” the *Taxpayer Protection Act, 1999*, S.O. 1999, c. 7, Sch. A, which set out extensive preconditions to any new tax or tax increase.

⁵¹ *CTF, ibid.*, at para. 10.

⁵² *Ibid.*, at para. 11.

⁵³ *Ibid.*, at para. 14.

The Federation applied for a declaration that there had been a breach of contract or a negligent misrepresentation.⁵⁴

The application judge dismissed both claims. He held that there was no contract because the document “was not a promise made to anyone in particular and was not framed as an agreement or contract between two parties,”⁵⁵ that such a promise could not be an offer — because it would fetter the legislature —⁵⁶ and that there was no consideration.⁵⁷ Similarly, the judge dismissed the negligent misrepresentation claim because there was no duty of care and there was no proof of negligence or deceit.⁵⁸ The judge also identified strong public policy reasons against both claims. Such contractual claims would “hinder if not paralyse the parliamentary system” and “our system of government would be rendered dysfunctional.”⁵⁹ Negligent misrepresentation claims would likewise “raise the spectre of unlimited liability to an indeterminate class” and “have a chilling effect and would interfere with the concept of parliamentary sovereignty” by fettering elected officials.⁶⁰ In so holding, the judge emphasized the traditional approach to these issues: “it is not the role of the courts, in circumstances such as in the present case, to intervene to enforce such promises and pledges. Rather, the remedy is for the electorate to consider and weigh the record of each candidate and party at the time of voting.”⁶¹

Similar promises may be made prior to an election campaign. Thus, in 2006 and 2007, a veteran’s widow publicly complained that Prime Minister Stephen Harper had not fulfilled a promise in a letter to her, made while he was Leader of the Opposition, to expand a program for veterans’ widows.⁶² (She was covered by the program but sought coverage for others.)⁶³ The first response was that the letter was signed not by the Prime Minister but by a

⁵⁴ *Ibid.*, at para. 1. The Federation also argued that a bill purporting to amend the *Taxpayer Protection Act*, *supra* note 50, to provide an exemption from its preconditions, was either *ultra vires* or invalid. This argument, which the judge rejected, is not relevant to this discussion.

⁵⁵ *Ibid.*, at para. 56.

⁵⁶ *Ibid.*, at paras. 59 and 60, quoting with approval from *Hogan v. Newfoundland (Attorney General)*, 2000 NFCA 12, 2000 CarswellNfld 47, 183 D.L.R. (4th) 225 at para. 38, leave to appeal refused 2000 CarswellNfld 337 (S.C.C.).

⁵⁷ *CTF, ibid.*, at para. 57.

⁵⁸ *Ibid.*, at paras. 68-69.

⁵⁹ *Ibid.*, at para. 58.

⁶⁰ *Ibid.*, at paras. 70-71. Note that Ma, *supra* note 1, at 744 uses longer versions of these quotes.

⁶¹ *CTF, ibid.*, at para. 52. Note that Ma, *ibid.*, at 744-775 uses part of this quote.

⁶² Gloria Galloway, “Widow pursues PM’s benefit pledge; Woman, 80, presses demand for home care promised by Harper as opposition leader” *The Globe and Mail* (19 April 2007) A10. While Harper was not a lawyer, the circumstances provide a helpful example that could well involve a lawyer-politician.

⁶³ *Ibid.*

member of his staff.⁶⁴ However, another letter was indeed signed by the Prime Minister in June 2005.⁶⁵ (This matter was not pursued in the courts.)

(b) The promise in office

Politicians may also make promises once in office. For example, in 1990 Ontario Premier Bob Rae sent a letter to a corporation seeking to establish a controversial waste facility in the Niagara Escarpment, “assur[ing] you [it] that our government will respect the environmental assessment process”.⁶⁶ Subsequently, a member of the governing party introduced a private member’s bill that effectively prohibited approval of the facility.⁶⁷ The corporation sought damages in both negligent misrepresentation and “contract” (promissory estoppel).⁶⁸ The motions judge struck out both parts of the statement of claim as disclosing no reasonable cause of action.⁶⁹ The judge held that the representation was indeed true:

First, a plain reading of the Premier’s words suggests only that he was representing at most that his government, the executive branch, would not interfere in the internal regulatory hearing process itself. Nothing in the pleadings suggests that the government did so interfere. The words do not expressly, or impliedly, represent that the legislature would never pass legislation precluding the use of the Niagara Escarpment for the disposal of waste.

