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2016

### The Immunity of the Attorney General to Law Society Discipline

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#### Recommended Citation

Andrew Flavelle Martin, "The Immunity of the Attorney General to Law Society Discipline" (2016) 94:2 Can Bar Rev 413.

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# THE IMMUNITY OF THE ATTORNEY GENERAL TO LAW SOCIETY DISCIPLINE

Andrew Flavelle Martin\*

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*The Attorney General is both the minister responsible to the legislature for oversight of the law society and a practicing member of the law society. This dual status raises important questions: Is the Attorney General subject to discipline by the law society? Should she be? This article argues that the Attorney General is immune, absent bad faith, both for prosecutorial discretion and core policy advice and decisions, as well as absolutely immune under parliamentary privilege for anything said in the legislature. The Attorney General enjoys no special immunity otherwise, i.e. for the practice of law outside prosecutorial discretion and for policy and political functions outside core policy advice and decisions. (The Attorney General for Ontario enjoys extended immunity under a statutory provision that is unique to that province.) The article then argues that the Attorney General should generally be subject to discipline to enhance the rule of law and the protection of the public. If some immunity is necessary, that immunity should require good faith.*

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*La procureure générale est à la fois la ministre responsable de la surveillance du barreau par le pouvoir législatif et un membre du barreau qui exerce. Ce double statut soulève des questions importantes. La procureure générale est-elle passible de sanctions disciplinaires imposées par le barreau? Devrait-elle l'être? L'auteur de cet article soutient que la procureure générale bénéficie d'une immunité, sauf dans les cas de mauvaise foi de sa part, tant en ce qui concerne le pouvoir discrétionnaire de poursuivre que les conseils et décisions de base en matière de politique. Elle jouit toutefois d'une immunité absolue en vertu du secret parlementaire concernant tout ce qui se dit en l'enceinte parlementaire. Par ailleurs, la procureure générale ne jouit d'aucune autre immunité particulière quant à l'exercice du droit hors de ses fonctions discrétionnaires de procureure générale et quant à ses pouvoirs de conseil et de décision liés aux politiques hors de ses fonctions de base en pareille matière. (La procureure générale de l'Ontario jouit*

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*d'une immunité élargie en vertu d'une disposition législative propre à cette province.) L'auteur de l'article soutient ensuite que la procureure générale devrait, de façon générale, pouvoir faire l'objet de sanctions disciplinaires afin d'améliorer la primauté du droit et la protection du public. Si un certain degré d'immunité est requis, cette immunité devrait avoir la bonne foi pour condition.*

### 1. Introduction

A key part of the mandate of the law society of each province and territory is “to protect the public interest.”<sup>1</sup> A core component of this mandate is to ensure the integrity and competence of lawyers, and to enforce these standards when necessary through disciplinary proceedings.<sup>2</sup> The purpose of such discipline is “to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.”<sup>3</sup> Thus, a lawyer who commits professional misconduct or conduct unbecoming may face disciplinary action.<sup>4</sup> Consider two examples: Lawyer X acts against a previous client in a related matter, violating the rules of professional conduct on conflicts.<sup>5</sup> Lawyer Y publicly impugns the integrity of a judge

<sup>1</sup> See e.g. *Legal Profession Act*, SBC 1998, c 9, s 3 [*Legal Profession Act*] (“It is the object and duty of the society to uphold and protect the public interest in the administration of justice”); *Law Society Act*, RSO 1990, c L.8, s 4.2, para 3 [*Law Society Act*] (“The Society has a duty to protect the public interest”); *Law Society of Upper Canada v Sudeesh Shivarattan*, 2010 ONLSPH 44 at para 2, [2009] LSDD No 167 (QL) (“The mandate of the Law Society is well known, and that is to protect the public interest”).

<sup>2</sup> See e.g. *Legal Profession Act*, *supra* note 1, s 3(b) (“It is the object and duty of the society to uphold and protect the public interest in the administration of justice by ... ensuring the independence, integrity, honour and competence of lawyers”); see also *Law Society Act*, *supra* note 1, s 4.1(a) (“It is a function of the Society to ensure that ... all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide”).

<sup>3</sup> Gavin MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Toronto: Carswell, 1993) (loose-leaf, revision 2015-3) at para 26.1 [MacKenzie], quoted with approval in *Ritchot v The Law Society of Manitoba*, 2010 MBCA 13 at para 48, 251 Man R (2d) 121. See e.g. *Law Society of Upper Canada v Walton*, 2015 ONLSTA 8 at para 29, [2015] LSDD No 41 (QL), quoting with approval from the reasons of the hearing panel 2014 ONLSTH 88 at para 15, [2014] LSDD No 206 (QL), quoting MacKenzie, *supra* note 3, including that excerpt.

<sup>4</sup> See e.g. *Law Society Act*, *supra* note 1, s 33: “A licensee shall not engage in professional misconduct or conduct unbecoming a licensee”.

<sup>5</sup> Federation of Law Societies of Canada, *Model Code of Professional Conduct*, (Ottawa: FLSC, 2009) last amended 2014, online: <www.flsc.ca>, rr 3.4-1 [*FLSC Model Code*] (“A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code”) and 3.4-10 (“Unless the former client consents, a lawyer must not act against a former client in: (a) the same matter, (b) any

without any basis, violating the duty to “encourage public respect for and try to improve the administration of justice.”<sup>6</sup> Both situations are potential grounds for disciplinary proceedings and clearly within the jurisdiction of the respective law society. Does this change if X or Y is the Attorney General?

In this paper I assess the disciplinary jurisdiction of the law society over the Attorney General. The situation of the Attorney General is unique and complicated. She is the only lawyer in elected public office who necessarily practices law in the exercise of official functions.<sup>7</sup> Moreover, the provincial Attorney General has a complex relationship with the law society. As Minister of Justice, she is responsible to the legislature for the oversight of the law society’s regulation of the legal profession.<sup>8</sup> She is also an *ex officio* benchler of the law society.<sup>9</sup> However, as a lawyer, she is also a member of the law society. These factors raise two important questions: Does the law society have disciplinary jurisdiction over the Attorney General? And should it? It is these questions I address here. While I focus my analysis on the peculiar situation of provincial and territorial Attorneys General, some of the same considerations apply to the federal Attorney General.<sup>10</sup>

I proceed in three parts. First, I review the various functions of the Attorney General to separate out three categories of conduct, because the actual and appropriate scope of law society jurisdiction may vary across those categories. I also consider historical examples of attempted discipline of the Attorney General. Second, I consider whether the Attorney General is, as a matter of current law, within the disciplinary jurisdiction of the law society. I begin by considering the law in territories and provinces other than Ontario. I argue that the Attorney General is not immune in general for public functions, with some exceptions. I then consider the special case of

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related matter, or (c) any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client”); see e.g. *Law Society of Alberta v Schwartz*, 2015 ABLs 4, [2015] LSDD No 159 (QL) (lawyer reprimanded for acting against a former client in a related matter).

<sup>6</sup> *FLSC Model Code*, *supra* note 5, r 5.6-1. See also commentary [1]: “A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations.” See e.g. *Law Society of Upper Canada v Napal*, 2014 ONLSTH 109 at paras 41, 45, [2014] LSDD No 130 (QL) (lawyer suspended for two months for committing misconduct by following client’s instructions to allege bias by judge (and Crown wrongdoing) with no basis).

<sup>7</sup> I will mention below the unusual, but by no means impossible, situation where the Attorney General is not a lawyer. See *infra* note 60.

<sup>8</sup> See e.g. *Ministry of the Attorney General Act*, RSO 1990, c M.17, s 5 [*MAGA*].

<sup>9</sup> See e.g. *Law Society Act*, *supra* note 1, s 12(2).

<sup>10</sup> In this article, I use the term “Canadian Attorneys General” to refer to provincial, territorial, and federal Attorneys General. I use the term “federal Attorney General” to refer specifically to the Attorney General for Canada.

Ontario under a provision unique to that province. Third, I consider whether the Attorney General should be subject to discipline. I argue that the current law outside Ontario is appropriate, and that the Ontario provision should not be adopted elsewhere. In particular, the importance of the rule of law and the protection of the public interest suggest that the Attorney General be subject to the same rules as all other lawyers. This consideration outweighs countervailing considerations, and particularly the concern that the prospect of professional discipline would deter the Attorney General from the proper exercise of her functions of office. If I am wrong, and such deterrence is a concern, I argue that good-faith immunity is a better solution than absolute immunity.

## 2. *The roles of the Attorney General: Three categories of conduct*

The Attorney General's official conduct can be separated into three categories based on the major roles of the office. The Attorney General is "the chief law officer of the Crown" and, as such, provides legal advice to cabinet and is responsible for all litigation involving the government.<sup>11</sup> These functions constitute the practice of law. As part of these legal functions, the Attorney

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<sup>11</sup> See e.g. *R v Ahmad*, 2011 SCC 6 at para 37, [2011] 1 SCR 110 ("the chief law officer of the Crown"). See e.g. *MAGA*, *supra* note 8, s 5; see especially ss 5(a), (e), (g), (h): "The Attorney General, (a) is the Law Officer of the Executive Council; ... (e) shall advise the Government upon all matters of law connected with legislative enactments and upon all matters of law referred to him or her by the Government; ... (g) shall advise the heads of the ministries and agencies of Government upon all matters of law connected with such ministries and agencies; (h) shall conduct and regulate all litigation for and against the Crown or any ministry or agency of Government in respect of any subject within the authority or jurisdiction of the Legislature." The Attorney General is, at least ostensibly, the legal adviser to the legislature. See e.g. *Krieger v Law Society of Alberta*, 2002 SCC 65 at para 27, [2002] 3 SCR 372 [*Krieger*], rev'g on other grounds 2000 ABCA 225, 277 AR 31 [*Krieger* (CA)], rev'g on other grounds 205 AR 243, 149 DLR (4th) 92 (QB) [*Krieger* (QB)]: "As in England, they [Attorneys General] serve as Law Officers to their respective legislatures." However, this role is contested or ignored entirely, and so I will not consider it further here. See e.g. *Schmidt v Canada (AG)*, 2016 FC 269 at para 33, 399 DLR (4th) 83 ("Parliament benefits from a report but is not the client of the Minister of Justice"). Justice Noël appears to ground that holding in an emphasis on the distribution of powers between Parliament and the executive; see e.g. para 277 ("To each his own obligation: the Executive governs and introduces bills to Parliament; Parliament examines and debates government bills and, if they are acceptable to Parliament, enacts them into law; the Judiciary, following litigation or a reference, determines whether or not legislation is compliant with guaranteed rights. Each branch of our democratic system is responsible for its respective role and should not count on the others to assume its responsibilities"). I have argued that insofar as the Attorney General is the lawyer to both the executive and the legislature, the rule on joint retainers applies: Andrew Flavelle Martin, "The Attorney General as Lawyer (?): Confidentiality Upon Resignation from Cabinet" (2015) 38:1 Dal LJ 147 at 162 [Martin, "Attorney General Resignation"]; *FLSC Model Code*, *supra* note 5, r 3.4-5.

