2021

# The Non-Lawyer Attorney General- Problems and Solutions

Andrew Flavelle Martin

# THE NON-LAWYER ATTORNEY GENERAL: PROBLEMS AND SOLUTIONS

**Andrew Flavelle Martin***

## Introduction

The Attorney General is the chief law officer of the Crown.[1] Among other things, they are "the official legal adviser of the Lieutenant Governor, and the legal member of the Executive Council"; "shall advise the heads of the several departments upon all matters of law"; and "ha[ve] the regulation and conduct of all litigation for or against the Crown".[2] These duties unquestionably constitute the practice of law. With some exceptions, the unlicensed practice of law is an offence.[3] The purpose of licensing, along with the rest of the self-regulation of the legal profession, is to protect the public interest.[4] Nonetheless, some Attorneys General are not licensed as lawyers, which is to say that they are not members of the corresponding law society. As Graham Steele asks, "Does it matter?".[5] More specifically, does this leave unprotected the interests of the government as client – or, more importantly, the public interest? Yes, indeed it does.

---

* Of the Ontario Bar; Assistant Professor, Schulich School of Law, Dalhousie University. Thanks to Adam Dodek, Michelle Bérubé, Kim Brooks, Richard Devlin, Senator Judith Keating, and Nicole Arski for comments on a draft. Thanks also to Emma Paquette at the Canadian Bar Association and Denise Fiset at the Canadian Bar Association (New Brunswick Branch).

[1] See e.g. *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para 35: "As Chief Law Officer of the Crown, the Attorney General has special responsibilities to uphold the administration of justice".

[2] *Public Service Act*, RSNS 1989, c 376, s 29(1) (a), (c), (e). The language is very similar across Canadian jurisdictions. See e.g. *Department of Justice Act*, RSC 1985, c J-2, ss 4, 5; *Ministry of the Attorney General Act*, RSO 1990, c M.17, s 5; *Attorney General Act*, RSBC 1996, c 22, s 2; *An Act Respecting the Role of the Attorney General*, RSNB 2011, c 116, s 2.

[3] See e.g. *Legal Profession Act*, SNS 2004, c 28, s 17(1)(a).

[4] See e.g. *ibid*, s 4(1): "The purpose of the Society is to uphold and protect the public interest in the practice of law." See also e.g. Gavin MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Toronto: Thomson Reuters Canada 1993) (loose-leaf updated 2021, release 3) at Ch 26, 26.1, p 26–1: "[t]he purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession." See also e.g. *The Law Society of Manitoba v Bueti*, 2018 MBLS 4 at para 4: "the purpose of a discipline hearing is to protect the public interest."

[5] Graham Steele, "Is There a Lawyer in the House? The Declining Role of Lawyers in Elected Office" (2017) 40:4 Can Parl Rev 2 at 7, online (pdf):<www.revparl.ca/40/4/40n4e_17_steele.pdf>.

The long-running assumption and assertion in the case law and literature was that the Attorney General is not required to be a lawyer. In 2013, the BC Court of Appeal in *Askin v Law Society of British Columbia* squarely confirmed this assumption.[6] This holding, despite its important consequences for the public interest and its aftermath, has been the subject of little analysis in the subsequent case law or literature. These consequences thus remain not only unaddressed, but also largely unacknowledged.

In this article, I provide a legal and policy analysis of the non-lawyer Attorney General and recommendations for legislative change. I begin in Part 1 by setting out and assessing *Askin* and its uptake in the case law and literature. I demonstrate that while the decision in *Askin* has two major weaknesses, the reasoning is presumably applicable across the country.[7] In Part 2, I examine the legal consequences of *Askin* and its policy or practical consequences. I argue that it threatens the government's solicitor-client privilege and that it leaves the non-lawyer Attorney General unconstrained by the law of lawyering more broadly. Against this context, in Part 3 I consider options for legislative reform and propose a path forward that will solve the legal consequences of *Askin*. I recommend legislative amendments that would deem the non-lawyer Attorney General to be a member of the corresponding law society so long as they held that role. I then conclude by reflecting on the implications of my analysis. If nothing else, such legislative deeming would clearly identify the reasonable expectations of the legislature and the public, as well as signal to law societies that the regulation of the legal profession must unavoidably include regulation of the Attorney General. I also recommend the recognition of a constitutional convention that only lawyers be appointed as Attorney General.

## Part 1: *Askin v Law Society of British Columbia* and its uptake

In this Part, I canvass and critique the holding and rationale in *Askin* and situate the case in the previous and subsequent legal literature and caselaw.

The petitioner in *Askin* unsuccessfully argued that the appointment of a non-lawyer as Attorney General was invalid and that the non-lawyer Attorney General was violating the prohibition against the unlicensed practice of law under the *Legal Profession Act*.[8] She also argued that other provincial legislation, including legislation

---

[6] *Askin v Law Society of British Columbia*, 2013 BCCA 233 [*Askin* BCCA], aff'g 2012 BCSC 895 [*Askin* BCSC], leave to appeal to SCC refused, 35463 (7 November 2013).

[7] While the reasoning is partly reliant on a provincial statute, the relevant statutory language is not unique to BC. See below note 62 and accompanying text.

[8] *Askin* BCSC, *supra* note 6 at paras 1, 7; *Askin* BCCA, *supra* note 6 at para 11. Indeed, on appeal she argued not only that the *Legal Profession Act*, SBC 1998, c 9, required the Attorney General to be a lawyer (*Askin* BCCA at para 50), but further that the *Queen's Counsel Act*, RSBC 1996, c 393, required the Attorney General to have been a lawyer for five years (*Askin* BCCA at para 47). It is unclear from the reasons in *Askin* BCSC whether she made this argument before the chambers judge.

on the office of the Attorney General, similarly required that the Attorney General be a lawyer.[9]

The petitioner also argued, likewise unsuccessfully, that the Law Society had erred in its decision that it lacked "jurisdiction" to investigate her complaint against the non-lawyer Attorney General for unlicensed practice.[10] The reaction of the Law Society to the decision of the Court of Appeal was that "[t]he law society is content to have the matter once again resolved and to have confirmation of our interpretation of the *Legal Profession Act* and other statutes."[11]

The core holding in *Askin* can be broken down into two linked propositions. The first is a matter of constitutional law: the unconstrained ability to appoint members of cabinet, including the Attorney General, is a prerogative power.[12] The second proposition, which is a question of statutory interpretation, is that BC legislation – including the *Legal Profession Act* – had not displaced that prerogative power.[13] In particular, the *Interpretation Act* deems that a statutory assignment of duties includes the necessary powers to fulfill those duties.[14]

In arriving at this decision, each level of court made a notable observation. Justice Stromberg-Stein of the Supreme Court of BC held that, as a matter of statutory interpretation, "statutes imposing duties on a minister of the Crown cannot be read as requiring that in order to perform their duties, the minister must obtain additional authority under a statute of general application, such as the *Legal Profession Act*."[15] The Court of Appeal, considering a statutory interpretation argument applying the concept of necessary implication, adopted the position of the Attorney General that "[i]t is not necessary for the purpose of protecting the general public, the purpose of

---

[9] *Askin* BCSC, *supra* note 6 at para 22; *Askin* BCCA, *supra* note 6 at paras 44–45, 50.

[10] *Askin* BCSC, *supra* note 6 at para 12, 16, 26.

[11] Charlotte Santry, "AG doesn't need to be a lawyer: B.C. appeal court" (8 May 2013) online: *Canadian Lawyer Magazine* <www.canadianlawyermag.com/news/general/ag-doesnt-need-to-be-a-lawyer-b.c.-appeal-court/271985> (quoting Deborah Armour, the Society's chief legal officer).

[12] *Askin* BCSC, *supra* note 6 at paras 29–30: "The prerogative power of the Lieutenant Governor to appoint ministers of cabinet is of constitutional significance, and cannot be removed, replaced, qualified, or extinguished without express legislative language or by necessary implication…. Further, as the royal prerogative is a branch of the common law, the legislature would need clear and unambiguous indication that it intended to change it". [Citations omitted.] See also *Askin* BCCA, *supra* note 6 at para 31.

[13] *Legal Profession Act*, *supra* note 8; *Askin* BCSC, *supra* note 6 at paras 22–26; *Askin* BCCA, *supra* note 6 esp at para 50.

[14] *Askin* BCSC, *supra* note 6 at para 23, quoting *Interpretation Act*, RSBC 1996, c 238, s 27(2) [BC *Interpretation Act*]: "If in an enactment power is given to a person to do or enforce the doing of an act or thing, all the powers that are necessary to enable the person to do or enforce the doing of the act or thing are also deemed to be given." See also *Askin* BCCA, *supra* note 6 at para 45.