Second, the Premier’s statement cannot be read reasonably as fettering the government as to future policy initiatives which might result in changes to legislation. ...

Third, the Premier’s statement did not purport to say he would fetter any member of the legislature from introducing a private members’ bill on any matter within the legislative competence of the legislature. The Premier could not (and did not purport in his statement so to do) fetter the elected members of the legislature from voting as they saw fit in the public interest.⁷⁰

In doing so, the judge emphasized the importance of allowing the legislature to act: “The legislature must have the freedom to devise policy and enact legislation that meets changing social needs. That norm is fundamental to a liberal democracy.”⁷¹ The judge also held that there was no existing

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Reclamation Systems Inc. v. Rae*, 1996 CarswellOnt 95, 27 O.R. (3d) 419, 19 C.E.L.R. (N.S.) 1 (Gen. Div.) at 424 [O.R.] [*Reclamation Systems*].

⁶⁷ *Ibid.*, at 424-426.

⁶⁸ *Ibid.*, at 429, 449.

⁶⁹ *Ibid.*, at 443-457.

⁷⁰ *Ibid.*, at 448.

⁷¹ *Ibid.*, at 448.

relationship between the Premier and the corporation that would ground an estoppel claim, and that such a claim did not constitute a cause of action.⁷²

The decision in the Rae case — in contrast to, for example, the McGuinty case — rested on a very narrow and literal reading of the Premier's letter. Even presuming that corporations are more sophisticated than natural persons, that reading seems unduly technical and strict. The judge himself noted “the probable fact and political reality” that the bill “could not have been enacted if the Premier ... had actively opposed” it.⁷³ Moreover, the Supreme Court had previously recognized that “the dichotomy of the executive on one hand and Parliament on the other ... [i]gnores the essential role of the executive in the legislative process”.⁷⁴ A fairer result may have been to acknowledge that the Premier's promise — as reasonably understood by the corporation — had not been fulfilled, but that allowing any cause of action based on that promise would have been contrary to public policy.

(c) The leadership campaign promise

The kinds of campaign-platform promises considered above could also be made during a leadership campaign. However, leadership campaigns also commonly involve agreements among candidates, where a candidate leaving the race asks his supporters to vote for another candidate. This decision is often based on promises from the other candidate, whether made publicly or privately. For example, at the 2003 Progressive Conservative leadership convention, candidate David Orchard supported candidate Peter MacKay after the two signed a ‘contract’ indicating that if MacKay became leader, there would be no merger with the Canadian Alliance party.⁷⁵ When leader MacKay subsequently supported a merger, Orchard (and others) filed an application seeking to halt that merger.⁷⁶ However, while the notice of application included a claim for breach of contract, this argument was not pursued at the hearing.⁷⁷

⁷² *Ibid.*, at 450 and 452-453.

⁷³ *Ibid.*, at 448.

⁷⁴ *Reference Re Canada Assistance Plan (BC)*, 1991 CarswellBC 168, [1991] 2 S.C.R. 525, 83 D.L.R. (4th) 297 (S.C.C.) at p. 559 [S.C.R.]. While this comment was in a different context — the argument that Parliament's power to pass bills could not be fettered, but the executive's power to introduce bills could be (see 559) — it seems fair to accept it as recognizing a complex and close relationship between the executive and the legislature.

⁷⁵ Brian Laghi, “Deal gives Tory jobs to Orchard supporters” *The Globe and Mail* (5 June 2003) A1.

⁷⁶ Brian Laghi, “Orchard to file suit against merger proposal” *The Globe and Mail* (21 November 2003) A4.

⁷⁷ *Ahenakew v. MacKay*, 2003 CarswellOnt 4930, 68 O.R. (3d) 277, 235 D.L.R. (4th) 371 (S.C.J.) at para. 5, aff'd 2004 CarswellOnt 2246, 71 O.R. (3d) 130, 241 D.L.R. (4th) 314 (C.A.): “I note that several items of the relief set out in the Notice of Application are not pursued before me. Paragraph 1(j) requested a declaration that Mr. MacKay is in breach of his written agreement, dated June 1, 2003, with Mr. Orchard and sought