General also has ultimate responsibility for all prosecutorial decisions—indeed, “[i]t is a constitutional principle that the Attorneys General . . . must act independently of partisan concerns when exercising their delegated sovereign authority to initiate, continue, or terminate prosecutions”,<sup>12</sup> generally referred to as “prosecutorial discretion.”<sup>13</sup> These functions are largely delegated to Crown prosecutors,<sup>14</sup> but a few such decisions must be made by the Attorney General personally.<sup>15</sup> The Attorney General is also the Minister of Justice and provides policy advice, not only in the areas of

<sup>12</sup> *Krieger, supra* note 11 at para 3. See similarly Ian G Scott, “The Role of the Attorney General and the Charter of Rights” (1987) 29:2 Crim LQ 187 at 189–91 [Scott, “Attorney General and the Charter”]. See recently *R v Cawthorne*, 2016 SCC 32, 402 DLR (4th) 50, McLachlin CJ [Cawthorne] (“a prosecutor—whether it be an Attorney General, a Crown prosecutor, or some other public official exercising a prosecutorial function—has a constitutional obligation to act independently of partisan concerns and other improper motives” at para 24; holding that “the principle that prosecutors must not act for improper purposes, such as purely partisan motives” is a principle of fundamental justice, at para 26; and noting that “the law presumes that the Attorney General—also a member of Cabinet—can and does set aside partisan duties in exercising prosecutorial responsibilities” at para 32).

<sup>13</sup> *Krieger, supra* note 11 at paras 46–47, on the scope of prosecutorial discretion: “Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution . . . (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether . . . and (e) the discretion to take control of a private prosecution . . . . Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General’s participation in it” [citations omitted]. *R v Anderson*, 2014 SCC 41 at para 44, [2014] 2 SCR 167, Justice Moldaver added to this list: “further examples to those in *Krieger* include: the decision to repudiate a plea agreement . . . ; the decision to pursue a dangerous offender application; the decision to prefer a direct indictment; the decision to charge multiple offences; the decision to negotiate a plea; the decision to proceed summarily or by indictment; and the decision to initiate an appeal” [citation omitted].

<sup>14</sup> See e.g. *Krieger, supra* note 11 at para 42: “This [prosecutorial] discretion is generally exercised directly by agents, the Crown attorneys, as it is uncommon for a single prosecution to attract the Attorney General’s personal attention.” See also 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 115 [Scott, “Constancy and Change”]: “Most of the decisions that are made about prosecutions and the conduct of civil or criminal trials are made by my agents. . . . I, of course, bear political responsibility for the decisions taken and must answer for them.”

<sup>15</sup> See e.g. the offence of promoting hatred in the *Criminal Code*, RSC 1985, c C-46, s 319(2) [*Criminal Code*]. Subsection 319(6) provides that “[n]o proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.” Note that some such duties may be delegable. See e.g. Public Prosecution Service of Canada, *Public Prosecution Service of Canada Deskbook* (Ottawa: Her Majesty the Queen in Right of Canada, 2014), Guideline 3.5, “Delegated Decision-Making”, online: <[www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpj/index.html](http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpj/index.html)>.

government for which she is responsible, but also more generally.<sup>16</sup> In this respect, she is like many lawyers who, in addition to legal advice, provide clients with policy advice;<sup>17</sup> furthermore, she is a partisan politician.<sup>18</sup> Thus, the conduct of the Attorney General can be divided into three categories: prosecutorial discretion, the practice of law other than prosecutorial discretion, and policy advice or decisions or political functions. The last category would include all conduct in office that does not constitute the practice of law. While the Attorney General could also conceivably face discipline for conduct in her personal life,<sup>19</sup> this article focuses on her conduct in office.

These three categories would have different potential for professional misconduct or conduct unbecoming, and thus different potential for disciplinary action. To the extent that the Attorney General engages in the practice of law, she could conceivably run afoul of many of the rules

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<sup>16</sup> See e.g. *MAGA*, *supra* note 8, ss 5(c), (i): “The Attorney General ... (c) shall superintend all matters connected with the administration of justice in Ontario; ... (i) shall superintend all matters connected with judicial offices.” See e.g. *Krieger*, *supra* note 11 at para 27: “the Attorney General is also the Minister of Justice.” See e.g. Scott, “Constancy and Change”, *supra* note 14 at 111–15, see especially: “I believe that it is the function of an independent attorney general to bring the focus of justice to questions of politics” at 112; “I believe that an independent attorney general has a special role regardless of the policy field in which that issue is presented” at 114. Scott also argues that this policy and political role as Minister of Justice is secondary to the legal role: “It is understood in our province [Ontario] that the attorney general is first and foremost the chief law officer of the Crown, and the powers and duties of that office take precedence over any others that may derive from his additional role as minister of justice and member of Cabinet” at 122.

<sup>17</sup> *FLSC Model Code*, *supra* note 5, r 3.1-2, commentary [10]: “In addition to opinions on legal questions, a lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy or social complications involved in the question or the course the client should choose. In many instances the lawyer’s experience will be such that the lawyer’s views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field and *should clearly distinguish legal advice from other advice*” [emphasis added]. See also Scott, “Attorney General and the Charter”, *supra* note 12 at 195: “In cases where legal and social policy is closely intertwined, as will often be the case in situations involving the Charter of Rights, the Attorney General must take care, in giving advice, to distinguish between legal opinion and policy preference”.

<sup>18</sup> See e.g. *Krieger*, *supra* note 11 at para 29: “the Attorney General is not only a member of Cabinet but also Minister of Justice, and in that role holds a position with partisan political aspects”.

<sup>19</sup> See e.g. *Law Society of Upper Canada v David Bradfield Sloan*, 2012 ONLSHP 176, [2012] LSDD No 203 (QL) (the lawyer had been convicted of child pornography offences and was disbarred at paras 38–40); *Nova Scotia Barristers’ Society v Calder*, 2012 NSBS 2 (the lawyer had been convicted of narcotics trafficking offences and was permitted to resign at para 10).

applicable to lawyers generally.<sup>20</sup> For example, in providing legal advice to cabinet, she could violate rules such as those concerning honesty and candour, confidentiality, conflicts, and withdrawal.<sup>21</sup> While it is rare that a Canadian Attorney General would appear in court, it is not impossible.<sup>22</sup> Any Attorney General who did so could also conceivably violate rules such as those regarding the lawyer as advocate.<sup>23</sup> In the exercise of prosecutorial discretion, the rule on prosecutors would be relevant: “When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.”<sup>24</sup> In policy and political functions, as in personal life, the applicable rules are those that apply to all lawyers whether inside or outside practice. These rules include those on encouraging respect for the administration of justice, on courtesy and good faith, and on non-interference with fair trial rights.<sup>25</sup> Moreover, some policy decisions or policy advice to cabinet would seemingly be inconsistent with the broad spirit of specific rules. For example, an Attorney General who recommends a significant cut in legal aid funding is arguably acting contrary to the duty to make legal services available and contrary to

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<sup>20</sup> There would be some rules that would be obviously inapplicable, such as those on fees and disbursements and preservation of client property. See e.g. *FLSC Model Code*, *supra* note 5, rr 3.5, 3.6.

<sup>21</sup> *Ibid*, rr 3.2-2 (honesty and candour), 3.3 (confidentiality), 3.4 (conflicts), 3.7 (withdrawal).

<sup>22</sup> Consider especially Ontario Attorney General Ian Scott, as discussed e.g. in The Honourable Marc Rosenberg, “The Attorney General and the Administration of Criminal Justice” (2009) 34:2 *Queen’s LJ* 813 at 847 [Rosenberg]. Rosenberg did suggest that such appearances are only appropriate in rare circumstances: “The Attorney General must be very careful that his or her appearance in court is not mistaken for partisan activity. When great counsel, such as Ian Scott, have been appointed to the position of Attorney General, the courts have benefited from their advocacy in their occasional court appearances. 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”.

<sup>23</sup> *FLSC Model Code*, *supra* note 5, r 5.1.

<sup>24</sup> *Ibid*, r 5.1-3. See also commentary [1]: “When engaged as a prosecutor, the lawyer’s primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately”.

<sup>25</sup> *Ibid*, rr 5.6-1 (respect for administration of justice), 7.2-1 (courtesy and good faith), 7.5-2 (fair trial rights). See also r 7.5-1: “*Provided that there is no infringement of the lawyer’s obligations to the client, the profession, the courts, or the administration of justice*, a lawyer may communicate information to the media and may make public appearances and statements” [emphasis added].



the goal of access to justice.<sup>26</sup> Similarly, an Attorney General who gives cabinet the legal advice that unilaterally reducing provincial judges' salaries would be high risk, but gives the policy advice to do so anyways, would seem to be threatening judicial independence.<sup>27</sup>

In the few reported cases where Canadian Attorneys General have faced law society discipline, the conduct at issue has been allegedly inappropriate public criticism of the judiciary, contrary to the duty to encourage public respect for the administration of justice.<sup>28</sup> Thus in *Barreau (Montréal) c Wagner*, a judge complained that Quebec Attorney General Claude Wagner had, during a speech to a bar organization, made “une attaque injustifiée de sa conduite comme juge.”<sup>29</sup> In *Law Society of Yukon v Kimmerly*, Yukon Attorney General Roger Kimmerly gave an interview in which he criticized a judge of the Yukon Supreme Court for covering a territorial coat of arms that had been installed on a courtroom wall, saying that “[i]t brings the repute of the courts and the judiciary into disrespect in the Yukon, and I’m extremely saddened by the whole thing.”<sup>30</sup> More recently, federal Attorney General Peter MacKay was criticized for publicly supporting comments made by the Prime Minister accusing the Chief Justice of Canada of inappropriate

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<sup>26</sup> *Ibid*, r 4.1-1: “A lawyer must make legal services available to the public efficiently and conveniently and, subject to rule 4.1-2, may offer legal services to a prospective client by any means”.

<sup>27</sup> Such a decision would seem to discourage public respect for the administration of justice. See e.g. *Provincial Court Judges’ Association of New Brunswick v New Brunswick (Minister of Justice)*; *Ontario Judges’ Association v Ontario (Management Board)*; *Bodner v Alberta*; *Conférence des juges du Québec v Québec (AG)*; *Minc v Québec (AG)*, 2005 SCC 44, [2005] 2 SCR 286.

<sup>28</sup> *FLSC Model Code*, *supra* note 5, r 5.6-1.

<sup>29</sup> *Barreau (Montréal) c Wagner* (1967), [1968] BR 235 at 235, 1967 CarswellQue 253 (WL Can) (CA) [*Barreau c Wagner*]. This is the phrasing of the Court. The reasons of the Court do not elaborate on the circumstances, and the original discipline decision was not published. See e.g. the description in John L 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 300 [Edwards, “Public Expectations”]: “the flamboyant Minister of Justice and Attorney General of Quebec Claude Wagner found himself having to meet charges of unprofessional conduct arising out of a speech, made at public meeting, in which Wagner had sought to awaken the conscience of the bar to the widespread erosion of public respect for the bench and bar. The complaint in this case was lodged by the judge whose conduct had been attacked in the course of the minister’s speech”.

<sup>30</sup> *Law Society of Yukon v Kimmerly*, [1988] LSDD No 1 (QL) (YLS), as discussed e.g. in 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 15 [Martin, “Political Practices”].

conduct—although no disciplinary hearing occurred.<sup>31</sup> It may not be clear in the circumstances whether such public criticism of the judiciary is made as the government’s lawyer or as a cabinet member, i.e. in the practice of law or in policy or political functions. However, the duty to encourage respect for the administration of justice would apply to conduct in either category.