[15] *Askin* BCSC, *supra* note 6 at para 24.

the *Legal Profession Act*, that the person appointed to the office of Attorney General be a member of the Law Society, or even that the person be legally trained."[16]

Neither level of court otherwise engaged with the petitioner's submissions that the public interest required the Attorney General to be a lawyer, i.e. that "[p]rinciples of the public interest in the administration of justice also militate against a non-lawyer holding office as Attorney General" and that "[s]erious harm to the rights of individual citizens of the province is a very real risk where an unqualified person is appointed to the office of the Attorney General."[17]

Although not mentioned in *Askin*, a similar question was superficially answered in the 1919 decision of the Manitoba Court of Appeal in *Rex v Nyczyk*.[18] The appellant in *Nyczyk* argued that the indictment was invalid because it was preferred under the authority of the acting Attorney General, who was not a lawyer.[19] However, the Court held that "[t]here is nothing in the statutes that I can find requiring the Attorney-General to be a barrister or a solicitor, although the holder of that office usually is a barrister."[20] (Unfortunately, the Court did not elaborate or otherwise support this statement with any legal analysis.) Moreover, Purdue CJM applied the proposition that "[i]t is a general presumption of law that a person acting in a public capacity is duly authorized so to do".[21] This proposition appears to parallel the interpretive argument in *Askin* that statutory duties include the power to carry out those duties.

Similarly, MacKenzie J in *Krieger v Law Society of Alberta* asserted, without giving any support, that "an Attorney General does not have to be a lawyer".[22] Moreover, presaging the interpretation of the BC *Legal Profession Act* in *Askin*, she also asserted that "the intent and purpose of that Act [the Alberta *Legal Profession Act*] is to control the standards of lawyers. It is not in any way concerned with the functions of the Attorney General as such."[23] While the Supreme Court of Canada affirmed the result in *Krieger*, it made no comment on these parts of the reasons of MacKenzie J.

---

[16] *Askin* BCCA, *supra* note 6 at para 50.

[17] *Askin* BCSC, *supra* note 6 at paras 2(f), 2(g).

[18] *Rex v Nyczyk* (1919), 30 Man R 17, 31 CCC 240 (CA) [*Nyczyk* cited to Man R].

[19] *Ibid* at 18–19.

[20] *Ibid* at 19, Perdue CJM. See also Cameron JA at 22: "That [the acting Attorney General] the Honourable T. C. Norris was not a lawyer is immaterial."

[21] *Ibid* at 19 [citation omitted].

[22] *Krieger v Law Society of Alberta* (1997), 149 DLR (4th) 92 at para 72, 51 Alta LR (3d) 363 (QB) [*Krieger* QB], rev'd on other grounds 2000 ABCA 255, aff'd on other grounds 2002 SCC 65 [*Krieger* SCC].

[23] *Krieger* QB, *supra* note 22 at para 72; *Legal Profession Act*, SA 1990, c L-9.1.

The assumption in almost all of the literature prior to *Askin* was that the Attorney General was not required to be a lawyer. For example, David Kilgour wrote in 1979 that "[t]he Attornies General of both our federal and provincial governments need not be lawyers but invariably have been since one's mind runneth not to the contrary."[24] Similarly, Grant Huscroft in 1995 noted that "[i]n Canada, however, it is clear not only that the Attorney General might not be the best lawyer; the Attorney General might not be a lawyer at all."[25] However, neither Kilgour nor Huscroft cited any legal support for their assertions, instead merely observing the fact that non-lawyers had occasionally been appointed as Attorneys General.[26] As noted by Michael B. Murphy, former Attorney General for New Brunswick, this fact is "irrelevant…. [t]he appointments simply have not been challenged."[27]

A more nuanced position was taken on behalf of the New Brunswick Branch of the Canadian Bar Association in 1987: "Given the nature of these duties and functions [of the Attorney General] it will be seen that only in exceptional circumstances could the office be discharged by one who is not a lawyer."[28] Unfortunately this assertion was not explained. In particular, there was no indication of what might qualify as such "exceptional circumstances".[29] Neither was it clear whether the assertion was squarely one of law or one of policy, or both.

Many decades before any of this literature, however, W. Kent Power in a 1939 note in the *Canadian Bar Review* squarely considered the arguments that the Attorney General must be a lawyer as a matter of law and policy.[30] Power's motivation was the appointment of a non-lawyer Attorney General for Alberta in 1937, which Power identifies as likely the first such non-lawyer Attorney General in Canadian history.[31] Intriguingly, Power's legal analysis largely foreshadowed *Askin*. Like the applicant in *Askin*, Power recognized a legal argument based on the legislation governing the practice of law and the office of the Attorney General – but, like the courts in *Askin*, he recognized the impact of the prerogative power (the scope of which

---

[24] David Kilgour, "Editorial Note to Lord Hailsham's "Lecture on the Law Officers and the Lord Chancellor"" (1979) 17:2 Alta L Rev 141 at 141.

[25] Grant Huscroft, "The Attorney General and Charter Challenges to Legislation: Advocate or Adjudicator?" (1995) 5 NJCL 125 at 134. (Now Huscroft JA of the Court of Appeal for Ontario.)

[26] Kilgour, *supra* note 24 at 141 (EC Manning, Alberta, 1955); Huscroft, *supra* note 25 at 135 note 36 (James MacRae, Manitoba, 1988; Marion Boyd, Ontario, 1993).

[27] Michael B Murphy QC, "The Case for an Unelected and Independent Attorney General" (November 2013) Solicitors' J 1 at 10 [on file with author].

[28] Hon Charles JA Hughes et al, "The Future of the Office of Attorney-General in New Brunswick" (1988) 37 UNBLJ 190 at 190 [Hughes et al].

[29] *Ibid* at 190.

[30] W Kent Power, "The Office of Attorney General" (1939) 17:6 Can Bar Rev 416.

[31] *Ibid* at 416.

power he described as being "very nebulous" at the time).[32] Also like *Askin*, Power suggested that as a matter of policy, a non-lawyer Attorney General would not be capable of effectively performing the duties of office and would thus endanger the public interest (in Power's words, "the public welfare").[33]

The uptake of *Askin* in the subsequent legal literature and the case law has been minimal. Only two cases have applied it, and they have only done so for fairly narrow propositions that are far from unique to *Askin*. The Alberta Court of Queen's Bench has relied on *Askin* for the proposition that "[i]n order to amend Crown Prerogative, the Legislature must express its intent in a clear and unambiguous manner".[34] Similarly, the BC Supreme Court has cited *Askin*, among other decisions, in holding that "[t]he object of the *Legal Profession Act* is the protection of the public".[35]

The few commentators that have cited *Askin* have at most critiqued its result but not its reasoning. Adam Dodek described *Askin* as "surprising[g]" and "strange".[36] However, he went no further. Indeed, he wrote soon after that "[p]remiers have the power and the right to appoint non-lawyers as their chief legal advisers."[37] Similarly, while Graham Steele observed that "[w]hen the Attorney General is not a lawyer, one may wonder in what meaningful sense he or she can offer legal advice to the government,"[38] he did not argue that *Askin* was problematic or wrong. Likewise, in analyzing the application of solicitor-client privilege to the non-lawyer Attorney General, I myself applied *Askin* without any critique.[39]

---

[32] *Ibid* at 418–422. See esp 422: "that contention brings us again into that very nebulous realm of the scope of the royal prerogative".

[33] *Ibid* at 424–429.

[34] *Engel v Alberta (Executive Council)*, 2019 ABQB 490 at para 32. But see below note 51 on displacement of a prerogative power by necessary implication.

[35] *Gowling Lafleur Henderson LLP v Cardero Resource Corp*, 2014 BCSC 892 at para 18.

[36] Adam Dodek, "The Curious Case of the Non-Lawyer Attorney General: White Tiger of the Legal System" (29 May 2013), online (blog): *SLAW* <www.slaw.ca/2013/05/29/the-curious-case-of-the-non-lawyer-attorney-general-white-tiger-of-the-legal-system/> [Dodek, "White Tiger"]: "It seems strange that the occupant of the highest legal office of the province could be a non-lawyer. It seems strange further still that this person is charged by statute with many important legal responsibilities, including acting as the official legal adviser to the Lieutenant Governor and to the Cabinet." See also Omar Ha-Redeye, "Possibilities Under a Non-Lawyer AG in Ontario" (1 July 2018), online (blog): *SLAW* <www.slaw.ca/2018/07/01/possibilities-under-a-non-lawyer-ag-in-ontario/>: "it may seem as an inconsistency".

