

The Lawyer's Professional Duty to Encourage Respect for—and to Improve—the Administration of Justice: Lessons from Failures by Attorneys General

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Article abstract

The lawyer's duty to encourage respect for the administration of justice remains largely amorphous and abstract. In this article, I draw lessons about this duty from historical instances in which Attorneys General inappropriately criticized judges. Not only are Attorneys General some of the highest-profile lawyers in the country, but they also face unique tensions and pressures that bring their duties as lawyers into stark relief. I focus on the two instances where law societies sought to discipline Attorneys General for such criticism of judges, as well as a more recent instance in which no discipline proceedings were pursued. I also consider the obligations of Attorneys General when other Ministers inappropriately criticize judges. I conclude that a lawyer must take all reasonable steps in the circumstances to confirm the factual and legal accuracy of any criticism of the judiciary; that law societies should allow reasonable but defined latitude for public criticism of judges; and that, where a client inappropriately criticizes the judiciary, their lawyer must make good-faith efforts to urge the client to discontinue and apologize for such criticism—and if those efforts are unsuccessful, the lawyer must repudiate that criticism themselves or withdraw.

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LE DEVOIR DE l'avocat ou l'avocate d'encourager le respect de l'administration de la justice demeure plutôt amorphe et abstrait. Dans cet article, je tire des leçons sur ce devoir à partir d'exemples historiques dans lesquels les procureurs généraux et les procureures générales critiquent des juges de façon inappropriée. Non seulement les procureurs généraux et procureures générales figurent parmi les avocats et les avocates avec les plus hauts profils du pays, mais ceux-ci et celles-ci sont également confrontés à des tensions particulières et à des pressions qui mettent en relief leurs devoirs en tant qu'avocats et qu'avocates. Je me concentre sur les deux cas où des barreaux ont cherché à sanctionner des procureurs généraux et procureures générales pour des critiques de la part de juges, ainsi que sur un cas un peu plus récent au cours duquel des mesures disciplinaires n'ont pas été prises. J'examine également l'obligation qu'a un procureur général ou une procureure générale lorsque d'autres ministres critiquent injustement les juges. Je conclus qu'un avocat ou une avocate doit prendre toutes les mesures raisonnables selon les circonstances pour confirmer l'exactitude, selon les faits et d'un point de vue juridique, de toute critique de la magistrature ; que les barreaux devraient accorder une marge de manœuvre raisonnable, mais définie, pour la critique publique des juges ; et que, lorsqu'un client ou une

cliente critique injustement la magistrature, son avocat ou son avocate doit faire preuve de bonne foi et s'efforcer d'inciter le client ou la cliente à retirer sa critique et à s'excuser, et si les efforts déployés ne portent pas leurs fruits, l'avocat ou l'avocate doit lui-même ou elle-même retirer la critique ou se retirer.

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The Lawyer's Professional Duty to Encourage Respect for—and to Improve—the Administration of Justice: Lessons from Failures by Attorneys General

*Andrew Flavelle Martin**

INTRODUCTION

All lawyers share a longstanding professional duty to encourage respect for the administration of justice.¹ With few exceptions, however, that duty remains amorphous and abstract. My goal in this article is to provide contours and depth to that duty. While I begin with an analysis of existing case law, my focus is drawing lessons from the conduct of Attorneys General. I use this approach to articulate a principled yet realistic conception of the duty to encourage respect for and to improve the administration of justice—one that is both grounded in past events and doctrinally principled to be relevant for practicing lawyers in the present and future.

Why Attorneys General? Not only are Attorneys General some of the highest-profile lawyers in the country, but they also face unique tensions and pressures that bring their duties as lawyers into stark relief. Thus, their successes and their failures present a valuable learning opportunity. As

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1 See e.g. Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2009) as amended October 2022, r 5.6-1 [*FLSC Model Code*]. See also *Code of Professional Conduct of Lawyers*, RLRC c B-1, r 3.1, art 11 [*Quebec Code*].

lawyers in public office, Attorneys General are ostensibly held to the same standards of conduct as other lawyers.² Moreover, most lawyers have little if any rational incentive to publicly criticize the judiciary. However, politicians have strong incentives to attack an independent unelected judiciary—particularly when judicial decisions protect minority groups or interests or are otherwise unpopular. While the Attorney General shares some of these incentives, they purportedly have a unique responsibility among elected politicians to defend the judiciary. Indeed, they are sometimes described as the “interlocutor between government and judiciary” and the “defender” of the judiciary.³ Elizabeth Sanderson has further asserted that “[c]learly informed commentators see the...duty to defend the institution of the judiciary as fundamental to Canada’s constitutional arrangements.”⁴ But this role tends to be articulated only vaguely in the literature and is rarely invoked—explicitly or implicitly—by Attorneys General. While this duty is sometimes contested in other commonwealth countries, particularly in Australia,⁵ my focus here is on the Canadian context.