While there are no reported Canadian cases of the law society seeking to discipline the Attorney General for conduct in the practice of law, such examples do come from the UK. Consider, for example, UK Attorney General Sir John Hobson, who was accused of submitting an affidavit that he “knew to be inaccurate and misleading” while appearing in an extradition hearing.<sup>32</sup> More recently, UK Attorney General Lord Peter Goldsmith was accused of manipulating his advice to cabinet on the legality of the Iraq war due to political pressure.<sup>33</sup> These two examples are not exactly analogous to Canada, as unlike Canadian Attorneys General, the UK Attorney General is not in cabinet and is not the Minister of Justice.<sup>34</sup> However, the Goldsmith

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<sup>31</sup> See e.g. Cristin Schmitz, “MacKay Fell Short as AG, Lawyers Say” 34:4 *The Lawyers Weekly* (30 May 2014) 1 [Schmitz]; Brent Cotter, “The Prime Minister v the Chief Justice of Canada: The Attorney General’s Failure of Responsibility” (2015) 18:1 *Leg Ethics* 73 (arguing that MacKay had an obligation to repudiate the Prime Minister’s comments (to “dissent publicly”), in addition to the obligation to not reinforce them, at 76, and asserting that MacKay would not be subject to discipline because of “rules of law that make most of the decisions of the Attorney General unreviewable” at 77, but did not elaborate). See also Martin, “Attorney General Resignation”, *supra* note 11 at 154, n 28, arguing that MacKay should have resigned as Attorney General.

<sup>32</sup> As described e.g. in Edwards, “Public Expectations”, *supra* note 29 at 300. See also e.g. John Ll J Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964) at 277–78 [Edwards, *Law Officers*]. As Edwards indicates, the Inner Temple dismissed the charges. No reasons are available. While the minutes of the Benchers of the Inner Temple contain a record of the complaint and the acquittal, they do not include reasons: Inner Temple, “Minutes of a Meeting of the Bench Table held on the 21st October, 1963, and adjourned to the 22nd October, 1963” *Bench Table Order Book*, BEN/1/42 (January 1963–December 1967) 208 at 208. This document is held at the Archives of the Inner Temple, and a copy is on file with the author.

<sup>33</sup> See e.g. Clare Dyer, “Attorney general spared trial by bar” *The Guardian* (14 July 2005), online: <[www.theguardian.com/politics/2005/jul/14/uk.iraq](http://www.theguardian.com/politics/2005/jul/14/uk.iraq)>. The Bar Council dismissed the complaints on the basis—as phrased by Dyer—that “it has no power to investigate the provision of legal opinions to ministers by the government’s law officers.” However, no reasons are available, and so I am unable to consider the Goldsmith rationale further. This matter is somewhat analogous to the case of John Yoo, who as a lawyer in the US Department of Justice, gave contrived advice on the legality of torture. The Office of Professional Responsibility’s recommendation to refer him for professional discipline was rejected by Associate Deputy Attorney General David Margolis. See e.g. David D Cole, “The Sacrificial Yoo: Accounting for Torture in the OPR Report” (2010) 4 *J Nat’l Security L & Pol’y* 455.

<sup>34</sup> See e.g. Edwards, *Law Officers*, *supra* note 32 at 166–67. See also Edwards, “Public Expectations”, *supra* note 29 at 301, noting that an “additional complication,

situation could certainly occur in Canada—although I do acknowledge that it is unlikely that a cabinet member would make such a complaint, or that the legal advice would become public so that other persons would know to complain, absent unusual circumstances.

### 3. *Is the Attorney General immune?*

As a matter of current law, Attorneys General outside Ontario are subject to law society discipline in official functions, with at least some exceptions. While the commonly cited 1967 decision of the Quebec Court of Appeal in *Barreau c Wagner* holds that the Attorney General is immune to discipline for all functions of office,<sup>35</sup> the reasoning is formal and narrow. Moreover, that reasoning is no longer correct after the Supreme Court of Canada’s 2002 decision in *Krieger v Law Society of Alberta*.<sup>36</sup> *Krieger* suggests that the Attorney General is generally subject to law society discipline, but immune for prosecutorial discretion absent bad faith. Beyond *Krieger*, the Attorney General will also be immune under parliamentary privilege for any statements within the legislature, and may arguably be immune for core policy functions absent bad faith. Ontario is a special case because of a unique provision in the province’s *Law Society Act*, first adopted in 1970, which grants the provincial Attorney General immunity in all official functions.<sup>37</sup>

#### A) *Outside Ontario: In general*

The case of *Barreau c Wagner*<sup>38</sup> is sometimes cited for the holding that the Attorney General, in the exercise of her official functions, is immune from professional discipline.<sup>39</sup> While this was indeed the holding of the

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regrettably not addressed by the Quebec Court of Appeal in the *Wagner* case, arises if the attorney general also happens to occupy the portfolio of minister of justice”.

<sup>35</sup> *Supra* note 29 at 235.

<sup>36</sup> *Krieger*, *supra* note 11.

<sup>37</sup> *Law Society Act*, *supra* note 1, s 13(3); originally *The Law Society Act*, SO 1970, c 19, s 13(3) [the 1970 Act].

<sup>38</sup> *Supra* note 29.

<sup>39</sup> See e.g. Adam M Dodek, ed, *Canadian Legal Practice: A Guide for the 21st Century* (Toronto: LexisNexis Canada, 2009) (loose-leaf release 42, March 2016) at para 5.78; Halsbury’s Laws of Canada (online), *Legal Profession*, “Regulation of Practice: Outside Interests and the Practice of Law: Public Office” (III.5(3)) at HLP-104 “Holding Public Office” (Cum Supp March 2015); Adam Dodek, “Public Office and Standards of Conduct” *National Magazine* (April–May 2013), online: <www.nationalmagazine.ca> [Dodek, “Public Office”]; Martin, “Political Practices”, *supra* note 30 at 18; Canadian Bar Association, *Code of Professional Conduct* (Ottawa: CBA, 2009), online: <www.cba.org> at 78 (ch X, commentary 8, footnote 10), as quoted in Martin, “Political Practices”, *supra* note 30 at 18, n 86; Martin, “Attorney General Resignation”, *supra* note 11 at 160; Edwards, “Public Expectations”, *supra* note 29 at 300–01. See also Schmitz, *supra* note 31, where Schmitz

Quebec Court of Appeal, these sources do not look at the reasoning behind the holding—reasoning that was very narrow:

Quand le ministre de la Justice exerce les pouvoirs qui lui sont conférés par la loi, il exerce le pouvoir exécutif de la Couronne et il agit pour la Couronne. Or, « nul acte de la Législature n’affecte les droits ou prérogatives de la Couronne, à moins qu’ils n’y soient compris par une disposition expresse » (art. 9 C.C.). La Loi du Barreau ne tombe pas sous l’exception et je suis d’avis que le dispositif du jugement du premier juge est bien fondé.<sup>40</sup>

That is, the Minister of Justice, in exercising her official powers, is part of the Crown; the *Civil Code* provides that “No act of the legislature affects the rights and prerogatives of the Crown, unless they are included therein by special enactment”;<sup>41</sup> the act establishing the powers of the Barreau does not include such a provision;<sup>42</sup> and so the Minister is immune. The Court provides no further explanation or justification for the immunity.

The relevant provision, which was then article 9 of the *Civil Code*, is standard in Canadian interpretation acts.<sup>43</sup> It is a codification of a common law rule.<sup>44</sup> The common law rule has an exception for “necessary implication”—i.e., the Crown may be bound in the absence of explicit language if necessary to the purpose of the legislation—and the codifications

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describes Adam Dodek’s suggestion that *Barreau c Wagner* may preclude disciplinary proceedings against Peter MacKay.

<sup>40</sup> *Barreau c Wagner*, *supra* note 29 at 237, quoting art 9 CCLC.

<sup>41</sup> Art 9 CCLC. This provision was unchanged since 1866: Paul-André Crépeau & John EC Brierley, eds, *Civil Code 1866-1980: An Historical and Critical Edition* (Montréal: McGill University & Chambre des Notaires du Québec, 1981) at 3.

<sup>42</sup> Now *An Act Respecting the Barreau du Québec*, CQLR c B-1. The provincial statutes on the self-regulation of the legal professions have various names. Most are called the *Legal Profession Act* (see e.g. SBC 1998, c 9); some are called the *Law Society Act* (see e.g. the Ontario *Act*, *supra* note 1). Indeed, the term “law society” itself is not always used (see e.g. the Nova Scotia Barristers’ Society). For consistency, I will use the phrases “law society acts” and “law societies” to refer to all regulators of the legal profession and their enabling statutes.

<sup>43</sup> See e.g. *Legislation Act, 2006*, SO 2006, c 21, Sched F, s 71: “No Act or regulation binds Her Majesty or affects Her Majesty’s rights or prerogatives unless it expressly states an intention to do so”.

<sup>44</sup> See e.g. Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 397–406 (common law rule), 406–10 (codification in statute) [Hogg, Monahan & Wright]. See also Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ont: LexisNexis Canada, 2014) at para 27.1 [Sullivan]. See also Law Reform Commission of Saskatchewan, *Crown Immunity: Final Report* (Saskatoon: The Commission, 2013) at 2–3 (common law rule), 4–5 (codification), online: <[www.lawreformcommission.sk.ca/Crown\\_Immunity\\_Report.pdf](http://www.lawreformcommission.sk.ca/Crown_Immunity_Report.pdf)> [LRCS].

have been interpreted in the same way.<sup>45</sup> These rules have been criticized, for example as being “inconsistent with the principles of a modern legal system and difficult to apply, creating uncertainty in the law.”<sup>46</sup> Peter Hogg has suggested that the presumption be reversed, i.e. that the Crown be liable unless a statute provides otherwise.<sup>47</sup> Two provinces have done so,<sup>48</sup> as has the Uniform Law Conference of Canada in its pending *Model Interpretation Act*.<sup>49</sup> In contrast, the Law Reform Commission of Saskatchewan argued that “the consequences of reversal are unknown and unpredictable”,<sup>50</sup> recommending instead that the *Interpretation Act* be amended to require all new statutes to explicitly specify whether the Crown is bound or not.<sup>51</sup>

It is worth emphasizing that *Barreau c Wagner*, as a decision of the Quebec Court of Appeal, may be at most persuasive in the other provinces and territories. Moreover, it is not entirely obvious whether some conduct, like giving a speech to lawyers or an interview to a reporter, is a function of office. Thus, for example, the Yukon Supreme Court refused to quash disciplinary proceedings against Attorney General Kimmerly for criticizing the Court in a media interview, partly because “the principle of ministerial immunity from a disciplinary inquiry by the Law Society ... has not been established”, and also because the judge was not “persuaded that Mr. Kimmerly’s conduct and statements at the time in question were made solely in the proper discharge of his ministerial responsibilities and totally

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<sup>45</sup> See e.g. Hogg, Monahan & Wright, *supra* note 44 at 411–17; Sullivan, *supra* note 44 at paras 27.12–27.15; LRCS, *supra* note 44 at 3–4.

<sup>46</sup> LRCS, *supra* note 44 at 1 [citation omitted]. See also e.g. Hogg, Monahan & Wright, *supra* note 44 at 456–59, see especially 457 (uncertainty and unpredictability) and 459 (“conflicts with the basic constitutional assumption that the Crown should be under the law”).

<sup>47</sup> Hogg, Monahan & Wright, *supra* note 44 at 456–60.

<sup>48</sup> *Interpretation Act*, RSPEI 1988, c I-8, s 14; *Interpretation Act*, RSBC 1996, c 238, s 14(1), as discussed e.g. in Sullivan, *supra* note 44 at para 27.1; Hogg, Monahan & Wright, *supra* note 44 at 409–10; LRCS, *supra* note 44 at 4. The BC *Act* provides an exception for land use and planning, which is not relevant for my purposes.