[37] Adam Dodek, "Does Solicitor-Client Privilege Apply to an Attorney-General Who Is Not a Lawyer?" (6 August 2013), online (blog): *SLAW* <www.slaw.ca/2013/08/06/does-solicitor-client-privilege-apply-to-an-attorney-general-who-is-not-a-lawyer/> [Dodek, "Solicitor-Client Privilege"].

[38] Steele, *supra* note 5 at 7.

[39] Andrew Flavelle Martin, "The Attorney General as Lawyer (?): Confidentiality upon Resignation from Cabinet" (2015) 38:1 Dal LJ 147 at 166–169 [Martin, "Confidentiality"].

Notably, the commentators who have more fully critiqued *Askin* have all come out of the government of New Brunswick: government lawyer Eric Boucher, former Deputy Attorney General Judith Keating, and former Attorney General Michael B. Murphy.[40] In his analysis of the role of the Attorney General as "lore master" of the rule of law, Boucher expressed in passing "grave concern" with *Askin*.[41] In an unpublished speech that drew on an article by Murphy, Keating similarly characterized *Askin* as "a most unfortunate case".[42] Murphy went further, writing that the holding in *Askin* "defies all logic".[43] Like Murphy, Keating argued that "[t]he powers of the Executive Council Office to appoint a minister and assign responsibility, and the constitutional imperative for appointing the chief legal advisor are not mutually exclusive, and to accept such a proposition is to negate the fundamental role of the Attorney General and along with it the proper application of the rule of law."[44] Indeed, Keating ranks non-lawyer Attorneys General as "[the] most flagrant erosion of the role of the Attorney General",[45] and ultimately characterizes the appointment of non-lawyer Attorneys General as a failure of the responsibility, and even the legal duty, of the Premiers who appoint them.[46] She called on lawyers, the Canadian Bar Association, and the law societies to engage on this issue.[47] Boucher likewise called on law societies to do so:

> My hope is also that law societies will be compelled to deal with the problem of non-lawyer Attorneys General. By stressing the importance of appointing only practicing lawyers to the top legal job of the jurisdiction, hopefully law societies will be in a better position to impress upon government the importance of its role as guardian of the rule of law and of the Attorney General's role as its Lore Master.[48]

---

[40] Recall also here the earlier view of the New Brunswick Branch of the Canadian Bar Association that the Attorney General should be a lawyer absent undefined "exceptional circumstances": Hughes et al, *supra* note 28.

[41] Eric Pierre Boucher, "Civil Crown Counsel: Lore Masters of the Rule of Law" (2018) 12 JPPL 463 at 483. Boucher here echoed the "grave concern" of Judith Keating, then a former Deputy Attorney General for New Brunswick and now Senator Keating: Judith Keating, QC, "The Role of the Attorney General: A Crisis of Conscience" (27 April 2017), online: *Canadian Bar Association, Teleconference* [membership required]: <www.cba.org/Sections/Public-Sector-Lawyers-Forum/Resources/MP3/TeleconferenceOct-1916-(5)> [on file with author].

[42] *Ibid* at 50:05 to 50:07; Murphy, *supra* note 27 at 10.

[43] Murphy, *supra* note 27 at 12.

[44] Keating, *supra* note 41 at 50:43 to 51:09; Murphy, *supra* note 27 at 10.

[45] Keating, *supra* note 41 at 48:13 to 48:25.

[46] *Ibid* at 44.06 to 45:04: "as fiduciaries and trustees of the constitutional makeup of their respective jurisdictions, Premiers have an obligation to ensure that the institutions as established serve to facilitate the provision of independent legal advice and protect the exercise of the fundamental role of the Attorney General. To do otherwise, in my view, by … appointing non-lawyers as Attorneys General and non-lawyers as Deputies Attorney General … is to allow for the rule of law to be overridden by political imperatives."

[47] *Ibid* at 59:41 to 59:50.

[48] Boucher, *supra* note 41 at 484.

There is no indication, at least publicly, that law societies have fulfilled Keating's plea or Boucher's hope. In my view this is not surprising, as law societies – in contrast to, for example, the Canadian Bar Association and its branches – seem reticent to engage with such issues. Moreover, the court in *Askin* held that the law society was correct that it had no jurisdiction over the appointment of a non-lawyer Attorney General.[49] This holding would provide a defensible justification for the law societies to avoid addressing this problem. It is less obvious why the Canadian Bar Association appears not to have addressed it, at least publicly.

Adam Dodek has suggested that the existence of non-lawyer Attorneys General is largely ignored by the profession because it is a threat to "some of the most fundamental assertions of the Canadian legal system", particularly the self-regulation and the professional monopoly of the legal profession.[50] This would be a compelling rationale to ignore *Askin*, albeit a self-serving one – although following this reasoning one might expect lawyers to argue that *Askin* was wrongly decided and that Attorneys General *must* be lawyers.

As for the reasoning in *Askin*, it has two major weaknesses. With respect, I would argue that the least supported and most vulnerable conclusion by the Court of Appeal was that the public interest mandate of the law society does not, by necessary implication, grant the law society jurisdiction over the Attorney General.[51] If the public interest requires the law society to regulate government lawyers, as the Supreme Court of Canada established in *Krieger*,[52] then it is unclear as to why it would not require the regulation of the Attorney General as the chief government lawyer.[53] (I do acknowledge that on a narrow reading, *Krieger* holds that the Law Society has this authority "[b]ecause Crown prosecutors must be members of the Law Society" – suggesting that *Krieger* itself does not assist in determining whether Attorneys General must likewise be members.)[54] More detailed reasoning would have been helpful from the courts in *Askin* on this point.

---

[49] *Askin* BCSC, *supra* note 6 at para 26. *Askin* BCCA, *supra* note 6 notes this argument at para 23 but does not explicitly consider it.

[50] Dodek, "White Tiger", *supra* note 36.

[51] With respect to the chambers judge, she may have overstated her holding at para 30 that "as the royal prerogative is a branch of the common law, the legislature would need clear and unambiguous indication that it intended to change it". A prerogative power can be displaced by necessary implication. See e.g. *Ross River Dena Council v Canada*, 2002 SCC 54 at para 54, as quoted e.g. by *Askin* BCCA at para 32 [citations omitted]: "this displacement [of a prerogative power] occurs only to the extent that the statute does so explicitly or by necessary implication". See also *Canadian Federation of Students v Ontario*, 2019 ONSC 6658 at para 94 (Div Ct): "The Crown cannot exercise its prerogative powers in a manner contrary to legislation or in circumstances where legislation has displaced the Crown's prerogative power explicitly or by necessary implication."

[52] *Krieger* SCC, *supra* note 23 at para 58.

[53] Thanks to Senator Keating for inspiring this point.

[54] *Krieger* SCC, *supra* note 23 at para 4.

The second major weakness in *Askin* is the assumed scope of the prerogative power to appoint the Attorney General. Keating and Murphy both make an important argument that the power to appoint the Cabinet must be interpreted alongside the duty of the Attorney General as chief law officer, and that the former does not trump the latter.[55] Indeed, insofar as the Attorney General has a duty to promote and protect the rule of law, and the rule of law is a constitutional principle,[56] the prerogative power is arguably constrained by that principle.[57] Moreover, the Supreme Court of Canada in *Krieger* recognized that "the office of the Attorney General is one with constitutional dimensions recognized in the *Constitution Act, 1867*".[58] That is, there are legitimate constitutional reasons to require the Attorney General to be a lawyer, which reasons legitimately constrain the otherwise absolute discretion to appoint the Cabinet. This argument is about the scope of the prerogative power and not its displacement by statute – and thus, if accepted, renders moot the statutory interpretation issue about displacement, which was the focus of the Court of Appeal in *Askin*. Nonetheless, explicit legal support for this argument about the scope of the prerogative power appears to be lacking. In contrast, courts have zealously protected undisplaced prerogative powers,[59] which zeal suggests that they may be unlikely to recognize an apparently novel constraint on the prerogative power to appoint the Attorney General. Unfortunately, this argument was not raised before the chambers judge or on the appeal.[60]

While *Askin* is not binding on courts outside British Columbia, its reasoning would appear to be applicable elsewhere. While the first proposition – that the unconstrained ability to appoint members of cabinet, including the Attorney General, is a prerogative power – applies across Canada, the question of whether that prerogative power has been displaced by statute is a matter of statutory interpretation that could conceivably vary from province to province. Steele, for example, writes that "[t]he BC Court of Appeal decision relies on some very careful interpretation of several BC statutes, so it is not clear that the case puts the issue to rest for the rest of

---

[55] Keating, *supra* note 41 at 50:43 to 51:09; Murphy, *supra* note 27 at 10–12.

[56] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 70–71, 161 DLR (4th) 385.