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- 2 See e.g. *FLSC Model Code*, *supra* note 1, r 7.4-1 (“[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.”) Commentary 2 qualifies this statement, apparently as a matter of disciplinary priorities: “[g]enerally, the Society is not concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely upon the lawyer’s integrity or professional competence may be the subject of disciplinary action.” (Thanks to a reviewer on this point). On the inconsistent interpretation of r 7.4-1, see Andrew Flavelle Martin, “Legal Ethics versus Political Practices: The Application of the Rules of Professional Conduct to Lawyer-Politicians” (2013) 91:1 *Can Bar Rev* 1 at 16, 35–36 [Martin, “Lawyer-Politicians”].
- 3 Elizabeth Sanderson, *Government Lawyering: Duties and Ethical Challenges of Government Lawyers* (Toronto: LexisNexis Canada, 2018) at 114–17. At 116–17, Sanderson uses the example of Peter MacKay to illustrate this duty. See also Craig E Jones, “On the Attorney General, the Courts and the New Ministry of Justice” (2013) 71:2 *Advocate* 189 at 192: “for 300 years it was the traditional and honourable role of the attorney general to speak in defence of the courts when they were criticized, because by constitutional convention judges do not speak except through their judgments.”
- 4 Sanderson, *supra* note 3 at 117.
- 5 See e.g. James Plunkett, “The Role of the Attorney General in Defending the Judiciary” (2010) 19:3 *J Judicial Admin* 160; Hon Darryl Williams, “The Role of the Attorney General” (2002) 13:4 *Pub L Rev* 252 at 254–58, 261–62; Tony Abbott, “Reflections on the Role of the Attorney General” (2002) 13:4 *Pub L Rev* 273 at 275–81; Ben Heraghty, “Defender of the Faith - The Role of the Attorney-General in Defending the High Court” (2002) 28:2 *Monash UL Rev* 206; Robert McLelland, “In Defence of the Administration of Justice: Where Is the Attorney-General” (1999) 1 *UTSL Rev* 118; Michael Kirby, “Attacks on Judges - A Universal Phenomenon” (1998) 81:6 *Judicature* 238 at 243; Gerard Carney, “Comment - The Role of the Attorney-General” (1997) 9:1 *Bond L Rev* [i] at 7–9; LJ King, “The Attorney-General, Politics and the Judiciary” (2000) 29:2 *UW Austl L Rev* 155 at 171–75; Tatum Hands & Danielle

The duty of the Attorney General to defend the judiciary is one with a long history but an unclear foundation and contested modern relevance.⁶ In particular, it is unclear whether it is a special public law duty of the Attorney General or an implication of the duty of the Attorney General as a lawyer to encourage respect for the administration of justice—or both. Here, I focus on the duty of the Attorney General as a lawyer. I do so both to draw lessons not just for Attorneys General, but for lawyers generally and to emphasize the importance and relevance of the professional obligations of Attorneys General as lawyers.

This article is organized in six parts. In Part 1, I canvass the existing case law on the lawyer's professional duty to encourage respect for the administration of justice. I demonstrate that, with the exceptions of breaching court orders and making unsupported allegations of misconduct against judges, the specific conduct that will violate that duty remains amorphous. In particular, while criticism of judges will often violate the duty, it is far from clear what the threshold is and how those purported violations