<sup>49</sup> Uniform Law Conference of Canada, *Model Interpretation Act*, s 20(1), online: <[www.ulcc.ca/images/stories/2015\\_pdf\\_en/2015ulcc0010.pdf](http://www.ulcc.ca/images/stories/2015_pdf_en/2015ulcc0010.pdf)> at 10. Section 20(2) provides for exceptions. At the time of writing, the adoption of the *Act* has been recommended by the corresponding working group, but the *Act* has yet to be officially adopted by the ULCC. Section 20 is a reversal from Uniform Law Conference of Canada, *Uniform Interpretation Act* (1984), s 8, online: <[www.ulcc.ca/en/uniform-acts-new-order/older-uniform-acts/476-josetta-1-en-gb/uniform-actsa/interpretation-act/1354-interpretation-act-1984](http://www.ulcc.ca/en/uniform-acts-new-order/older-uniform-acts/476-josetta-1-en-gb/uniform-actsa/interpretation-act/1354-interpretation-act-1984)>, which codified the traditional presumption: “No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty’s rights of prerogatives in any manner, except only as therein mentioned or referred to”.

<sup>50</sup> LRCS, *supra* note 44 at 19.

<sup>51</sup> *Ibid* at 20. *The Interpretation Act, 1995*, SS 1995, c I-11.2.

divorced from his status as a member of the Law Society of Yukon.”<sup>52</sup> For my purposes, I adopt a broad interpretation under which all policy and political functions, including speeches, are within the functions of office.

*Barreau c Wagner* must be read in light of the decision of the Supreme Court of Canada in *Krieger*. *Krieger* supports three separate but related propositions. First, *Barreau c Wagner* is no longer correct, as law society acts necessarily bind the Crown. Second, the Attorney General is generally subject to law society discipline as are Crown prosecutors. Third, the Attorney General is immune to law society discipline in exercising prosecutorial discretion absent bad faith, as are Crown prosecutors.

The decision of the Supreme Court of Canada in *Krieger* indicates that the holding in *Barreau c Wagner* is no longer correct and that law society acts bind the Crown even without a specific provision to that effect.<sup>53</sup> The Court in *Krieger* held that Crown prosecutors were generally subject to law society discipline, but immune for prosecutorial discretion absent bad faith.<sup>54</sup> The reasoning was as follows: the law society act prohibits the practice of law by non-members and gives the law society the power to discipline any member; Crown prosecutors practice law, and therefore must be members; accordingly, as members, Crown prosecutors are subject to discipline.<sup>55</sup> That is, the law society (of Alberta, in that case) “has the jurisdiction to regulate the conduct of all Alberta lawyers”, and “[a]ll Alberta lawyers are subject to the rules of the Law Society—Crown prosecutors are no exception.”<sup>56</sup> Among the contrary arguments, the Court noted the argument—rejected by the application judge—“that because the Act does not specifically state that it is binding on agents of the Crown, ... it is of no force and effect as regards Crown prosecutors.”<sup>57</sup> While the

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<sup>52</sup> *Kimmerly v Law Society of Yukon*, 3 YR 54 at para 4, [1987] YJ No 39 (QL). It is unclear from the brief reported oral reasons whether counsel cited *Barreau c Wagner* in argument in front of the application judge.

<sup>53</sup> *Krieger*, *supra* note 11.

<sup>54</sup> *Ibid* at para 4; see *ibid* at para 56 (while the case concerned a provincial Crown prosecutor, the Court explicitly stated that the same analysis would apply to federal Crown prosecutors).

<sup>55</sup> *Ibid* at paras 40–41.

<sup>56</sup> *Ibid*.

<sup>57</sup> *Ibid* at para 20, discussing the *Legal Profession Act*, SA 1990, c L-9.1 (now RSA 2000, c L-8). See *Krieger* (QB), *supra* note 11 at para 75: “In enacting the *Legal Profession Act*, the Legislature must be taken to have known that prosecutors are all barristers who act in the courts of civil or criminal jurisdiction of this Province. The purpose of the Act was to ensure that barristers are people of integrity. Nothing in the Act suggests that only certain barristers and solicitors are subject to it. Clearly the Legislature intended that the Act would apply to all lawyers whether acting as prosecutors or not. It would be absurd to hold that a barrister who conducted himself or herself in a grossly dishonest way should not be subject to dismissal from the Society simply because the dishonesty occurred whilst the

Supreme Court did not explicitly consider this argument, it did hold that the jurisdiction of the law society comes from the province's law society act (in Alberta, the *Legal Profession Act*), and that such jurisdiction includes Crown prosecutors.<sup>58</sup> If the *Act* did not bind the Crown, this would not be true. *Krieger* thus certainly overrides *Barreau c Wagner*.

Thus, *Barreau c Wagner* is not only narrow and formal, but is now no longer correct. The Court does not discuss why disciplinary immunity for the Attorney General is desirable, necessary, or consistent with legal principles other than those of statutory interpretation. Neither did the Court consider whether the Crown was bound by necessary implication. Moreover, this narrow reasoning is inconsistent with *Krieger*.

The reasoning in *Krieger* can, and should, be understood as meaning that the Attorney General is generally subject to law society discipline. While the Supreme Court did not specifically decide this point, it follows logically from the reasons. If the law society has jurisdiction over all lawyers in the province,<sup>59</sup> and the Attorney General is a lawyer,<sup>60</sup> then the law society should have jurisdiction over the Attorney General. More specifically, Justices Iacobucci and Major for the Court in *Krieger* were explicit that prosecutorial functions were functions of the Attorney General that were delegated to Crown prosecutors as agents.<sup>61</sup> If Crown prosecutors necessarily practice law when exercising functions delegated from the Attorney General, then those functions must also involve the practice of law to the extent that they are exercised personally by the Attorney General. Similarly, to the extent that Crown prosecutors are subject to discipline for the exercise of delegated powers, it follows that those powers are subject to discipline to the same extent when exercised by the person who delegates them. Moreover, if the Attorney General is to supervise and ultimately be responsible for the exercise of delegated powers, it would seem that she must be subject to law society discipline in the same way Crown prosecutors are.<sup>62</sup>

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barrister was engaged in prosecutorial activities. That could not have been the intention of the Legislature when it passed the *Legal Profession Act*".

<sup>58</sup> *Krieger*, *supra* note 11 at para 4; Alberta *Legal Profession Act*, *supra* note 57.

<sup>59</sup> *Krieger*, *supra* note 11 at paras 40–41.

<sup>60</sup> While the Attorney General is almost always a lawyer, she is not required to be a lawyer. See e.g. Martin, "Attorney General Resignation", *supra* note 11 at 166–67, discussing *Askin v Law Society of British Columbia*, 2013 BCCA 233, 363 DLR (4th) 706. The law society would have no jurisdiction over a non-lawyer Attorney General.

<sup>61</sup> *Krieger*, *supra* note 11 at para 42: "In making independent decisions on prosecutions, the Attorney General and his agents exercise what is known as prosecutorial discretion. This discretion is generally exercised directly by agents, the Crown attorneys".

<sup>62</sup> Thanks to Candice Telfer for this suggestion.

While *Krieger* specifically deals with prosecutorial discretion and the rest of the practice of law, the reasons do suggest that the law society would also have jurisdiction over any policy advice (and private conduct) of Crown prosecutors, and therefore by extension, over the policy and political functions of the Attorney General. For example, the reasons state in broad language that “[a]ll conduct that is not protected by the doctrine of prosecutorial discretion is subject to the conduct review process.”<sup>63</sup> Indeed, they explicitly recognize that law societies have jurisdiction over conduct outside of practice, and use that recognition to strengthen the position that prosecutorial discretion absent bad faith is within that jurisdiction too:

The conduct over which the Law Society has jurisdiction by virtue of [the *Legal Profession Act*] ... is very broad, encompassing conduct which may be unrelated to one’s legal practice. It would be an absurd interpretation of the statute to include such profession-unrelated conduct but exclude decisions of a prosecutor in a criminal matter.<sup>64</sup>

Thus, based on *Krieger*, the law society has jurisdiction over the Attorney General’s conduct not only in the practice of law, but also in policy and political functions.

John Edwards, writing in 1995, took a position similar to the one that the Supreme Court would later adopt in *Krieger* in 2002—although he explicitly considered the disciplinary liability of the Attorney General as well as that of Crown prosecutors.<sup>65</sup> Specifically, he argued that the Attorney General and Crown prosecutors should be subject to discipline as other lawyers are for conduct in the practice of law, except for prosecutorial discretion.<sup>66</sup> While Edwards did not specifically discuss the policy and

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<sup>63</sup> *Krieger*, *supra* note 11 at para 4.

<sup>64</sup> *Ibid* at para 53.

<sup>65</sup> Edwards, “Public Expectations”, *supra* note 29 at 298, describing “a relatively new development that concerns the extent to which an attorney general and his agents, be they the director of public prosecutions, Crown Counsel, or state prosecutors, are amenable to the disciplinary processes of the professional body that is responsible for maintaining minimum standards of professional conduct.” See also 299–300, where Edwards specifically considers two of the Attorneys General mentioned above, John Hobson of the UK and Claude Wagner of Quebec.

<sup>66</sup> *Ibid* at 302: “[t]here should be no serious question raised if what is at issue is the professional conduct of the prosecutor in the handling of a case as it proceeds through the criminal courts. If the alleged breach of ethical standards consists of, for example, misleading the court, pressuring Crown witnesses as to their forthcoming testimony, or failing to observe the essential requirements of pre-trial disclosure to the defence, no exemption based on the office should protect the prosecutor from his or her accountability to the disciplinary processes that extend to all members of the profession. ... The boundary line is crossed if the body seeking to exercise the disciplinary review powers of the law



political functions of the Attorney General, he did acknowledge that such conduct might be different, observing that “an additional complication, regrettably not addressed by the Quebec Court of Appeal in the *Wagner* case, arises if the attorney general also happens to occupy the portfolio of minister of justice or its equivalent.”<sup>67</sup>

*B) Outside Ontario: Exceptions*

Thus, following *Krieger*, the Attorney General is subject to law society discipline as a general rule. However, there are at least two exceptions. One exception, prosecutorial discretion, comes from *Krieger* itself. The other, parliamentary privilege, is external to *Krieger*. There may also be a third exception, for core policy advice and decisions.

The Court in *Krieger* held that Crown prosecutors are immune from law society discipline in the exercise of prosecutorial discretion, absent bad faith, and it is clear that the rationale applies equally to the Attorney General herself. The Court relied on the “constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions.”<sup>68</sup> Just as “the fundamental principle of the rule of law under our Constitution” protects prosecutorial discretion from both “political interference” by cabinet and “judicial supervision”,<sup>69</sup> it also requires such “deference” from “statutory bodies like provincial law societies.”<sup>70</sup> But similarly, just as judicial review is appropriate where there is an abuse of process,<sup>71</sup> law society discipline is appropriate where there is “bad faith or improper purpose.”<sup>72</sup> These exceptions are justified because such conduct is beyond the legitimate scope of prosecutorial discretion: “an official action which is undertaken in bad faith or for improper motives is not within the scope of the powers of the Attorney General.”<sup>73</sup> Here, the Court in *Krieger* adopted the general statement from the concurring reasons of Justice McIntyre in *Nelles v Ontario* that “public officers are entitled to no special immunities or privileges when they act beyond the powers

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society focuses its attention on the *decisions* made by the prosecutor in charge of the case” [emphasis in original]. See also 300, discussing the Hobson case mentioned above: “The professional conduct of the attorney general, however, was concerned with his observance of the appropriate standards by which every lawyer is subject to the assessment of his peers. Hobson enjoyed no preferential status in this regard, simply because he was the incumbent attorney general”.