[57] Murphy, *supra* note 27 at 10, 12. Murphy roots his rule of law argument in the preamble to the *Constitution Act, 1982* and the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[58] *Krieger*, *supra* note 22 at para 26; *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

[59] See e.g. *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paras 34–37.

[60] *Askin* BCCA, *supra* note 6 at para 11: "Ms. Askin filed a factum raising numerous grounds of appeal and seeking a number of orders. Counsel appeared for Ms. Askin on the hearing of the appeal, and properly limited the grounds of appeal and the nature of the order sought." Even a generous reading of the appellate factum, however, does not reveal this particular constitutional argument. Moreover, no notice of constitutional question was given: *Askin* BCSC, *supra* note 6 at para 31.

Canada."[61] Nonetheless, the key provision in the BC *Interpretation Act* – that the imposition of a duty includes the powers necessary to execute that duty – is a fairly typical one.[62] At the same time, any courts outside BC purporting to rely on or follow *Askin* as persuasive would be wise to address the two weaknesses in its reasoning discussed above.

In her unsuccessful application for leave to appeal to the Supreme Court of Canada, Askin made the novel but intriguing and compelling argument that there is a Canadian constitutional convention that only lawyers be appointed Attorney General.[63] Under this argument, the few past appointments of non-lawyer Attorneys General become rare exceptions to a convention instead of evidence that such appointments are lawful. Whether this argument is correct depends on the three-part test from the *Patriation Reference* as re-stated in *Conacher v Canada (Prime Minister)*: "first, what are the precedents; second, did the actors in the precedents believe that they were bound by a rule; and third, is there a reason for the rule?"[64] The first part of the test is clearly met, as there are numerous precedents. The third part, the reason for the rule, will become clear in Part 2 – in short, that the Attorney General can adequately uphold the rule of law and fulfill their other duties only if they are a lawyer. The second part of the test, whether the appointing premiers felt they were required to appoint only lawyers as Attorneys General, does not seem to be in serious doubt. In particular, why else would premiers almost always appoint lawyers as Attorneys General?[65] The few exceptions would appear to prove the rule.

While *Askin* was perhaps correct, and its underlying reasoning is presumably applicable across Canada, it nonetheless has undesirable legal and policy consequences. Before turning to these consequences, I note that insofar as the power of appointment at issue in *Askin* is indeed a prerogative power, it can be constrained or removed by the legislature.

---

[61] Steele, *supra* note 5 at 8.

[62] See e.g. *Interpretation Act*, RSNS 1989, c 235, s 19(b): "In an enactment, …where power is given to the Governor in Council or a public officer to do or enforce the doing of any act, all necessary powers are also given to enable him to do or enforce the doing of the act"; Federal *Interpretation Act*, *supra* note 51, s 31(2): "Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given."; *Legislation Act, 2006*, SO 2006, c 21, s 78: "If power to do or to enforce the doing of a thing is conferred on a person, all necessary incidental powers are included."

[63] *Askin*, *supra* note 6, *Application for Leave to Appeal* at 34–46, Memorandum of Argument (31 July 2013) (Supreme Court of Canada, 35463) at paras 4046 [on file with author] [*Askin* SCC leave application].

[64] *Conacher v Canada (Prime Minister)*, 2009 FC 920 at para 37, aff'd 2010 FCA 131 at para 12, citing *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 at 888, 125 DLR (3d) 1 [*Patriation Reference*].

[65] See above note 23 and accompanying text. See also *Askin* SCC leave application, *supra* note 63, at 65–70 (four non-lawyers appointed Attorney General in the history of British Columbia, including the Attorney General whose appointment was being challenged), 71–77 (one non-lawyer (Acting) Attorney General in the history of Canada, including Upper Canada and Lower Canada).

## Part 2: The legal and policy consequences of *Askin*

In this Part, I assess the legal and policy consequences of *Askin*, consequences that on balance are negative for the government and for the public. While at first glance it may appear that the most important consequence is that the non-lawyer Attorney General lacks adequate legal training and experience, it is the discrete legal consequences that I argue are more problematic.

Perhaps the most important legal consequence of *Askin*, at least for governments, is uncertainty over whether solicitor-client privilege applies to communications involving a non-lawyer Attorney General. While this point has never been decided by a court or tribunal, there is disagreement in the literature. Adam Dodek has argued that solicitor-client privilege would not apply, because a non-lawyer Attorney General is not a "professional legal advisor" following Wigmore's test.[66] In contrast, John Gregory has argued that the conduit exception applies to the non-lawyer Attorney General conveying advice from their Ministry to the Cabinet.[67] Similarly to Gregory, Tom D. McKinlay argues that "Attorneys General rely almost exclusively on the legal advice prepared by the expert counsel employed in the Department of Justice. The communication of such advice would clearly be covered by solicitor-client privilege, even if conveyed by an Attorney General who is not personally a lawyer…. [because] [s]olicitor-client privilege is not lost when it is communicated among non-lawyers within the government."[68] McKinlay nonetheless acknowledges that "in those rare cases that a non-lawyer Attorney General communicates their personal advice, divorced from the advice of his or her officials, … any question of privilege would arise".[69] In contrast, I have argued elsewhere that the Attorney General alone is a lawyer – i.e. a professional legal adviser – without being a member of the bar.[70] Under my approach, their legal advice would be privileged whether or not they were conveying it from their departmental lawyers or providing it personally. This disagreement has yet to be resolved in the case law and, with respect to McKinlay, I am unconvinced that the issue "is largely academic".[71]

The most important legal consequence of *Askin*, in terms of the public interest, is that the non-lawyer Attorney General is not bound by the law of lawyering more generally, including but not limited to duties under the rules of professional conduct. Indeed, the law society has no regulatory authority over the non-lawyer

---

[66] Adam M Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis Canada, 2014) at paras 4.28–4.34; Dodek, "Solicitor-Client Privilege", *supra* note 37.

[67] Martin, "Confidentiality", *supra* note 39 at 166–169. But see below note 83 and accompanying text.

[68] Halsbury's Laws of Canada (online), *Crown*, "Crown Privilege: Solicitor-Client Privilege: The Solicitor" (IX.1.(2)) at HCW-22 "Non-Lawyer Attorney General" (2021 Re-issue) [citations omitted] [McKinlay].

[69] *Ibid*.

[70] Martin, "Confidentiality", *supra* note 39 at 166–169.

[71] McKinlay, *supra* note 68.

Attorney General and so its rules have no application to them.[72] Admittedly, many of these professional duties are owed to the client, and the government as client is unlikely to complain to the law society about the Attorney General regardless – indeed, the premier has the immediate and ever-present option of simply removing the individual acting as Attorney General from Cabinet or shuffling them into another portfolio. Client complaints are admittedly not a formal prerequisite for law society investigation or discipline. Lawyers have other overarching duties than those owed to the client, including civility and the duty to encourage respect for the administration of justice.[73] Sadly, not all Attorneys General have fulfilled these duties.[74] Moreover, the Supreme Court of Canada held in *Krieger* that law society authority over Crown prosecutors is necessary to protect the public interest.[75] As I mentioned above, similar considerations would apply to the Attorney General.[76] While even a lawyer Attorney General enjoys some statutory and constitutional immunities to law society discipline, those immunities are – and should be – narrow.[77] It is for this reason that, as I mentioned above, I respectfully question the conclusion of the Court of Appeal that "[i]t is not necessary for the purpose of protecting the general public, the purpose of the *Legal Profession Act*, that the person appointed to the office of Attorney General be a member of the Law Society".[78] At the same time, I acknowledge the argument that law society jurisdiction over the Attorney General has an undesirable chilling effect over the execution of their duties.[79] On balance, my view is that law society jurisdiction over the Attorney General, whether a lawyer or not, is an unavoidable element of the regulation of the legal profession in the public interest. Moreover, any negative impact of a chilling effect is outweighed by the positive impact of law society jurisdiction.

---

[72] Andrew Flavelle Martin, "The Immunity of the Attorney General to Law Society Discipline" (2016) 94:2 Can Bar Rev 413 at 426, n 60 [Martin, "Immunity"]. See also *Krieger* QB, *supra* note 23 at para 72: "Because of the fact that an Attorney General does not have to be a lawyer, that official may well escape the disciplinary scrutiny of the *Legal Profession Act*. That is of no concern because the intent and purpose of that Act is to control the standards of lawyers. It is not in any way concerned with the functions of the Attorney General as such. The Attorney General, although an Honourary Bencher, need not be a lawyer. An Attorney General, not a lawyer, would of course never be subject to any scrutiny by the Law Society. That situation is reasonable because the purpose of the *Legal Profession Act* is to govern the conduct of lawyers not that of Attorneys General."