Based on the other decisions, one can imagine how the application judge may have ruled on the issue of breach of contract — at least under the traditional approach. In this situation, there clearly was a contract, with privity between MacKay and Orchard and consideration (in the form of an endorsement) from Orchard to MacKay. (I do note that any damages suffered by Orchard would likely be considered non-compensable.)⁷⁸ However, the public policy reasons against recognizing such a contract remain. Such an agreement would unduly fetter the discretion of MacKay, as party leader, to act in the best interests of the party as he understood them at any given time. Presumably, if party members were displeased with the decisions made by MacKay in his capacity as leader — such as the decision to pursue the merger — then it was for them to seek a change in leader or to vote against the merger, with Orchard being free to participate in, and otherwise to attempt to influence, those processes.⁷⁹

In summary, courts have generally held that political promises, regardless of the situation in which they are made, do not meet the requirements for causes of action in contract or tort and that even if they did, allowing such claims would be contrary to public policy. In particular, the fettering and chilling of decision-making by public officials, and particularly the binding of Parliament and the legislatures, would be inappropriate. Courts have endorsed the traditional view that the appropriate penalty for broken political promises is for voters to consider voting differently at the next opportunity.

3. HOW SHOULD THE RULE ON UNDERTAKINGS APPLY TO LAWYER-POLITICIANS' POLITICAL PROMISES?

Lawyer-politicians' political promises do not constitute undertakings in the traditional sense. While the rules themselves do not enumerate or limit the situations in which lawyers' promises qualify as undertakings, it seems fairly clear from the case-law and from the realities of practice that undertakings are typically limited to particular and narrow contexts within the practice of law. While undertakings to the law society may have myriad specifics, they are all really iterations of a promise to follow closely whatever rules of professional

consequential relief. The request for this relief was withdrawn on the consent of counsel prior to the date set for the hearing." [*Ahenakew*.]

⁷⁸ In the original application, Orchard et al sought "a declaration that Peter MacKay is in breach of his written agreement with the applicant David Orchard dated June 1, 2003 and more particularly described in the affidavit material filed in support of this application, together with an order referring this matter to the Master at Toronto in order to determine the *quantum* of damages due to David Orchard by reason of the breach". (*Ahenakew, ibid.*, Application (Court File 03-CV-259202CMI) at para. 1(j), online: David Orchard http://www.davidorchard.com/online/PDF_files/Orchard-application.pdf.)

⁷⁹ This point — that even though MacKay broke a promise, that kind of promise and its breach were for party members to resolve and not the court — was made in a newspaper editorial: "Vexing, but it's politics," Editorial, *The Globe and Mail* (24 November 2003) A12.

conduct and best practices a lawyer had been flouting. Thus, political promises may appear to be beyond the scope of undertakings.

However, lawyer-politicians' political promises may still be properly understood as a special kind of undertaking. Recall that there are two reasons for the enforcement of the rule on undertakings — one being the efficient practice of law, and the other being the honour and integrity of lawyers and the legal profession. Lawyer-politicians' political promises clearly make no contribution to the efficient practice of law. However, they do engage the honour and integrity of lawyer-politicians and the legal profession. Recall, as well, that the rules of professional conduct cite conduct going to integrity as one of the circumstances in which law societies will be concerned with the behaviour of lawyers in public office. Note the admittedly anecdotal — and possibly coincidental — yet nonetheless interesting fact that every one of the reported cases cited above, where lawyers were taken to court after breaking political promises, involved a lawyer-politician.⁸⁰ Lawyer-politicians are some of the most visible lawyers in the country,⁸¹ and their broken promises are also among the most publicly visible. To the extent that law societies are concerned with maintaining the public reputation of the legal profession, these realities cannot be avoided.

That courts will not enforce political promises, or undertakings outside the practice of law, does not mean that these promises must be ignored by law societies. Undertakings do not need to meet the requirements of tort or contract law, such as consideration, to be binding. The rule on undertakings is simple but strict: “A lawyer must not give an undertaking that cannot be fulfilled and must fulfill every undertaking given”.⁸² Moreover, the courts and the law societies have distinct roles in the oversight and regulation of the legal profession.⁸³

There are certainly several reasons for law societies to decline to consider broken political promises. Many of these reasons are the same as the public policy reasons given by courts in the cases discussed above. First, the prospect of discipline may chill or fetter decision-making by lawyer-politicians.⁸⁴

⁸⁰ I note that I have not discussed *Hogan v. Newfoundland (Attorney General)*, *supra* note 56. The Newfoundland politician Joey Smallwood featured prominently in that case, and was not a lawyer. However, it is unclear on the facts of the case what the purported promise was, whether Smallwood was the one who made it or received it, and whether Smallwood held any position that gave him any legal authority to do so.