<sup>67</sup> *Ibid* at 300–01.

<sup>68</sup> *Krieger*, *supra* note 11 at para 30.

<sup>69</sup> *Ibid* at para 32.

<sup>70</sup> *Ibid* at paras 45–46.

<sup>71</sup> *Ibid* at para 32.

<sup>72</sup> *Ibid* at para 51.

<sup>73</sup> *Ibid* at para 51.

which are accorded to them by law in their official capacities.”<sup>74</sup> The Court in *Krieger* gave an example: “[a] prosecutor who laid charges as a result of bribery or racism or revenge.”<sup>75</sup>

Like the Court in *Krieger*, Edwards’ rationale for disciplinary immunity of the Attorney General and Crown prosecutors in prosecutorial discretion is a constitutional principle.<sup>76</sup> He also seems to recognize that such immunity should not be absolute, insofar as he refers approvingly to the decision of the Supreme Court of Canada in *Nelles*, rejecting civil immunity for malicious prosecution.<sup>77</sup>

The second exception to disciplinary jurisdiction is absolute immunity for anything the Attorney General says in the legislature, because of parliamentary privilege.<sup>78</sup> Thus, for example, the Attorney General could freely impugn the integrity of a judge or a lawyer or a party to a proceeding, or jeopardize fair trial rights by commenting on an ongoing proceeding, in blatant contravention of the rules of professional conduct, without the possibility of any disciplinary ramifications—as long as she did so in the legislature and nowhere else. She could even violate the law with impunity, for example, by disclosing the name of a young person under the *Youth Criminal Justice Act*.<sup>79</sup> While the Attorney General saying any of these things could face consequences within the legislature or be forced to resign, those consequences cannot include law society discipline. Like the immunity for prosecutorial discretion, this immunity for parliamentary

<sup>74</sup> *Ibid* at para 51, quoting from *Nelles v Ontario*, [1989] 2 SCR 170 at 211, 60 DLR (4th) 609 [*Nelles*].

<sup>75</sup> *Krieger*, *supra* note 11 at para 52.

<sup>76</sup> Edwards, “Public Expectations”, *supra* note 29 at 298: “What cannot be ignored, however, are the serious constitutional issues that emerge from the shadows if the breadth of the professional body’s disciplinary powers are expanded in a way that crosses the boundary line between (a) the prosecutor as an ordinary member of the legal profession who, like his colleagues in the defence bar, specializes in the practice of criminal law, and (b) the state or Crown prosecutor in his capacity as the public embodiment of the attorney general’s constitutional powers and prerogatives in the area of criminal law”.

<sup>77</sup> *Ibid* at 304: “I welcome this additional form of public accountability encompassing the office of attorney general and its prosecutorial agents”.

<sup>78</sup> See e.g. *Canada (House of Commons) v Vaid*, 2005 SCC 30, [2005] 1 SCR 667 [*Vaid*], as discussed e.g. in Martin, “Political Practices”, *supra* note 30 at 17.

<sup>79</sup> *Youth Criminal Justice Act*, SC 2002, c 1, ss 110(1), 129, 138. Consider e.g. two instances in Ontario where a minister other than the Attorney General resigned after the naming in the legislature of a young person contrary to corresponding provisions of the *Young Offenders Act*, RSC 1985, c Y-1: Solicitor General Bob Runciman, where the naming was in a throne speech, and Corrections Minister Rob Sampson, where the naming was by a legislator of the governing party. These are discussed e.g. in Lorne Sossin & Valerie Crystal, “A Comment on ‘No Comment’: The *Sub Judice* Rule and the Accountability of Public Officials in the 21st Century” (2013) 36:2 Dal LJ 535 at 539–40.

privilege has a constitutional basis: “Parliamentary privilege ... is one of the ways in which the fundamental constitutional separation of powers is respected.”<sup>80</sup> “The purpose of privilege is to recognize Parliament’s *exclusive* jurisdiction to deal with complaints within its privileged sphere of activity.”<sup>81</sup> However, unlike the immunity for prosecutorial discretion, this immunity for parliamentary privilege seemingly has no exception for bad faith.<sup>82</sup>

A potential third exception to disciplinary jurisdiction is the Attorney General’s exercise of policy functions. For example, the Attorney General in her role as Minister of Justice makes policy decisions and gives policy advice to cabinet.<sup>83</sup> Given the protection of policy decisions in tort law, a credible argument could be made that such policy decisions—as well as policy advice—should also be beyond law society discipline. The Supreme Court of Canada has recognized civil immunity for “core policy” decisions, i.e. “decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith.”<sup>84</sup> For example, the federal Attorney General’s decision on a mercy application was such a policy decision.<sup>85</sup> Just as courts are a questionable forum to review multifaceted discretionary decisions about societal needs and priorities,<sup>86</sup> so too would be a law society disciplinary tribunal. Moreover, many of the Attorney General’s policy advice and decisions may be controversial among the bench and bar.<sup>87</sup> For example, while a law society may have views about the appropriate design and funding of the legal aid system,

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<sup>80</sup> *Vaid*, *supra* note 78 at para 21.

<sup>81</sup> *Ibid* at para 4 [emphasis in original], see e.g. para 20: “Quite apart from the potential interference by outsiders [courts or tribunals] in the direction of the House, such external intervention would inevitably create delays, disruption, uncertainties and costs which would hold up the nation’s business and on that account would be unacceptable”.

<sup>82</sup> See by analogy *Vaid*, *ibid* at para 4, rejecting the assertion that “an allegation of discrimination destroys any privilege that might otherwise immunize the Speaker’s conduct from external review”.

<sup>83</sup> See e.g. *Krieger*, *supra* note 11 at para 27.

<sup>84</sup> *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 90, [2011] 3 SCR 45, McLachlin CJ [*Imperial Tobacco*].

<sup>85</sup> *Hinse v Canada (AG)*, 2015 SCC 35 at para 36, [2015] 2 SCR 621, Wagner and Gascon JJ (the Court is clear that the holding is restricted to mercy decisions prior to 2002 amendments to the *Criminal Code*, *supra* note 15, by the *Criminal Law Amendment Act, 2001*, SC 2002, c 13, s 71, at paras 34, 36).

<sup>86</sup> See e.g. Hogg, Monahan & Wright, *supra* note 44 at 226–27.

<sup>87</sup> Consider e.g. some of the many controversial decisions made by a single Attorney General, Ian Scott, as discussed in Ian Scott with Neil McCormack, *To Make a Difference: A Memoir* (Toronto: Stoddart, 2001): to abolish QCs at 138; to change the appointment process for provincial judges at 138–39; to restructure the province’s courts at 176; to allow contingency fees in class actions at 182; and to support no-fault car insurance at 183.

such views would not be determinative and would certainly not be any more legitimate than those of the Attorney General or her ministry. The Attorney General's policy decisions about the law society, including amendments to its enabling legislation, should even more so be protected from law society supervision. There is no apparent reason to treat policy advice differently than policy decisions.

Such immunity for core policy advice and decisions, however, would not cover everything done in the Attorney General's policy and political capacity. The Supreme Court of Canada has been explicit that core policy decisions are "a narrow subset of discretionary decisions, covering only those decisions that are based on public policy considerations, like economic, social, and political considerations."<sup>88</sup> For example, unfounded or unsupported criticism of the judiciary, even where nominally made in the execution of official duties and arguably in good faith, would not be a core policy decision.<sup>89</sup>

Thus, the law society generally has jurisdiction over the Attorney General, but with some exceptions. In legal functions, she would be immune only for prosecutorial discretion absent bad faith. In policy and political functions, she would likely be immune for "core" policy decisions, absent bad faith. She would also be absolutely immune for anything she said in the legislature. Aside from these exceptions, she would be subject to professional discipline in the same way as all lawyers.

### *C) Ontario: Subsection 13(3) of the Law Society Act*

In Ontario, the immunity is extended by statute to all conduct in official duties. Specifically, the Ontario Attorney General is immune not only for prosecutorial discretion absent bad faith and core policy decisions absent bad faith, but also for all other legal and policy or political functions. This additional immunity would likely apply only absent bad faith.

Subsection 13(3) of the Ontario *Law Society Act* grants the provincial Attorney General, in the exercise of duties of office, seemingly absolute immunity from law society discipline: "No 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>90</sup> This provision is

<sup>88</sup> *Imperial Tobacco*, *supra* note 84 at para 88.

<sup>89</sup> Where the Attorney General must know that such criticism is unfounded, as in the MacKay example discussed above, bad faith may be apparent.

<sup>90</sup> *Law Society Act*, *supra* note 1, s 13(3).

unique among Canadian law society acts,<sup>91</sup> and may well be unique in the Commonwealth.<sup>92</sup> John Edwards has suggested it be repealed.<sup>93</sup> With the exception of Edwards, this provision is not mentioned in any of the standard Canadian legal literature on the role of the Attorney General.<sup>94</sup> As I will explain, this provision has a curious history.

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<sup>91</sup> The *Legal Profession Act*, RSY 2002, c 134, s 106 [*Yukon Act*] (originally SY 1984, c 17, s 108) has similar language to ss 13(1) and 13(2) (which subsections I discuss below) but no equivalent to s 13(3).

<sup>92</sup> Edwards, “Public Expectations”, *supra* note 29 at 303: “There may be other examples of this kind of extraordinary protection conferred on attorneys general in other parts of the Commonwealth, but I am unable to cite any other historical precedents for this kind of immunity”.

<sup>93</sup> *Ibid.*: “To say the least, it seems incongruous to confer upon every attorney general in Ontario the ex officio rank of a bencher of the governing body and simultaneously clothe the same person with total immunity from the disciplinary powers of the law society. In my opinion, the Ontario provision cited above, or any parallel enactments, should be totally removed from the statute book” (Edwards provides no further argument for repeal, although he does note at 304 that absolute disciplinary immunity is inconsistent with *Nelles*, and he is clear in the rest of the article that the Attorney General should generally be as liable as other lawyers).

<sup>94</sup> In this respect I am referring to the following: Scott, “Attorney General and the Charter”, *supra* note 12; Scott, “Constancy and Change”, *supra* note 14; Grant Huscroft, “The Attorney General and Charter Challenges to Legislation: Advocate or Adjudicator?” (1995) 5 NJCL 125; Kent Roach, “The Attorney General and the Charter Revisited” (2000) 50:1 UTLJ 1; Debra M McAllister, “The Attorney General’s Role as Guardian of the Public Interest in Charter Litigation” (2002) 21 Windsor YB Access Just 47; 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; Mark J Freiman, “Convergence of Law and Policy and the Role of the Attorney General” (2002) 16 SCLR (2d) 335; Lori Sterling & Heather Mackay, “Constitutional Recognition of the Role of the Attorney General in Criminal Prosecutions: *Krieger v. Law Society of Alberta*” (2003) 20 SCLR (2d) 169; The Honourable Justice Ian Binnie, “Mr. Attorney Ian Scott and the Ghost of Sir Oliver Mowat” (2004) 22:4 Adv Soc’y J 4; 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; 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; Rosenberg, *supra* note 22; Grant Huscroft, “Reconciling Duty and Discretion: The Attorney General in the Charter Era” (2009) 34:2 Queen’s LJ 773. (I do not mean to suggest that this literature should have cited this provision.) It is mentioned briefly in Martin, “Attorney General Resignation”, *supra* note 11 at 160 and at 161, n 63, quoting Edwards, “Public Expectations”, *supra* note 29 at 303.