Davies, "Defend Thyself!" (2003) 28:2 Alt LJ 65; Hon Daryl Williams, "Who Speaks for the Courts?" in *Courts in a Representative Democracy* (Canberra: Australian Institute of Judicial Administration, 1995) 183 at 190–92 [CIRD]; David Soloman, "Who Speaks for the Courts? Commentary" in *CIRD* 195 at 198. To contrast the context in the United Kingdom, see e.g. Rt Hon SC Silkin, "The Functions and Position of the Attorney-General in the United Kingdom" (1978) 12:1 Bracton LJ 29 at 33 (role in prosecuting contempt of court. For the corresponding role in Canada, see e.g. Sanderson, *supra* note 3 at 115–16). For a recent comparative United Kingdom-United States-Australia analysis, see Scott Stephenson, "Constitutional Conventions and the Judiciary" (2021) 41:3 Oxford J Leg Stud 750 at 773 ("[i]t is arguable that, in Australia, the constitutional convention requiring the Attorney-General to defend the judiciary against public attack has either been wholly eradicated or significantly reduced in scope"), 768–69 ("[t]here is little evidence of a constitutional convention that the [US] executive, or even the Attorney General, is under a duty to defend the judiciary from public attack. Indeed, there is, if anything, evidence of a countervailing convention entitling the executive, including the Attorney General, to say whatever it wishes about the judiciary.... Furthermore, there is an established history of the Attorney General taking the lead in criticizing the judiciary"), 766–67, quoting New Zealand Cabinet Office, *Cabinet Manual* (Wellington: Department of Prime Minister and Cabinet, 2017) at para 4.8, online: <www.dpmc.govt.nz> ("[t]he [New Zealand] Attorney-General...has an important role in defending the judiciary by answering improper or unfair public criticism, and discouraging ministerial colleagues from criticizing judges and their decisions").

6 See e.g. Jones, *supra* note 3: "the attorney's relationship with the judiciary itself...has been decaying for a generation.... [I]n recent years one is as likely to read of a provincial attorney general either standing mute as judges and their decisions are impugned (often if not usually unfairly), or even (in rare but nevertheless unforgivable circumstances) joining in the chorus of criticism, apparently out of a misplaced sense of populist solidarity." See also Heraghty, *supra* note 5 at 221–22 (albeit in the Australian context): "[t]he legal basis for this latter principle as defender of the judiciary is still an open question."

square with the lawyer's corresponding duty to speak out where the judicial system is unjust. Against this background, I then consider several case studies where Attorneys General have engaged, if not violated, the duty to encourage respect for the administration of justice. I begin Part 2 with a speech made by Claude Wagner, Attorney General and Minister of Justice for Quebec, in October 1965. This account and analysis are based not only on contemporary news coverage and transcripts of legislative debates, but also the reasons of the Barreau, the initial judge on judicial review, and the Court of Appeal. The Appendix provides the full text of the speech and the reasons of the Barreau, the application judge on judicial review, and the Court of Appeal, each in their original French alongside new English translations.⁷ Other than the contemporaneous newspaper reporting, these reasons—aside from those of the Court of Appeal—are previously unpublished. Part 3 considers media interviews by Roger Kimmerly, Minister of Justice and Attorney General of the Yukon, in 1986. Part 4 examines the more recent—and most severe—misdeeds of Peter MacKay as federal Minister of Justice and Attorney General. Then in Part 5, I consider instances of apparent inaction by Attorneys General Ken Rostad (Alberta), Ron Basford (Canada), and Rob Nicholson (Canada). I conclude in Part 6 by exploring the implications for an informed understanding of the professional duty to encourage respect for the administration of justice, as well as the proper role of the Attorney General.

I acknowledge at the outset that law society discipline proceedings against an Attorney General seem unlikely. In particular, while the rules of professional conduct are clear that a lawyer in public office is held to the same standard as other lawyers, the commentary to that rule suggests that the discipline of such lawyers will typically not be a regulatory priority.⁸ Moreover, legal protections such as parliamentary privilege would preclude law society discipline of the Attorney General for large swaths of conduct.⁹ However, while the immunity of the Attorney General to law society discipline is an important issue, it is not central to my analysis

7 Thanks to Michael Cormier, Natascha Joncas, and Olivia Pearson for translations. Any errors are my own.

8 *FLSC Model Code*, *supra* note 1, r 7.4-1, commentary 2: “[g]enerally, the Society is not concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely upon the lawyer’s integrity or professional competence may be the subject of disciplinary action.”

9 See Andrew Flavelle Martin, “The Immunity of the Attorney General to Law Society Discipline” (2016) 94:2 *Can Bar Rev* 413 at 429–30 (parliamentary privilege), 431–39 (statutory immunity unique to Ontario) [Martin, “AG Immunity”].

in this paper. Instead, my purpose is to draw lessons about legal ethics, specifically the duty to encourage respect for the administration of justice, even if that duty would not actually be enforced. I nonetheless maintain that the duty is far from aspirational.