⁸¹ At the federal level, for example, these have included party leaders Brian Mulroney, Kim Campbell, Jean Chretien, Paul Martin, Peter MacKay and Tom Mulcair, as well as John Manley, Jim Flaherty, and Tony Clement.

⁸² *FLSC Model Code*, *supra* note 2, r. 7.2-11.

⁸³ See e.g. *Groia v. Law Society of Upper Canada*, 2016 ONCA 471 at paras. 98-99, 2016 CarswellOnt 9453, 1 Admin. L.R. (6th) 175 at paras. 98-99, MacPherson J.A. for the majority, *aff'g* and quoting with approval from 2015 ONSC 686, 2015 CarswellOnt 1238, 124 O.R. (3d) 1 at paras. 34-35 (Div. Ct.): “the obligations of judges and the obligations of the [Law Society], as regulator of the profession, are different.”

⁸⁴ See e.g. the Mulroney case (*Ruffolo*, *supra* note 42 and accompanying text), McGuinty

Second, the appropriate recourse is for voters to consider voting differently.⁸⁵ Third, complaints may be abused for political purposes.⁸⁶ Fourth, while proceedings are unlikely to actually be politicized, they may be seen to be politicized, thus impairing law societies' reputations for neutrality.⁸⁷ Fifth, the potential volume of complaints is immense and would have serious resource implications for law societies.⁸⁸ These reasons are all compelling.

Balanced against these compelling reasons for non-intervention is another policy reason: the role of law societies in upholding the public reputation of lawyers and the integrity of the profession. While law societies cannot and should not become arbiters of the huge volume of political promises that lawyer-politicians breach on a regular basis, ignoring those promises is too simplistic a response. That is, there can be an appropriate middle ground between considering all political promises and considering none. Political promises are most reasonably understood — as discussed in the Mulrone case mentioned above — as a current statement of intentions based on the present circumstances and knowledge available.⁸⁹ They also attract a reasonable level of skepticism based on past experience.⁹⁰ These are reasonable bases for law societies to decline to consider these matters.

However, there are some circumstances in which lawyer-politicians will couch their political promises in what might be described as the trappings of law. In these circumstances, the lawyer-politicians are implicitly if not explicitly trading on their status as lawyers and putting into question their integrity as lawyers. Thus, reliance on these promises becomes more reasonable than, and should be expected more than, reliance on typical political promises. It is this subset of promises that should be legitimate concerns for law societies. The clearest examples are the MacKay-Orchard 'contract' and the McGuinty pledge: documents resembling a contract and that are signed by the lawyer-politician and another person. While the MacKay-Orchard agreement would likely not have been recognized by a court, it was a signed document that looked like a contract. MacKay seemed to be making a very clear promise that he proceeded to very clearly break. Similarly, the McGuinty pledge was in a document entitled "Taxpayer Protection Promise", and signed by a "witness". While the court was reasonable in its holding that this was not a contract, the pledge could nonetheless be reasonably understood to be a serious promise by a lawyer to

case (*CTF*, *supra* notes 59-60 and accompanying text), and Rae case (*Reclamation Systems*, *supra* note 71 and accompanying text).

⁸⁵ See e.g. the McGuinty case (*CTF*, *supra* note 61 and accompanying text); Dodek, "Public Office", *supra* note 2; Martin, "Political Practices", *supra* note 2, at 25; Ma, *supra* note 1, at 745.

⁸⁶ See e.g. Dodek, "Public Office", *ibid.*; Martin, "Political Practices", *ibid.*, at 26.

⁸⁷ Dodek, "Public Office", *ibid.*; Martin, "Political Practices", *ibid.*, at 25-26.

⁸⁸ See e.g. Martin, "Political Practices", *ibid.*, at 25.

⁸⁹ See e.g. the Mulrone case (*Ruffolo*, *supra* note 47 and accompanying text).

⁹⁰ See e.g. the Mulrone case (*Ruffolo*, *supra* note 48 and accompanying text).

the “witness” based on its form. These broken promises could reasonably cause the public to question the integrity of lawyers, or at least the integrity of lawyer-politicians. Similarly, if a lawyer-politician were to use the term ‘undertaking’, whether orally or in writing, she would be reasonably understood as invoking its full and official meaning and the consequences flowing from it.