The immunity provision originated in the 1970 *Law Society Act*,<sup>95</sup> and has had no substantive amendments since its enactment.<sup>96</sup> It was accompanied by two other subsections, subsections that are unusual but not unique in Canada, and that have also not had any substantive amendments since then. Subsection 13(1) provides, “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.” The provision also grants her a corresponding power to “require the production of any document or thing pertaining to the affairs of the Society.”<sup>97</sup> There was disagreement among legislators concerning whether this role as guardian of the public interest was part of the inherent role of the Attorney General,<sup>98</sup> although there was eventual agreement that it was related to the inherent role of the Attorney General and not to her status as an *ex officio* benchner.<sup>99</sup>

<sup>95</sup> The 1970 *Act*, *supra* note 37.

<sup>96</sup> *The Government Reorganization Act, 1972*, SO 1972, c 1, s 9(7), changed the reference to “the Minister of Justice and Attorney General” to simply “the Attorney General” [*The Government Reorganization Act*]. The *Law Society Amendment Act, 1998*, SO 1998, c 21, s 7(3) [*Law Society Amendment Act, 1998*] substituted “proceedings of the Society or to any penalty imposed under this Act” for “disciplinary proceedings of the Society or to any penalty imposed in Convocation or in a committee of benchers”.

<sup>97</sup> *Law Society Act*, *supra* note 1, s 13(1). The same change to the term “the Minister of Justice and Attorney General” was made by *The Government Reorganization Act*, *supra* note 96, s 9(7). The *Law Society Amendment Act, 1998*, *supra* note 96, s 7(1) replaced “document, paper, record or thing” with “document or thing.” The *Access to Justice Act, 2006*, SO 2006, c 21, Sched C, s 13 was part of the amendments extending law society regulation to Ontario paralegals. It replaced “having to do with the legal profession in any way” with “having to do in any way with the practice of law in Ontario or the provision of legal services in Ontario”.

<sup>98</sup> There was a suggestion during debate that the Attorney General has always had this role: “And even if section 14 [later 13] were absent, the Attorney General as the person who is responsible for and commandeers this legislation through the House is the guardian of the public interest in our name.” Ontario, Legislative Assembly, *Official Record of Debates (Hansard)*, 28th Leg, 3rd Sess [*Hansard*], No 37 (14 April 1970) at 1488 (Elmer Walter Sopha). In contrast, the Attorney General argued that this was new: “one finds here something new, something we have not had before” (*Hansard*, No 71 (19 May 1970) at 2860 (Hon Arthur Wishart)).

<sup>99</sup> *Hansard, ibid*, No 71 (19 May 1970) at 2863 (James Edward Bullbrook): “Section 13 is not talking about you [the Attorney General] as a benchner. It is not; it is talking about you as the Attorney General of the province of Ontario. . . . The Attorney General of Ontario does not have to be an *ex officio* benchner to guard the public interest; that is inherent in his very office.” Accordingly, subsection 13(1) was amended at the committee of the whole to remove a reference to Attorney General as an *ex officio* benchner. Whereas the bill as introduced read “The Minister of Justice and Attorney General for Ontario in his capacity as an *ex officio* benchner shall serve as the guardian of the public interest”, it was amended to read “The Minister of Justice and Attorney General for Ontario shall serve as the guardian of the public interest” (*Hansard, ibid*, No 71 (19 May 1970) at 2864).

Subsection 13(2) provides that such documents or things required under that power are admissible only in proceedings under the *Law Society Act*.<sup>100</sup> Subsections similar to 13(1) and 13(2), but not to subsection 13(3) on disciplinary immunity, were adopted in the Yukon in 1984.<sup>101</sup>

The 1970 *Act* was primarily a response to the McRuer Report on civil rights.<sup>102</sup> (While this Act, including subsection 13(3), came only a few years after the *Wagner* decision, there is no indication that legislators had considered that decision or intended to codify it.) However, none of section 13 was specifically suggested by McRuer, either in his analysis of the role of the Attorney General or of the self-governing professions.<sup>103</sup> Indeed, only once did McRuer refer to the Attorney General using language close to “guardian of the public interest”.<sup>104</sup> And while McRuer noted that the Attorney General was a bencher, he did not discuss whether the Attorney General *should* be a bencher.<sup>105</sup>

With respect to the self-governing professions, the major point of the McRuer Report was that “the granting of self-government is a delegation

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<sup>100</sup> *Law Society Act*, *supra* note 1, s 13(2). The same change to the term “the Minister of Justice and Attorney General” was made by *The Government Reorganization Act*, *supra* note 96, s 9(7). The *Law Society Amendment Act, 1998*, *supra* note 96, s 7(2) made the same change to “document, paper, record or thing” and replaced “disciplinary proceedings of the Society or to any penalty imposed in Convocation or in a committee of benchers” with “proceedings of the Society or to any penalty imposed under this Act”.

<sup>101</sup> The Yukon *Act*, *supra* note 91, s 106(1) uses broader language than s 13(1) but requires a court application: “The Minister shall serve as a guardian of the public interest in all matters within the scope of this Act, and for this purpose may apply by originating application to the Supreme Court for an order requiring the society or any member to produce any document, record, or thing pertaining to the affairs of the society.” *Ibid*, s 106(2), is similar to s 13(2): “No admission of any person in any document, record, or thing produced under subsection (1) is admissible in evidence against that person in any proceedings other than disciplinary proceedings under this Act”.

<sup>102</sup> *Hansard*, *supra* note 98, No 4 (27 Feb 1970) at 96 (Hon Arthur Wishart): “Mr. Speaker, this bill is just what the title says it is, an Act to revise and completely review the Law Society Act, ... following generally the recommendations of the Hon. Mr. McRuer”; Ontario, *Royal Commission: Inquiry into Civil Rights* (Toronto: Queen’s Printer for Ontario, 1968, 1969, 1970) (Hon James Chalmers McRuer, Commissioner) [*McRuer Report*]. The Commission issued three reports in five volumes. *Report Number One* had three volumes and was published in 1968. *Report Number Two*, the fourth volume, was published in 1969. *Report Number Three*, the fifth volume, was published in 1971.

<sup>103</sup> *McRuer Report Number One*, *supra* note 102, vol 2, Section 6, 929–56 (“The Role of the Attorney General in Government”); *ibid*, vol 3, Section 4, 1159–1228 (“Self-Governing Professions and Occupations”).

<sup>104</sup> *Ibid*, vol 2, Section 6 at 932: “guardian of the interests of the public”.

<sup>105</sup> *Ibid*, vol 3, Section 4 at 1165 (noting that the Attorney General is a bencher); *ibid*, vol 2, Section 6 and vol 3, Section 4 (no mention of whether the Attorney General should be a bencher).

of legislative and judicial functions and can only be justified as a safeguard to the public interest.”<sup>106</sup> However, the 1970 *Act* did not implement, for the law society, McRuer’s recommendation that lay members be added to the “governing bodies” of professional regulators.<sup>107</sup> The 1970 *Act* did establish a new body—the Law Society Council—that included lay members.<sup>108</sup> Like the Council with its lay members,<sup>109</sup> section 13 seems to have been added as a substitute for lay benchers.<sup>110</sup> Indeed, the explanatory note for the bill suggests this purpose. The note provides a list that matches the recommendation numbers to the sections of the bill. For the recommendation on lay members of governing bodies, the note reads “Not adopted – but see ss. 14 and 27.”<sup>111</sup> These were the sections of the bill that would become sections 13 and 26, on the Attorney General as “guardian of the public interest” and on the Law Society Council.<sup>112</sup>

There is nothing in the record that specifically mentions the intentions behind the immunity provision in subsection 13(3). It is not mentioned in the debates in the legislature or at committee of the whole.<sup>113</sup> The subsection did undergo amendment at the Legal and Municipal Committee. Whereas

<sup>106</sup> *Ibid*, vol 3, Section 4, at 1162.

<sup>107</sup> *Ibid*, vol 3, Section 4, at 1166, 1209.

<sup>108</sup> The 1970 *Act*, *supra* note 37, s 26.

<sup>109</sup> See e.g. *Hansard*, *supra* note 98, No 32 (8 April 1970) at 1285 (James Edward Bullbrook, reading from Harold Greer, “Law Society Dodges Public Interest” *Peterborough Examiner* (5 March 1970)): “And far from appointing laymen as benchers, the society proposes instead a ‘law society council’.” See also e.g. No 32 (8 April 1970) at 1289 (Patrick Daniel Lawlor): “As we come to the Law Society Act, that principle [lay benchers] in effect has been abandoned. What has been substituted for it is the concept of a council”.

<sup>110</sup> See also *LaBelle v Law Society of Upper Canada*, 52 OR (3d) 398 at paras 18–20, [2001] OJ No 60 (QL) (Sup Ct J), *aff’d* 56 OR (3d) 413, [2001] OJ No 4263 (QL) (CA): “At the same time as s. 13 was passed, s. 26 was also enacted which established a body known as the Law Society Council ‘to consider the manner in which the members of the Society are discharging their obligations to the public and generally matters affecting the legal profession as a whole’ .... Clearly, the 1970 legislation contemplated some form of public accountability on the part of the Law Society.” See also Christopher Moore, *The Law Society of Upper Canada and Ontario’s Lawyers, 1797-1997* (Toronto: University of Toronto Press, 1997) at 284 [Moore]: “Some of the changes firmly established due process and public supervisory authority over the Law Society”.

<sup>111</sup> Bill 7, *An Act to consolidate and revise The Law Society Act*, 28th Leg, 3rd Sess, Ontario, 1970 [Bill 7]. I acknowledge that the explanatory note does not form part of the bill, but it does provide some context.

<sup>112</sup> There was minor renumbering as a result of amendments to the bill. For consistency, outside of this instance I refer to the relevant provision as section 13.

<sup>113</sup> First reading: *Hansard*, *supra* note 98, No 4 (27 Feb 1970) at 96. Second reading: Nos 32 (8 April 1970) at 1281–96, 33 (9 April 1970) at 1322–43, 37 (14 April 1970) at 1478–1504. Committee of the whole: Nos 71 (19 May 1970) at 2849–77, 80 (26 May 1970) at 3210–22, 81 (27 May 1970) at 3237–49. Third reading: No 81 (28 May 1970) at 3250–51. Royal Assent: No 114 (26 June 1970) at 4640–42.



the provision initially provided that current and past Attorneys General were immune to disciplinary proceedings or penalties “for anything done by him while in such office”, the committee narrowed it to cover only “anything done by him while exercising the functions of such office.”<sup>114</sup> This amendment, which clarifies that the immunity is only for acts done in an official capacity, suggests that the provision was discussed at committee. However, no proceedings from those committee meetings are available.<sup>115</sup>

Bill 7—which would become the 1970 *Act*—was, as first introduced, based on a draft bill composed by the Law Society and approved by Convocation.<sup>116</sup> However, this draft bill did not include section 13 or any of its three component subsections.<sup>117</sup> Thus the law society’s preferences for the bill cannot illuminate the purpose of subsection 13(3).<sup>118</sup>

Nonetheless, some reasonable inferences can be drawn from the inclusion of subsection 13(3) within the 1970 *Act* and more specifically within section 13. Recall that subsection 13(1) sets out the Attorney General’s role as “guardian of the public interest” and grants a specific power

<sup>114</sup> Bill 7, *supra* note 111, as at first reading and as amended by the Legal and Municipal Committee [emphasis from annotation on amended bill].