[73] Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2009, last amended 2019), rr 5.6-1, 7.2-1, online: *Federation of Law Societies of Canada* <www.flsc.ca> [*FLSC Model Code*].

[74] See e.g. Brent Cotter, "The Prime Minister v the Chief Justice of Canada: The Attorney General's Failure of Responsibility" (2015) 18 Leg Ethics 73, discussing federal Minister of Justice and Attorney General Peter MacKay.

[75] *Krieger* SCC, *supra* note 23 at para 58.

[76] See above note 52. See also Martin, "Immunity", *supra* note 72 at 443.

[77] *Ibid* at 422–439.

[78] See above note 16.

[79] Martin, "Immunity", *supra* note 72 at 440–442.

An interesting consequence of *Askin* is that the non-lawyer Attorney General has no professional duty of competence.[80] If I am correct that the non-lawyer Attorney General practices law despite not being a member of the law society,[81] they may nonetheless be liable in negligence.[82] However, the duty of care would be likely be owed solely to the client, and not to third parties or the public at large. The government would be unlikely to pursue an action in negligence against its own Attorney General – and even if it did so, it would likely be for political reasons. In contrast to the duty of care in negligence, the professional duty of competence is enforceable by the law society regardless of the wishes of the client. Following *Askin*, law societies would have no ability to discipline non-lawyer Attorneys General for incompetence, among other things.

The practical consequence of *Askin* is that it permits the appointment of an Attorney General who, at least as a matter of training and experience, is unqualified for the role. Power in 1939 argued that it is inappropriate and anemic for a non-lawyer Attorney General to merely convey the advice of lawyers in their department:

> The attorney-general should not be a mere conduit of the opinions of others, and it is not possible for him to be anything but that if he is not learned in the law. In order to come to any conclusion really worth while he must have that instinct for the spirit of the law which can be acquired only from professional learning and experience, and, in order to weigh the opinions of his assistants and be qualified to discuss them and to convey the result which to his own mind follows from them he must be able to think in legal terms and to formulate his conclusions in accordance with those terms.[83]

Brian Smith, on his resignation in 1988 as Attorney General for British Columbia, made a similar observation about non-lawyer Attorneys General: "I know from my experience that the Attorney-General requires considerable legal and constitutional sensibility in giving advice to government, or else the Attorney-General will simply be repeating, without understanding, the legal advice of others."[84] Recall also that the courts in *Askin* did not squarely address the petitioner's submissions that a non-lawyer

---

[80] *FLSC Model Code*, *supra* note 73, r 3.1-2.

[81] Martin, "Confidentiality", *supra* note 39 at 166–169. See above note 70 and corresponding text.

[82] I recognize that, as the *Model Code* emphasizes, the standard of competence is not identical to negligence. See *FLSC Model Code*, *supra* note 73, r 3.12, commentary 15: "This rule [competence] does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described by the rule."

[83] Power, *supra* note 30 at 426.

[84] British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 34th Parl, 2nd Sess (28 June 1988) at 5498 (Hon BR Smith), online: <www.leg.bc.ca/documents-data/debate-transcripts/34th-parliament/2nd-session/34p_02s_880628p>. Thanks to Adam Dodek for reminding me of this part of Smith's speech.

Attorney General endangers both the public interest and the rights of individuals.[85] Moreover, the non-lawyer Attorney General has not been screened for character and integrity as have lawyers, although admittedly the utility of that screening is contested.[86]

At the same time, any requirement that the Attorney General be a lawyer, even a lawyer in good standing, would be a meagre floor on competence and integrity, and certainly on experience – but a floor nonetheless. One might dream of a world-class constitutional litigator like Ian Scott but end up with an undistinguished recent call.[87] Power, though, somewhat poetically ended his analysis with the assertion that at least a lawyer can "envisage the ideal at which he should aim".[88]

In the abstract, all else equal, a lawyer Attorney General is arguably more effective than a non-lawyer Attorney General. In reality, however, a mediocre lawyer may be a failure and an otherwise exceptionally qualified non-lawyer may make a highly effective Attorney General. For example, former Minister of Justice and Attorney General for Canada, Anne McLellan, argued in 2018 that "thoughtful[ness]" and "good judgment" are more important for an Attorney General than being a lawyer.[89] (McLellan would, however, go on to state in a 2019 report for the Prime Minister's Office that "the federal [Attorney General and Minister of Justice] has always had legal training, and I believe that it is important to continue this tradition."[90])

Indeed, some commentators argue that a non-lawyer Attorney General may be more effective than a lawyer – depending on how one defines effectiveness. For example, Omar Ha-Redeye writes that "[s]ometimes lengthy experience in a profession is the biggest obstacle to reforming that profession."[91] Similarly, former

---

[85] See above note 17. Contrast B Schwarz & D Rettie, "Interview with Rick Mantey: Exposing the Invisible" (2001) 28:2 Man LJ 187 at 191: "Did the whole administration of justice fall down when Jim McCrae [a non-lawyer] was the Attorney General? I don't think so."

[86] See e.g. Alice Woolley, "Tending the Bar: The Good Character Requirement for Law Society Admission" (2007) 30 Dal LJ 27.

[87] See e.g. W Brent Cotter, "Ian Scott: Renaissance Man, Consummate Advocate, Attorney General Extraordinaire" in Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer* (Vancouver: UBC Press, 2015) 202.

[88] Power, *supra* note 30 at 429.

[89] Fatima Sayed, "Mulroney's reputation 'on the line', say critics, if she won't oppose Ford on notwithstanding clause" (18 August 2018), online: *National Observer* <www.nationalobserver.com/2018/09/18/news/mulroneys-reputation-line-say-critics-if-she-wont-oppose-ford-notwithstanding-clause>.

[90] The Hon A Anne McLellan, *Review of the Roles of the Minister of Justice and Attorney General of Canada* (June 28, 2019) at 9 , online: *Government of Canada* <pm.gc.ca/en/news/backgrounders/2019/08/14/review-roles-minister-justice-and-attorney-general-canada> [McLellan]. With great respect to McLellan, in my view membership in the provincial Bar (or, at the federal level, membership in *a* provincial bar) is necessary as opposed to merely legal training.

[91] Ha-Redeye, *supra* note 36. See also comments by lawyer Clayton Ruby on the appointment of Marion Boyd as Attorney General for Ontario: "She brings a new perspective and I think that's hopeful…. The only

Ontario premier Bob Rae described his non-lawyer Attorney General, Marion Boyd, as "an advocate for change".[92] Boyd herself said of her appointment that "I think what we are saying -- and what the clear message from the government is -- is that the justice system is not the prerogative of the legal profession only."[93] Shirley Bond, whose appointment triggered *Askin*, suggested that "as a non-lawyer serving as Attorney General, I bring a common-sense approach that most British Columbians can appreciate".[94] More dramatically, Vic Toews argued that the adoption of administrative measures against impaired driving in Manitoba was easier because the non-lawyer Attorney General was not fixated on the requirements of the *Canadian Charter of Rights and Freedoms*:[95]

> From the onset the greatest impediment to the development of this administrative program was the objection by the legal community, including my colleagues in the Manitoba Department of Justice, that this initiative should not be pursued because it violated the *Charter of Rights and Freedoms*…. The advantage that we had in developing this program for the Province of Manitoba was that our Attorney General was not a lawyer; rather, he could have been a model for the archetypal reasonable man we used to read about in law school. His focus was not so much on the *Charter* objections to the program that the legal community was intent on providing but on finding a mechanism to protect the lives and property of the people of Manitoba.[96]

Admittedly, a fixation on the *Charter* – even an undue one – might not be considered a disadvantage by some. Contrast here Boyd, the non-lawyer Attorney General for Ontario, who wanted her lawyers to confirm the constitutionality of such impaired-driving measures before she recommended them.[97] A more fundamental concern than

---

question is, can she understand the legal issues? If she's bright, she'll have no difficulty." (Paul Moloney, "Minister's lack of legal training may be an asset, lawyers say", *The Toronto Star* (4 February 1993) A11.)

[92] Bob Rae, *From Protest to Power: Personal Reflections on a Life in Politics* (Toronto: Viking, 1996) at 251.

[93] Tom Onyshko, "Ontario's new Attorney General has ambitious plans for reform", *The Lawyers Weekly* 12:40 (26 February 1993) (QL). See also Monique Conrod, "'We didn't think there would be any problem. We really didn't.' Bill 167 defeat was major disappointment for Boyd", *The Lawyers Weekly* 15:5 (2 June 1995) (QL), quotinig Boyd: "I think the perspective that someone who's a layperson, a lay advocate, a feminist, and someone who has worked on social justice issues previous to being attorney general, is very important to focus attention on some parts of the job that may not have had as much attention in the past, and at a time when the general public is looking to the justice system from the perspective of: How does it serve the general public? Is it only focused on issues that the legal profession itself is interested in, or is it really focused on providing justice for the general population? So I think it was an ideal time for a new perspective to come to the job."