The mere fact that a political promise framed in pseudo-legal form is unwise or beyond the powers of the person who made it should not prevent the law society from considering it, so long as it was clearly worded and clearly broken, as its terms would be reasonably understood. McGuinty’s promise was perhaps foolish in that it was incredibly broad (no tax increases and no deficit) and made before he had any direct knowledge of the state of the province’s finances. Moreover, a Premier or prospective Premier cannot bind the legislature. Similarly, MacKay’s promise may have unduly limited his ability to act in the best interests of the party, as he understood them at any given time. Recall, however, that it is for the lawyer to ensure that he makes no undertakings that cannot be fulfilled. Given that the motivating concern for law societies is the public reputation and integrity of the legal profession, it is the reasonable interpretation of the promise that should be determinative of meaning.

The Rae letter presents a more complicated situation. A signed letter, addressed to a specific person and answering that person’s specific inquiry about a specific situation involving that person’s interests, seems more like a lawyer’s promise than does a campaign platform aimed at voters in general. While the commitment in the letter, read strictly, may not have been broken, the corporation may reasonably have understood the promise to be broader — particularly since, given his effective powers as Premier, Rae certainly could have stopped the bill if he wished. From a regulatory perspective, the situation would seem to warrant at least an admonition from the law society that promises should be clear in their meaning.

In contrast, the Harper letter and Mulroney campaign promises are examples of conduct that would seem inappropriate for law society consideration.⁹¹ The Harper letter might seem to be a borderline situation — a signed letter, addressed to a specific person but making a specific promise that does not affect that person directly. Certainly, the fact that the letter was signed by a staffer, not the politician himself, is not relevant. However, this situation has the potential to make any general commitment grounds for discipline, if repeated in a signed letter to a single voter. Similarly, the Mulroney situation — general campaign promises made to the electorate at large — would be the archetype of a political promise that would not constitute an undertaking. These are the situations where the policy concerns against law society action are at their greatest, and the impact on the perceived integrity and reputation of the profession is at its least.

⁹¹ Hypothetically, if Harper had been a lawyer.

The letter examples, however, are noteworthy in highlighting the responsibility of lawyer-politicians for commitments made by members of their staff. The difficulty here may be in defining who is, or is not, on a lawyer-politician's staff. For example, a leader's personal spokesperson or aide wields his or her power and should be understood as speaking for the leader. In contrast, a party or campaign spokesperson might not. The distinction will not always be clear. Certainly, party members — whether candidates, legislators, or volunteers — cannot be reasonably understood to bind the leader.

Thus while political promises do not need to meet the rigid requirements of contract or tort law to constitute undertakings, there needs to be more than a mere promise to the public at large. This is a question of form, not content. Only political promises that use the trappings of law, such as the form of a contract or the term 'undertaking', should be of concern; in particular, signatures will be a key feature for written documents. This nuance allows law societies to engage in discipline of lawyer-politicians who impugn their integrity as members of the legal profession, without unduly interfering in — or being pulled into — the processes of politics and government. In particular, any chilling effect or fettering can be avoided by lawyer-politicians being wise about how they express their political promises. That a particular political promise is difficult or even impossible to keep should not excuse a lawyer-politician from disciplinary consequences.

It should be noted that in narrow circumstances, the legal barriers discussed above may preclude law society discipline of lawyer-politicians for broken political promises. If a promise in office (or a promise before the election campaign begins) is made only in the legislature, parliamentary privilege will apply. A promise made by a minister before an election campaign may be protected if it can be argued that that promise was made in an official ministerial capacity. However, neither of these barriers would apply to a campaign promise or a leadership campaign promise, which tend to be the situations in which political promises are most often made and broken.

CONCLUSION

Lawyer-politicians and their staff make — and break — many political promises. In general, these promises should not be considered undertakings such that their breach would be an appropriate matter for law society discipline. However, in a narrow subset of situations, where lawyer-politicians cloak their political promises in a particular kind of form, i.e. the trappings of law, disciplinary action may be appropriate. It is in these circumstances that the honour and integrity of the lawyer-politician, and arguably that of lawyers in general, is implicated in the same way as in the breach of a traditional undertaking.

Indeed, lawyer-politicians may find political benefit in this approach. All politicians struggle with how to convince voters that they will keep their promises. By using the trappings of law, a lawyer-politician can indicate that she is invoking her professional reputation and willing to risk law society discipline if the promise is not kept. Those lawyer-politicians who wish to

avoid such consequences should be careful about how they and their staff express their political promises. If they consider the professional risk to pose a comparative political disadvantage as compared to non-lawyer politicians, a foolproof way to avoid professional consequences would be to resign from the bar.⁹²

⁹² I have previously made this point for lawyer-politicians in general: Martin, "Political Practices", *supra* note 2, at 37.