<sup>115</sup> Committee *Hansard* was not published at that time. Neither the Archives of Ontario nor the Legislative Library at Queen’s Park hold any transcripts or other records from that committee at that time.

<sup>116</sup> *Hansard, supra* note 98, No 32 (8 April 1970) at 1282–84 (James Edward Bullbrook, reading from a letter from Treasurer WGC Howland to Leader of the Opposition Robert F Nixon (5 June 1969)). As detailed in the letter as read, a draft was approved by Convocation on 16 November 1968 and circulated to the profession on 17 December 1968 (at 1252); amendments were approved by Convocation on 26 February 1969 and circulated to the profession on 20 March 1969 (at 1283); and further amendments were approved by Convocation on 18 April 1969 (at 1284). The amended version of 18 April 1969 was “sent to the Attorney General with a request that it be enacted by the Legislature” (at 1283–84). This approach, with the law society drafting the bill, was criticized. See e.g. *Hansard, ibid*, No 37 (14 April 1970) at 1492 (Elmer Walter Sopha): “I am one of those who question the right of the society to even initiate this bill. I think the Attorney General was wrong in allowing the society to be the proponent of this bill. This bill should have been written indoors by legislative counsel.” In this respect, the 1970 *Act* was the last of its kind. See e.g. Moore, *supra* note 110 at 284: “No longer would the Law Society draft its own acts and expect to see them promptly passed into law” [citation omitted].

<sup>117</sup> The draft bill was an enclosure to a letter from Treasurer WGC Howland to the profession (undated but presumably 17 December 1968). The amendments of 26 February 1969 were an enclosure to a letter from Treasurer WGC Howland to the profession (20 March 1969). Further amendments were contained in a minute from Convocation (18 April 1969) at cxli. These three documents are held at the Archives of the Law Society of Upper Canada, and copies are on file with the author.

<sup>118</sup> The law society may have commented on section 13, including subsection 13(3), at the Legal and Municipal Committee. However, as mentioned above, no records are available. See n 115.

to require production. Thus it would seem that the disciplinary immunity granted in subsection 13(3) was considered necessary or advisable to facilitate the exercise of that role and that power, which included oversight of the law society. That is, disciplinary liability would impact the ability of the Attorney General to serve as “guardian of the public interest”. However, recall that subsection 13(3) granted immunity “for anything done by him [the Attorney General] while exercising the functions of such office.”<sup>119</sup> This scope is narrower than it was on first reading, which was “for anything done by him while in such office.”<sup>120</sup> However, it could have been even narrower, i.e. for anything done by him in the role as guardian of public interest under subsection 13(1).

Thus, subsection 13(3) seems to presume that the disciplinary powers of the law society could be used or perceived as being used—either by the law society itself or by a third party complaining to the law society—to retaliate against the Attorney General for her actions as “guardian of the public interest” or to pressure her against acting as such in the first place. It also seems to presume that actions taken by the Attorney General in the functions of office, but outside the role of “guardian of the public interest”, could be used as grounds for discipline in order to restrain the exercise of the guardian role.

One possible explanation for this concern was that the Law Society had recently exceeded its apparent jurisdiction by conducting its own investigation into, and making its own denunciation of, the conduct of Justice Leo Landreville of the Supreme Court of Ontario.<sup>121</sup> The Treasurer of the Law Society, however, asserted that while the Law Society did not have jurisdiction over judges, it nonetheless had “a right and a duty, as representing the Bar of Ontario, to make known its views upon matters relating to the administration of justice, and to communicate those views

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<sup>119</sup> The 1970 *Act*, *supra* note 37, s 13(3).

<sup>120</sup> Bill 7, *supra* note 111.

<sup>121</sup> See e.g. William Kaplan, *Bad Judgment: The Case of Mr Justice Leo A. Landreville* (Toronto: University of Toronto Press, 1996) at 99–108, see especially at 104 on jurisdiction [Kaplan]; Moore, *supra* note 110 at 273: “And in 1965, in a rare instance of venturing into ethical questions that went beyond its statutory mandate, convocation voted to deplore the continuation in office of Mr Justice Leo Landreville, who had recently been acquitted of criminal charges but whose fitness for legal or judicial rank remained hotly controversial.” Thanks to the reviewer for suggesting that I consider the impact of the Landreville matter. Writing in 1996, Kaplan at 104 characterized the Landreville matter in harsh terms: “the Law Society already had some experience in character assassination. This was not the first time that it had, on its own initiative, solicited evidence against an individual and used that evidence in an effort to ruin that person’s standing and reputation in the community. However, this was the first time that the Law Society had acted in such a way against a judge” [citation omitted].

to the appropriate official or tribunal having jurisdiction over the particular matter in question.”<sup>122</sup> These actions were clearly on the mind of legislators as they debated the 1970 *Act*. Commented one legislator:

I say unhesitatingly that I was against the law society initiating the investigation into Landreville and I think that marred, to a large extent, the activities of the law society. It is no function of the law society to review the conduct of judges. ... I think the law society besmirched all of us by its activities there, and I hope they will not launch into the expression of initiatives in that way again.<sup>123</sup>

He emphasized the importance of establishing the boundaries of law society jurisdiction: “the central purpose of this bill is to bring home to the law society that they are only concerned with the regulation of the profession. ... We must make sure that they get the message from us.”<sup>124</sup> In this context, it is understandable that legislators, and the public more generally, may have been concerned that the Law Society could abuse its disciplinary authority over the Attorney General.<sup>125</sup>

At the same time, another legislator suggested that the Attorney General was perceived by the public as being too cozy with the law society and the profession generally:

It is all well and good, in section 14 [later 13], to support the principle that the Attorney General is representing the public. But to the public, Mr. Speaker, the Attorney General is one of the boys. We may feel and believe in our own minds that the Attorney General will do everything he can to represent the public, because that is his duty, his responsibility as a politician. But the general public does not necessarily think so. After all, he is a lawyer; he is one of them.<sup>126</sup>

Under this view, disciplinary retaliation against the Attorney General would seem unlikely. Indeed, clear disciplinary jurisdiction over the Attorney General would arguably be even more important. It is possible, however, that two contrasting views were prevalent among the public.

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<sup>122</sup> John D Arnup statement (13 December 1965) held by the LSUC Archives, as quoted in Kaplan, *supra* note 121 at 107 and at 214, n 103.

<sup>123</sup> *Hansard*, *supra* note 98, No 37 (14 April 1970) at 1490 (Elmer Walter Sopha).

<sup>124</sup> *Ibid*, No 37 (14 April 1970) at 1490 (Elmer Walter Sopha).

<sup>125</sup> On the other hand, another legislator noted that the Law Society had a reputation among lawyers for the fairness of its disciplinary process at *ibid*, No 33 (9 April 1970) at 1329 (James Renwick): “I think it is fair to say that if you were to ask the men that have been subjected to the rigours of the disciplinary procedures and had been disbarred, and struck from the rolls, that they would say that there had been a scrupulous care and attention paid to assessing the evidence and the quality of discipline and the way in which the investigations were carried on which led up to any disciplinary action being taken”.

<sup>126</sup> *Ibid*, No 32 (8 April 1970) at 1295 (James Beecham Trotter).

If there were concerns that the Law Society could abuse its disciplinary authority over the Attorney General, then it is curious that the absolute immunity in the original version of subsection 13(3) was amended to cover only the exercise of official duties. If the prospect of professional discipline for acts in the functions of office could be used to punish or restrain the Attorney General from acting as “guardian of the public interest”, then presumably the prospect of professional discipline for acts outside the functions of office could be used in the same way.

While the scope of the immunity in subsection 13(3) appears absolute, it would likely be interpreted as only applying absent bad faith. There are no reported discipline decisions applying subsection 13(3). While there is one reported court decision interpreting the subsection, it merely rejected the argument that the subsection means that the *Law Society Act* does not bind the Crown or its employees.<sup>127</sup> However, while the disciplinary immunity in subsection 13(3)—“for anything done by him or her while exercising the functions of such office”—appears absolute, consistent with *Krieger* it would likely be interpreted as not covering any conduct in bad faith. Recall that such actions are not within the powers of office,<sup>128</sup> as “public officers are entitled to no special immunities or privileges when they act beyond the powers which are accorded to them by law in their official capacities.”<sup>129</sup> Thus, any conduct in purported official functions, whether in prosecutorial discretion or otherwise within the practice of law or in policy or political functions, would be subject to discipline if taken in bad faith.

#### 4. *Should the Attorney General be immune?*

Having considered the extent to which the Attorney General is immune to law society discipline, I now turn to the deeper question: *should* she be immune? I begin by canvassing the typical arguments for immunity, and then turn to the arguments against immunity. While the arguments on both sides can be expressed concisely, that brevity should not suggest that their weighing is simple. I ultimately conclude that the Attorney General should be subject to law society discipline, and that if she is to be made immune, that immunity should be limited to actions taken in good faith in the execution of official functions. That is, the immunity for prosecutorial discretion and policy functions absent bad faith should be extended to the Attorney General’s practice of law and her policy and political functions.

As in my discussion of subsection 13(3) above, I recognize that there are two purposes for which immunity may be necessary: for the actual

<sup>127</sup> *Law Society of Upper Canada v Ontario Public Service Employees Union*, 2014 ONSC 270 at para 61, 120 OR (3d) 24.

<sup>128</sup> *Krieger*, *supra* note 11 at para 51.

<sup>129</sup> *Ibid* at para 51, quoting *Nelles*, *supra* note 74 at 211.

ability of the Attorney General to function properly and for the public's perception of her ability to function properly. That is, even if disciplinary immunity is not actually necessary for the Attorney General to function, it may still be necessary for public confidence in that functioning.

*A) Policy arguments for disciplinary immunity*

In the civil context, the typical argument for immunity is that liability will have a “chilling effect”, i.e. that the potential for liability will cause a person—such as the Attorney General—to refrain from exercising her powers as she otherwise would.<sup>130</sup> Related to the chilling effect is the “floodgates” argument, i.e. that the sheer volume of allegations and proceedings would interfere with the person's functioning.<sup>131</sup> The chilling effect is also sometimes asserted in the context of law society discipline. For example, one argument against law society jurisdiction over courtroom conduct is that it will impede the duty of zealous advocacy.<sup>132</sup>

In the context of civil liability, these kinds of considerations are often dismissed as “speculative”.<sup>133</sup> However, such concerns may be lessened by difficulties in proving the elements of the cause of action. Thus in *Nelles*, Justice Lamer (as he then was) held that the tort of malicious prosecution entails “a formidable burden of proof” and that the “plaintiff ... has no easy task.”<sup>134</sup> It is unclear and debatable whether disciplinary proceedings

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<sup>130</sup> See e.g. *Nelles*, *supra* note 74 at 196–97, Lamer J. While Justice Lamer wrote only for himself and two others—a plurality but not a majority of the six judges—Justice La Forest (at 218–19) concurred in brief separate reasons (except for the *Charter* issues, which are not relevant to this discussion). Given that *Nelles* was an analysis of the civil liability of the Attorney General and Crown prosecutors, it is particularly relevant in this context. See also Hogg, Monahan & Wright, *supra* note 44 at 280; Edwards, “Public Expectations”, *supra* note 29 at 304.

<sup>131</sup> See e.g. *Nelles*, *supra* note 74 at 179.

<sup>132</sup> See e.g. *Groia v Law Society of Upper Canada*, 2016 ONCA 471 at para 127, 131 OR (3d) 1, MacPherson JA (the court rejects this argument). Justice Brown, dissenting, seemed to recognize a greater role for zealous advocacy: see e.g. paras 353–54.