[94] Jeremy Hainsworth, "B.C. ministry merger assailed", *The Lawyers Weekly* 31:48 (27 April 2012).

[95] *Charter*, *supra* note 57.

[96] Vic Toews, "The *Charter* in Canadian Society" (2003) 19 SCLR (2d) 345 at 347–348. (Now Justice Toews of the Manitoba Court of Queen's Bench.)

[97] See e.g. Editorial, "Consulting Unlimited", *The Toronto Star* (22 February 1995) A20: "Last November, she pronounced herself in favor of a 90-day licence suspension for drivers accused of impaired driving. But

that of Toews is that the Attorney General cannot properly oversee the profession, including the law society and its enabling legislation, unless they are independent from that profession and immune to regulation by that law society.[98]

The most important policy consideration is that a lawyer is more likely to understand and appreciate the unique role of the Attorney General than a non-lawyer. Such an understanding and appreciation is even more important when they are cross-appointed to other portfolios and in jurisdictions where public safety remains part of the Ministry of Justice, as their other duties and pressures can interfere with their duties as Attorney General.[99] Particularly concerning is a non-lawyer Premier who appoints themself as Attorney General, as did E.C. Manning of Alberta in 1955.[100] Puzzlingly, Manning would later observe that "I felt that if anybody was going to serve as Attorney General who was not a lawyer, there would be more public acceptance of it if I did it myself as premier."[101] Such a dual portfolio can be disastrous for the rule of law even where the Premier and Attorney General is a lawyer, as demonstrated by the conduct of Quebec's Maurice Duplessis in the classic case of *Roncarelli v Duplessis*.[102] While Attorney General for Ontario, Ian Scott wrote in 1989 that "[i]t is understood in our province that the attorney general is first and foremost the chief law officer of the Crown, and that 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."[103] This understanding is all the more important when the Attorney General holds other portfolios.

In sum, while the Attorney General should arguably be a lawyer as a matter of policy, at least as a general rule, that argument is contested. Moreover, even if that argument is correct, it does not follow that the Attorney General must be a lawyer as a matter of law. Indeed, *Askin* holds the opposite. Nonetheless, there are significant adverse legal consequences to the appointment of a non-lawyer Attorney General. Most concerning for governments is that solicitor-client privilege may not apply. In

---

Boyd - not a lawyer herself - said she just wanted to have her legal advisers double-check the constitutionality of the idea, even though Manitoba already has implemented it."

[98] See e.g. Martin, "Immunity", *supra* note 72 at 437, 438.

[99] See e.g. Murphy, *supra* note 27 at 9.

[100] See e.g. Kilgour, *supra* note 24 at 141 (mentioning Manning but not acknowledging any concern).

[101] Brian Brennan, *The Good Steward: The Ernest C. Manning Story* (Calgary: Fifth House 2008) at 126. See also Barry L Strayer, *Canada's Constitutional Revolution* (Edmonton: University of Alberta Press, 2013) at 8: "It was said of Mr. Manning, who of course was not a lawyer, that he did not have enough faith in any lawyer to entrust him with the role of Attorney General."

[102] *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2d) 689, concerning Quebec Premier and Attorney General Maurice Duplessis, as noted e.g. in Huscroft, *supra* note 25 at 132, n 29. See also Keating, *supra* note 41 at 16:33 to 16:35. For a detailed analysis, see Andrew Flavelle Martin, "The Premier Should Not Also Be the Attorney General: *Roncarelli v Duplessis* Revisited as a Cautionary Tale in Legal Ethics and Professionalism" (2021) 44 Man LJ [forthcoming].

[103] 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 122.

contrast, what should be most concerning for the public, and most concerning for legislatures and governments insofar as their role is to protect the public interest, is that the law of lawyering does not fully apply, if it applies at all.

## Part 3: Options for reform

As I explained in Parts 1 and 2, *Askin* – even if correctly decided – has undesirable legal and policy consequences. In this Part, I consider options for reform. Insofar as the holding in *Askin* is an application of the Crown prerogative, there is no legal impediment to legislatures changing the law through legislation. Thus the adverse legal consequences of *Askin* can be fixed. Further, the recognition of a constitutional convention that only lawyers be appointed as Attorney General would address the adverse policy consequences.

One option, as always, is to do nothing. As described above,[104] the most serious legal consequence of a non-lawyer Attorney General for the government is Dodek's argument that solicitor-client privilege does not apply. However, there is as yet no case in which this argument has been accepted. Moreover, counterarguments are available. The other legal consequences of *Askin* may be unimportant or not pressing, at least to legislators. This do-nothing option is the easiest but is certainly not recommended.

A second and superficially simple option is to require by statute that the Attorney General be a lawyer in good standing with the provincial law society. Indeed, Power explains that such amendments were proposed, but rejected, in Alberta in the late 1930s.[105] This option would fix the legal consequences of *Askin*. However, this option leaves no recourse in situations where there are no lawyers in the caucus of the governing party. Moreover, this option would compromise the freedom of the Premier to select their Cabinet, which freedom is desirable in itself and, regardless, is central to the Canadian system of responsible government. The Premier may have good – or, admittedly, bad – reasons to choose a non-lawyer Attorney General. While Keating suggests that if no lawyer-legislator is available, a lawyer who is not an elected legislator can be appointed Attorney General,[106] I disagree that such an appointment could be reconciled with responsible government.[107] (Such an appointment would be less problematic if the position of Attorney General were removed from Cabinet, but such a reform is well beyond the scope of this article.)

---

[104] See above note 66 and accompanying text.

[105] Power, *supra* note 30 at 417.

[106] Keating, *supra* note 41 at 52:12 to 52:29.

[107] See e.g. Steele, *supra* note 5 at 8: "It is constitutionally permissible to appoint non-MLAs to Cabinet, but that option creates a raft of other issues having to do with responsible government."

A third option, and one that would fix the legal consequences of *Askin* without impeding the freedom of the Premier to select their cabinet, is both to require the Attorney General to be a lawyer in good standing with the provincial law society *and* to require the law society to admit any person appointed as Attorney General. One model here is the Ontario *Barristers Act*, which provides that the federal or provincial Attorney General may join the Ontario bar without meeting the admission requirements,[108] but does not *require* the federal Attorney General or provincial Attorney General to do so. If the goal post-*Askin* is to ensure that the non-lawyer Attorney General is bound by the law of lawyering, it is not enough to *allow* the Attorney General to become a lawyer; instead, the Attorney General must be *required* to become a lawyer.[109]

I recognize that a requirement to admit the non-lawyer Attorney General is, at least at first glance, an imposition on the independence of the law society. However, recall that the non-lawyer Attorney General practices law.[110] From this perspective, imposing this requirement on the law society merely completes, or fills a gap in, its statutory mandate to regulate the practice of law in the public interest and ensures it can meet that mandate. Indeed, without such a requirement, the law society is prevented from meeting – or, more cynically, permitted to abdicate – its statutory mandate. In terms of the regulation of the profession and the law of lawyering, it is better that the Attorney General be a completely unqualified lawyer than a non-lawyer.

I argue that the best option is a fourth one: to amend provincial legislation to *deem* that the Attorney General is a member of the corresponding law society so long as they remain Attorney General. This option would fix the legal consequences of *Askin* without in any way impeding the freedom of the Premier to select their Cabinet, while impairing little if at all the independence of the law society or compromising the qualifications required to become a lawyer.

---

[108] *Barristers Act*, RSO 1990, c B.3, s 1, as amended by *Accelerating Access to Justice Act, 2021*, Sched 1, s 1. Note that prior to this amendment in April 2021, this provision oddly applied only to the federal Attorney General and not the provincial Attorney General. The addition of the provincial Attorney General to this provision, as well as the larger issue of non-lawyers Attorney General, was largely ignored during the legislative debates, although one opposition legislator did ask "Why give the Attorney General that power? How does it serve the people of this province?" – though the question was left unanswered: Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 42-1, No 228 (1 March 2021) at 11660 (Catherine Fife), online: <www.ola.org/en/legislative-business/house-documents/parliament-42/session-1/2021-03-01/hansard> [Fife] (See also Fife's unanswered questions about how the provision was related to the purported topic of the bill, i.e. access to justice: 11657, 11660).