<sup>133</sup> See e.g. *Nelles*, *supra* note 74 at 197. See e.g. *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at paras 56–57, 60–61, [2007] 3 SCR 129, McLachlin CJ [*Hill*], *aff'g* (2005), 76 OR (3d) 481 at para 63, 259 DLR (4th) 676 (CA), MacPherson JA, both discussed in e.g. Andrew Flavelle Martin, “Statutory Good-Faith Immunity for Government Physicians: Cogent Policy or a Denial of Justice?” (2011) 4:2 McGill JL & Health 75 [Martin, “Statutory Good-Faith Immunity”].

<sup>134</sup> *Nelles*, *supra* note 74 at 194. See also *Miazga v Kvello Estate*, 2009 SCC 51 at para 50, [2009] 3 SCR 339. See also *Cawthorne*, *supra* note 12 (“whatever the circumstances of the particular case, the bar for finding that a prosecutor's conduct was prompted by an improper motive is rightly very high” at para 29; “The Minister, like the Attorney General or other public officials with a prosecutorial function, is entitled to a strong presumption that he exercises prosecutorial discretion independently of partisan concerns” at para 32).

against the Attorney General would similarly be rare and unlikely to prevail. To some extent, that depends on the law society's ability and willingness to dismiss frivolous complaints—and public perception of that ability. As the Attorney General is a politician, there may be particular concern that complaints may be used, or perceived as being used, as a political weapon.<sup>135</sup>

I note that a common solution to this chilling effect is to provide that public servants, as well as other persons exercising functions granted or imposed by law, are immune in tort so long as they acted in good faith.<sup>136</sup> (Such provisions for public servants typically preserve the liability of the Crown.<sup>137</sup>) I have argued that good faith is too low a standard for professionals in the context of civil liability, and they should instead be held to the standard of professional competence.<sup>138</sup> Similar considerations would apply in the disciplinary context. Malice or bad faith are by no means necessary elements for a finding of misconduct, and a lawyer acting in good faith can still do significant harm to clients or others. Competence—the standard applicable for professional discipline<sup>139</sup>—is much lower than perfection.<sup>140</sup> Nonetheless, good-faith immunity remains a common compromise.

As discussed above, the history of subsection 13(3) suggests that the immunity was provided to protect the Attorney General's function as "guardian of the public interest". However, disciplinary immunity could arguably be necessary to protect the Attorney General's other functions, i.e. as chief law officer of the Crown or as Minister of Justice. Even without

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<sup>135</sup> See e.g. Dodek, "Public Office", *supra* note 39; Martin, "Political Practices", *supra* note 30 at 23–24.

<sup>136</sup> See e.g. Hogg, Monahan & Wright, *supra* note 44 at 167.

<sup>137</sup> See e.g. *ibid.*

<sup>138</sup> Martin, "Statutory Good-Faith Immunity", *supra* note 133 (specifically discussing physicians).

<sup>139</sup> *FLSC Model Code*, *supra* note 5, r 3.1-2: "A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer".

<sup>140</sup> *Ibid.*, r 3.1-2, commentary [15]: "This rule [on competence] does not require a standard of perfection." In this respect the disciplinary standard of competence is similar to (although not the same as) the reasonableness standard in negligence. See e.g. *Hill*, *supra* note 133 at para 73, McLachlin CJ: "The standard is not perfection, or even the optimum, judged from the vantage of hindsight. It is that of a reasonable officer, judged in the circumstances prevailing at the time the decision was made .... The law of negligence does not require perfection of professionals; nor does it guarantee desired results.... Rather, it accepts that police officers, like other professionals, may make minor errors or errors in judgment which cause unfortunate results, without breaching the standard of care. The law distinguishes between unreasonable mistakes breaching the standard of care and mere "errors in judgment" which any reasonable professional might have made and therefore, which do not breach the standard of care" [citation omitted].

the “guardian of the public interest” function, the Attorney General—if a lawyer—is still in the complex situation of being the minister responsible for the law society while simultaneously being a member of the law society subject to professional discipline. While a credible argument could be made that the Attorney General’s core policy advice and decisions are beyond law society jurisdiction, such an argument might be unsuccessful. If there is a public perception that the law society might use disciplinary proceedings to retaliate for policy functions, then broader immunity would be necessary to protect against such retaliation. Similarly, the Attorney General’s function as law officer of the Crown might—like the role of Crown prosecutors,<sup>141</sup> but outside the protected scope of prosecutorial discretion—entail unpopular or controversial positions and actions that make her a target for complaints. Immunity would be justified, if necessary, to protect the Attorney General’s exercise of any one (or more) of these functions, either in reality or in the public perception.

*B) Policy arguments against disciplinary immunity*

The primary consideration against disciplinary immunity is that it is contrary to the rule of law. It is often noted in contexts such as civil liability that in principle, the same law should apply to governments (and those exercising government functions) that applies to anyone else.<sup>142</sup> That is, if there must be some immunity for government, that immunity should not be absolute, as “exempting all government actions from liability would result in intolerable outcomes.”<sup>143</sup> Justice Lamer specifically made this point in *Nelles*, although in the context of civil, not disciplinary, immunity:

It is said by those in favour of absolute immunity that the rule encourages public trust and confidence in the impartiality of prosecutors. However, it seems to me that public confidence in the office of a public prosecutor suffers greatly when the person who is in a position of knowledge in respect of the constitutional and legal impact of his conduct is shielded from civil liability when he abuses the process through a malicious prosecution. The existence of an absolute immunity strikes at the very principle of equality under the law and is especially alarming when the wrong has been committed by a person who should be held to the highest standards of conduct in exercising a public trust.<sup>144</sup>

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<sup>141</sup> See e.g. *Krieger (CA)*, *supra* note 11 at para 32: “a prosecutor acts as agent of the Attorney General and in so doing, makes difficult and often unpopular decisions in the interest of justice and the public good”.

<sup>142</sup> See e.g. Hogg, Monahan & Wright, *supra* note 44 at 2–3.

<sup>143</sup> *Imperial Tobacco*, *supra* note 84 at para 76, McLachlin CJ.

<sup>144</sup> *Nelles*, *supra* note 74 at 195. Edwards, “Public Expectations”, *supra* note 29 at 304, notes with reference to subsection 13(3) that “[t]his underlying philosophy [of apparently absolute immunity] is in stark contrast to the landmark decision of the Supreme

The role of disciplinary liability in maintaining public confidence is presumably as significant as, if not more significant than, the role of civil liability. Thus, although the rule of law requires the Attorney General to be independent in the exercise of prosecutorial discretion,<sup>145</sup> it would also seem to require that the Attorney General otherwise be subject to discipline, at least where there is bad faith. Immunity, even good-faith immunity, protects both the competent Attorney General from frivolous disciplinary proceedings and the negligent or incompetent Attorney General from warranted ones.

Disciplinary immunity also compromises the law society's protection of the public interest. Thus, the Supreme Court in *Krieger* held that the law society has jurisdiction over Crown prosecutors partly because the law society has the unique power to restrict or bar that lawyer from future practice.<sup>146</sup> Any employment discipline of the Crown prosecutor could not be an adequate substitute for professional discipline by the law society. In the same way, the Attorney General may face political consequences for her conduct, such as being fired or forced to resign, but those consequences are not a substitute for professional discipline. A suspension or disbarment might be necessary in the public interest, and “[o]nly the Law Society can protect the public in this way.”<sup>147</sup>

### *C) Recommendation and alternative*

Whether or not immunity for the Attorney General is appropriate depends on how one weighs the policy arguments. Is protection against the prospect of frivolous or retaliatory disciplinary proceedings more important than the rule of law and the ability of the law society to protect the public against a malicious or negligent lawyer? Disciplinary immunity is exceptional and, absent clear evidence or overwhelming concern, seems unjustified. I thus recommend that section 13(3) be repealed in Ontario and not be adopted in the other provinces and territories. The Attorney General would remain immune, as in other provinces and territories, for prosecutorial and policy functions absent bad faith, and for anything said in the legislature.

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Court of Canada in *Nelles*.” See also e.g. *Roncarelli v Duplessis*, [1959] SCR 121 at 142, 16 DLR (2d) 689, Rand J: “That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure”.

<sup>145</sup> *Krieger*, *supra* note 11 at para 32.

<sup>146</sup> *Ibid* at paras 50, 58.

<sup>147</sup> *Ibid* at para 58.



While I conclude that the policy considerations against immunity outweigh those for it, I acknowledge that reasonable people can disagree on which set of considerations prevails. In the alternative to the repeal of subsection 13(3), the provision should be amended to explicitly provide that the immunity does not apply where there is bad faith. As mentioned above, this subsection would likely be interpreted in this way. However, explicit language would remove any uncertainty and promote public confidence in the Attorney General and the rule of law. Extending good-faith immunity to all official functions would provide a single standard across all categories of conduct, with the only remaining exception being absolute immunity under parliamentary privilege.

I have focused on the peculiar situation of provincial and territorial Attorneys General. While the federal Attorney General is similarly likely to be a lawyer, she is not the minister with policy responsibility for the law society of which she is a member. (She may be, under provincial law society acts, an *ex officio* bencher.<sup>148</sup>) However, if the prospect of law society discipline were serious enough to negatively impact the execution of her other duties, statutory immunity from law society discipline would also be appropriate.<sup>149</sup>

### 5. Conclusion

The law society has disciplinary jurisdiction over the Attorney General, with some exceptions. More specifically, the Attorney General is immune absent bad faith in the exercise of prosecutorial discretion, likely immune absent bad faith in “core” policy advice and decisions, and absolutely immune for anything said in the legislature. In the practice of law other than prosecutorial discretion, the law society has the same jurisdiction as it does over other practicing lawyers. In policy and political functions other than “core” policy decisions, the law society has the same jurisdiction as it does over all lawyers. In Ontario, immunity is extended to all public functions, including the practice of law other than prosecutorial discretion and policy and political functions other than “core” policy decisions. This statutory immunity, while absolute in its language, would likely be interpreted as applying only absent bad faith. Immunity, even good-faith immunity, is contrary to the rule of law and to public confidence. If any immunity is necessary, it should be limited to good faith.

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<sup>148</sup> See e.g. *Law Society Act*, *supra* note 1, s 12(1).

<sup>149</sup> I assume that such a provision would properly belong in the provincial law society acts as opposed to a federal statute, but it could be argued that, in order to protect the proper federal jurisdiction over criminal law, Parliament could enact such a provision. It is unnecessary for my purposes to determine this issue. For a discussion, see e.g. Hogg, Monahan & Wright, *supra* note 44 at 450–56; Sullivan, *supra* note 44 at paras 27.9–27.10; LRCS, *supra* note 44 at 7.

It should be emphasized that while the law society has some disciplinary jurisdiction over the Attorney General, the law society may exercise that jurisdiction as it sees fit. That is, it may choose not to exercise it at all, or to apply its rules differently to the Attorney General than to other lawyers. For example, the law society may choose to pursue discipline only for the Attorney General's legal functions, not for policy functions, or only for egregious conduct. Such a choice would be consistent with the rule on lawyers in public office. While the rule states that "[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," the commentary provides that discipline will typically be limited to "conduct in office that reflects adversely upon the lawyer's integrity or professional competence."<sup>150</sup> It is for the law society—subject, of course, to judicial review—to decide how best to use its jurisdiction and resources in order to protect the public interest.

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<sup>150</sup> *FLSC Model Code*, *supra* note 5, r 7.4 and commentary [2].