[109] I note here that, based on the wording of the *Barristers Act*, *supra* note 108, there is some residual uncertainty over whether an Attorney General admitted under that provision would be subject to the disciplinary jurisdiction of the law society (although on reflection I think that uncertainty was overblown): Andrew Flavelle Martin, "The Implications of Federalism for the Regulation of Federal Government Lawyers" (2020) 43:1 Dal LJ 363 at 385–386 [Martin, "Federalism"]. While that uncertainty was raised in the context of the federal Attorney General, now that this provision has been extended to apply to provincial Attorneys General, the same uncertainty would apply to provincial Attorneys General called under that provision.

[110] See e.g. note 70 and accompanying text.

An important consequence of making or deeming the non-lawyer Attorney General a lawyer is that they would have an identifiable duty to encourage respect for the administration of justice.[111] For my purposes, it is worth emphasizing that this duty does not prohibit criticism of lawyers, judges, or courts – indeed, it may often require such criticism.[112] Instead, this duty mandates only that such criticism be fair "bona fide and reasoned", not "petty, intemperate or unsupported".[113] While a naïve romantic might hope that all politicians would do so, this expectation seems appropriate of at least the Attorney General. The professional duty of civility would likewise apply to such criticism, at least nominally.[114] Post-*Groia*, however, litigation is not a "tea party"[115] to which a robust expectation of civility applies – and if anything, politics is less likely to attract a robust expectation of civility than litigation. There is thus little reason to suspect that a non-lawyer under my proposals will enthusiastically embrace their newfound duty of civility. However, the existence of a duty to encourage respect for the administration of justice has normative force in itself – even if that duty remains unenforced.

One seemingly problematic consequence is that, if made or deemed a lawyer, the non-lawyer Attorney General would have a professional duty of competence – a duty it would seem they have no chance of fulfilling themself.[116] However, the non-lawyer Attorney General, like all lawyers, can fulfill their duty of competence by "obtain[ing] the client's instructions to retain, consult or collaborate with a lawyer who is competent for that task".[117] Thus, their lawyers can assist them in fulfilling that duty of competence. Importantly, fulfilling this duty *requires* the non-lawyer Attorney General to consider the advice of their lawyers, and apparently to follow that advice unless they have a good basis for rejecting it.

Perhaps the most undesirable consequence of deeming or making the non-lawyer Attorney General into a member of the law society is that they would have the right to appear as counsel in court. They should resist that temptation. Indeed, even a lawyer appointed Attorney General must be thoughtful and deliberate in their court

---

[111] *FLSC Model Code*, *supra* note 73, r 5.6-1.

[112] *Ibid*, r 5.6-1, commentary 3.

[113] *Ibid*, r 5.6-1, commentaries 3, 4.

[114] *Ibid*, r 7.2-1. See also r 7.2-4: "A lawyer must not, in the course of a professional practice, send correspondence or otherwise communicate to a client, another lawyer or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer."

[115] *Groia v Law Society of Upper Canada*, 2018 SCC 27 at para 3: "trials are not — nor are they meant to be — tea parties." Although, as a potential floor, see *Karahalios v Conservative Party of Canada*, 2020 ONSC 3145 at para 262: "Litigation is not an MMA match where one calls out his opponent and dares him or her to enter the courtroom."

[116] *FLSC Model Code*, *supra* note 73, r 3.1-2.

[117] *Ibid*, r 3.1-2, commentary 6(b).

appearances.[118] Any such appearance by a non-lawyer Attorney General would suggest at least hubris, if not, as Justice Rosenberg (writing extrajudicially about lawyer Attorneys General) warned, that they are "[u]sing the court process to push a personal or political agenda".[119]

If the chilling effect of law society jurisdiction over the Attorney General is considered a legitimate concern, then one of these options could be combined with an immunity provision like that on the Attorney General under the Ontario *Law Society Act*.[120] This combination would solve the problem of solicitor-client privilege without subjecting the Attorney General to that part of the law of lawyering that is enforced by the law society.

What about federally? The implications of *Askin* are less of a concern federally because, as a matter of federalism, provincial law cannot require the Attorney General for Canada – or indeed any person providing legal services to the federal government – to be a lawyer.[121] While Parliament could displace the prerogative and require the federal Attorney General to be a lawyer, i.e. to be a member of a provincial bar, Parliament would have no power to concomitantly require any provincial bar to admit them as one. Nonetheless, section 1 of the Ontario *Barristers Act* guarantees the admission of the federal Attorney General to the Ontario Bar. Parliament could deem or require the Attorney General to be a lawyer, at least for the purposes of matters within federal jurisdiction, which deeming or requirement under section 91(8) of the *Constitution Act, 1867* – federal power over officers and employees of the federal government – would likely prevail over provincial legislation via paramountcy.[122] Indeed, as at the provincial level, my recommendation is that Parliament adopt legislation deeming the Attorney General for Canada to be a member of at least one provincial or territorial bar. Given that the seat of government is Ottawa, and that the Ontario *Barristers Act* allows the federal Attorney General to become a member of the Ontario bar, it might appear to make the most sense for Parliament to choose the Ontario bar. However, to ensure the law of lawyering applied to the Attorney General evenly across the country, the best approach would be for Parliament to deem the Attorney General to be a member of every provincial and territorial bar.

The modified *Barristers Act* approach – in which the law society is required to admit the Attorney General *and* they are required to join it – has both advantages and disadvantages insofar as the Attorney General remains a member of the law society after they cease to be Attorney General, at least until they apply for permission to surrender their license. An advantage is that the law society has regulatory and

---

[118] The Honourable Marc Rosenberg, "The Attorney General and the Administration of Criminal Justice" (2009) 34:2 Queen's LJ 813 at 846–849.

[119] *Ibid* at 848.

[120] *Law Society Act*, RSO 1990, c L.8, s 13(3). See e.g. Martin, "Immunity", *supra* note 72 at 431–433.

[121] Martin, "Federalism", *supra* note 109 at 374–383.

[122] *Ibid* at 386–389, esp 388 on 91(8); *Constitution Act, 1867*, *supra* note 58.

disciplinary authority over them while they are Attorney General and retains that authority after they leave the portfolio.[123] In contrast, under the deeming approach, they would be removed from law society jurisdiction by ceasing to be Attorney General. This difference admittedly may be an insignificant or largely hypothetical one, given the reality that law societies seem unlikely to discipline Attorneys General regardless.[124] (A slightly more complex legislative solution would be to specify that the law society retains permanent disciplinary jurisdiction over conduct while deemed to be Attorney General.) Under either approach, however, courts would maintain authority over any breaches of law by the non-lawyer Attorney General, such as a breach of their lawyerly fiduciary duty to the client, even after they cease to be Attorney General.

On the other hand, a disadvantage to this modified *Barristers Act* approach is that, after leaving office, the former Attorney General has the lifetime ability to practice law despite having no legal training – posing a substantial risk to potential clients. This lifetime ability to practice law could also be seen as a gratuitous, arbitrary, and undeserved "perk",[125] which is the antithesis of my purpose. Indeed, if this granting of a "perk" to non-lawyer Attorneys General was the intended purpose of this amendment to the *Barristers Act*, as suggested during the legislative debates,[126] then with respect the government and the Attorney General either overlooked or did not appropriately appreciate the important legal issues and law society independence considerations involved – as well as the importance of the public understanding and perception of the motivation and rationale for this change.

Another option would be to split the roles of the Minister of Justice and Attorney General,[127] and to only require or deem the latter to be a member of the law society. As Adam Dodek argues, "[w]e need to have a minister of justice who is responsible for justice policy in the same way that the minister of health is responsible for health policy. But it is not apparent that we need a lawyer in this role any more than we need a doctor as minister of health, a farmer as minister of agriculture or a teacher as minister of education."[128] While this splitting at the federal level was not endorsed in the recent *Review of the Roles of the Minister of Justice and Attorney*

---

[123] But see note 109.

[124] Consider again here Peter MacKay.

[125] Fife, *supra* note 107 at 11656, 11660.

[126] *Barristers Act*, *supra* note 108; Fife *supra* note 108 at 116660: "Tell me why giving the Attorney General the right and the authorization for current and former Attorneys General to be called to the Ontario bar without having to meet law society licensing requirements—and he calls this a perk."

[127] See e.g. Adam Dodek, "The impossible position: Canada's attorney-general cannot be our justice minister" (22 February 2019), online: *The Globe and Mail* <www.theglobeandmail.com/opinion/article-the-impossible-position-canadas-attorney-general-cannot-be-our/> [Dodek, "Impossible Position"]. See also Murphy, *supra* note 27 at 14.

[128] Dodek, "Impossible Position", *supra* note 127.

*General of Canada*,[129] it warrants careful consideration both federally and provincially. Under this approach, the Attorney General could be subject to law society authority, for the necessary reasons explained above, while the Minister of Justice could be free from that authority, avoiding the accompanying constraints.

As for the policy consequences of *Askin*, here Askin's constitutional convention argument is intriguing and potentially effective. A constitutional convention that only lawyers be appointed as Attorney General would recognize the applicable policy considerations without making them legally enforceable, while serving as a strong signal to premiers that there may be political fallout for appointing a non-lawyer. Any premier who concluded that the appointment of a non-lawyer was the best option despite this disincentive would be free to choose that option. The prerogative power would thus be constrained as a matter of politics but not as a matter of law. Alongside my other recommendations, legislatures should consider adopting legislation or passing motions purporting to recognize a constitutional convention that only lawyers be appointed as Attorney General. While the formal recognition of a constitutional convention is a matter for the courts,[130] such a declaration by the legislatures would be meaningful evidence in itself.

## Reflections and conclusion

In this article I have analyzed the legal and policy consequences of the non-lawyer Attorney General. In doing so, I both demonstrated that *Askin* has received little attention in the case law and the literature and argued that it warrants more. Aside from the weaknesses in its reasoning, *Askin* has problematic legal implications. Chief among these implications is the non-application of solicitor-client privilege and of the law of lawyering. The best way to overcome the legal implications of *Askin* without affecting the freedom of the Premier to choose their cabinet is to amend provincial legislation to deem that the Attorney General is a member of the provincial law society so long as they hold that portfolio. (At the federal level, Parliament should likewise legislatively deem the Attorney General for Canada to be a member of all provincial and territorial bars.) This approach is preferable to the guaranteed but voluntary call in the Ontario *Barristers Act*, which among other things does not require the non-lawyer Attorney General to join the law society, detracts from the independence of the law society to control admission to the bar in the public interest, and can be seen as granting an arbitrary and gratuitous lifetime perk.[131] The intention of my recommendations is not to benefit the non-lawyer Attorney General but to protect the interests of the government as client, the public interest, and the ability of the law society to fulfill its statutory mandate.

---

[129] McLellan, *supra* note 90 at 31.

[130] *Patriation Reference*, *supra* note 64 at 853. I note that Power, *supra* note 30 at 422–423, though not considering a constitutional convention, gives little weight to "tradition and custom" in itself.

[131] Fife, *supra* note 108 at 11656, 11660. See above note 125 and accompanying text.

Indeed, to leave the law societies unable to regulate non-lawyer Attorneys General is to hobble their ability to protect the public interest and public confidence in the administration of justice. To insert the law societies, at least in theory, into politics in this way is admittedly inconvenient if not dangerous for the independence and self-regulation of the legal profession – law societies may indeed be "content" with the status quo.[132] Nonetheless, the ability to regulate all Attorneys General is ultimately unavoidable to properly fulfill law societies' statutory mandate. Under any approach, the law societies seem in reality unlikely to investigate or discipline the non-lawyer Attorney General – or for that matter, any Attorney General. While that reality is disillusioning, I leave that disillusionment for another day.

The importance of the changes I have recommended is nonetheless much more than symbolic. The largely theoretical potential for discipline is not the only driver for compliance with legal obligations; there is a normative and political force to those obligations. As John Edwards observed in a slightly different context, the ultimate backstop for any Attorney General to act properly is their character and integrity.[133] This reality is, if anything, even more true for a non-lawyer Attorney General. To subject the non-lawyer Attorney General to the professional and legal obligations of all lawyers is, one would hope, to impress those obligations upon their integrity. If nothing else, there could potentially be political ramifications if a non-lawyer Attorney General did not meet these obligations. Such ramifications would be reinforced by recognizing a constitutional convention that only lawyers be appointed as Attorney General.

In any case, legislative clarity that these obligations apply to the non-lawyer Attorney General, via a clear statement of the legislature on behalf of the public, is a first step in actualizing them and raising public expectations. Such legislation would emphasize that the legislature will (or can or should) hold even the non-lawyer Attorney General to a higher standard than it does other members of cabinet. It would provide a clear and articulable basis, although some might characterize this as a fig-leaf, for calls for the non-lawyer Attorney General to resign.

An analogy can be drawn here to the recent recommendation by Anne McLellan to create a special oath of office for the Minister of Justice and Attorney General of Canada, one that would among other things explicitly acknowledge a duty

---

[132] See note 11. See also Murphy, *supra* note 27 at 11: the failure of the law society to take jurisdiction is "disconcerting".

[133] John Ll J Edwards, *The Attorney-General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984) at 69, quoted e.g. in McLellan, *supra* note 90 at 11: "in the final analysis it is the strength of character, personal integrity and depth of commitment to the principles of independence and the impartial representation of the public interest, on the part of the holders of the office of Attorney General, which is of supreme importance." See also Murphy, *supra* note 27 at 7: "the implementation of the Rule of Law which is so critical to the integrity of our democratic system of government depends entirely on the integrity of the person holding the position of Attorney General." Again, as a counterpoint see Peter MacKay.

to the rule of law.[134] McLellan argued that such an oath would "clarify" the role for the Attorney General both for herself and for others.[135] The legislative amendments I recommend would serve a similar function. I also echo McLellan's position that such changes are "not a purely symbolic gesture" and could, if nothing else, support the Attorney General's resignation after a breach.[136]

There is a clear role for the profession, if not the public, to push for clarification and change. As suggested by Keating, the Canadian Bar Association and its branches should encourage the Federation of Law Societies of Canada and its member law societies to adopt and make public a clear position on their actual and preferable jurisdiction over the non-lawyer Attorney General – and encourage Parliament and the legislatures to act on the recommendations proposed above.

While the implications of *Askin* are problematic, my view is that an absolute rule that only lawyers can be appointed as Attorney General would be problematic in a different way. At minimum, *Askin* is problematic in that it allows the appointment of an Attorney General who is unqualified as a matter of education, training, and experience. While a bare requirement to be a lawyer does not guarantee much, it does provide a minimum measure of preparation for the role. A deeper question is whether the non-lawyer Attorney General can truly appreciate, understand, and fulfill their duties to the rule of law – as its "protector" or "lore master".[137] The non-lawyer Attorney General is unduly reliant on the judgment of the lawyers who advise them – unless they reject that judgment, as espoused by Toews, which is not much better. As Murphy notes, "the Attorney General is not merely a figurehead."[138] On the other hand, I acknowledge the argument that a lawyer Attorney General is beholden to the legal profession, if not to the law society itself, and cannot effectively oversee that profession and that law society while simultaneously being a member of that profession and a licensee of that law society. On balance, the freedom of the Premier or Prime Minister to choose their Attorney General outweighs the benefits of requiring them to choose a lawyer. Thus, while I agree that the Attorney General should generally be a lawyer before their appointment, I disagree that there should be a legal

---

[134] McLellan, *supra* note 90 at 42: "I propose we develop a Canadian oath which refers specifically to the Attorney General's unique role in upholding the rule of law, giving independent legal advice, and making decisions about prosecutions independently."

[135] *Ibid* at 42.

[136] *Ibid* at 43.

[137] Kent Roach, "Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law" (2006) 31:2 Queen's LJ 598 at 600: "the Attorney General is not simply the government's lawyer, but *the protector of the rule of law* within government" [emphasis added]; Boucher, *supra* note 41 at 465 [citations omitted, emphasis in original]: "While it is correct and perhaps convenient to describe the Attorney General's role as that of custodian of the rule of law, guardian of the rule of law or guardian of the public interest, it is more practical to describe him or her as the *exclusive interpreter* of the rule of law, a role which, in a fit of whimsy, I have dubbed *Lore Master of the Rule of Law*."

[138] Murphy, *supra* note 27 at 12–13.

requirement to that effect – although I do advocate the recognition of a corresponding constitutional convention.

While there is no way to overcome the negative policy consequences of a non-lawyer Attorney General – i.e. that they are unavoidably untrained and unqualified in a technical sense, and their integrity has not been assessed by the corresponding law society, and they lack a lawyer's understanding and appreciation of the rule of law – my proposals do overcome the legal consequences. In doing so, they also provide a clear and objective and rigorous standard for the non-lawyer Attorney General to meet. Premiers are free to appoint non-lawyers as Attorneys General, and eliminating that freedom itself would be problematic. At the same time, both appointer and appointee should bear the consequences of that choice, be they positive or negative. The public should expect more of Attorneys General, be they lawyers or non-lawyers, and – if nothing else – my proposal is a reasonable way to set and affirm those expectations. It is also a clear direction to law societies that regulating the legal profession in the public interest must mean regulating the Attorney General. I emphasize that to leave the chief legal officer of the Crown beyond law society authority, in law or in reality, is to require or allow law societies to abdicate their responsibility.