The case studies I have chosen involve public statements in which Attorneys General or other ministers criticize the courts or specific judges. These include the only two known cases in which a Canadian law society has attempted to discipline an Attorney General, one from Quebec and one from Yukon. I also consider the role of inaction or omission by the Attorney General via two scenarios in which criticism of courts by a minister other than the Attorney General played a prominent role in subsequent litigation. I round out these case studies with two more recent situations that had the unrealized potential to result in law society proceedings against the Attorney General—in one situation the remarks of the Attorney General themselves, and in the other, the failure of the Attorney General to act after improper criticism of the courts by another minister.

Given that context, it is helpful to introduce two important concepts from the rules of professional conduct for lawyers before I proceed with my analysis. The first is the general duty of civility.¹⁰ The duty of civility is closely linked to the duty to encourage respect for the administration of justice. The second important concept is the rule on public statements, which specifically references a lawyer's obligations to the courts and to the administration of justice: “[p]rovided 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.”¹¹ The commentary to this rule emphasizes that a lawyer's professional obligations apply to such statements: “[t]he mere fact that a lawyer's appearance is outside

10 See e.g. *FLSC Model Code*, *supra* note 1, rr 5.1-5 (“[a] lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings.”), 7.2-1 (“[a] lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice”). See also *Quebec Code*, *supra* note 1, art 4: “[a] lawyer must act with honour, dignity, integrity, respect, moderation and courtesy.”

11 *FLSC Model Code*, *supra* note 1, r 7.5-1. See also *Quebec Code*, *supra* note 1, art 17: “[p]rovided he complies with this code, a lawyer may communicate information to the media, make public appearances or make public communications, including on a website, blog or online social network, by means of statements, photographs, images or videos.”

of a courtroom, a tribunal or the lawyer's office does not excuse conduct that would otherwise be considered improper."¹²

My final task before proceeding is to explain why I treat the titles and roles of Minister of Justice and Attorney General interchangeably. In Canadian jurisdictions, the Minister of Justice and Attorney General roles are held by the same person, though the two roles are more neatly separable in some jurisdictions than others.¹³ Likewise, the terminology favoured varies from jurisdiction to jurisdiction. Some of the incidents I will discuss engage the Minister of Justice role more squarely than the Attorney General role. However, given that the same individual always occupies both roles and is almost always a lawyer,¹⁴ their conduct in both roles engages—and thus is potentially illustrative of—the duty to encourage respect for the administration of justice. Indeed, as I will identify in Part 1, that duty applies to all lawyers in both their professional and extraprofessional roles.

PART 1: THE DUTY

While the duty to encourage respect for the administration of justice is often mentioned in the legal literature and in disciplinary decisions,¹⁵ it is rarely analyzed in detail.¹⁶ I thus begin with some discussion of the history

12 *Ibid.*, r 7.5-1, commentary 1.

13 For example, contrast the federal *Department of Justice Act*, RSC 1985, c J-2, ss 4 (Minister of Justice) and 5 (Attorney General) [*DOJ Act*], with the Ontario *Ministry of the Attorney General Act*, RSO 1990, c M.17, s 5 (Attorney General) (the Act makes no mention of the phrase “Minister of Justice”). For a statute in which the distinction is quite explicit, see e.g. *Extradition Act*, SC 1999, c 18.

14 See Andrew Flavelle Martin, “The Non-Lawyer Attorney General: Problems and Solutions” (2021) 72 UNBLJ 257.

15 See e.g. Brent Olthuis, “Professional Conduct” in Adam M Dodek, ed, *Canadian Legal Practice: A Guide for the 21st Century* (Toronto: LexisNexis Canada, 2009) (loose-leaf updated 2022, release 85), vol 1, ch 3 at paras 3.205–3.209; Mark M Orkin, *Legal Ethics*, 2nd ed (Toronto: Thomson Reuters Canada, 2011) at 15–16; Gavin MacKenzie, “The Valentine’s Card in the Operating Room: Codes of Ethics and the Failing Ideals of the Legal Profession” (1995) 33:4 *Alta L Rev* 859 at 868 (characterizing the rule embodying this duty as one that “exhort[s] lawyers to strive for exemplary ethical standards of practice,” which appears to suggest that this rule is an aspirational one).

16 But see Andrew Flavelle Martin, “Legal Ethics and the Political Activity of Government Lawyers” (2018) 49:2 *Ottawa L Rev* 263 at 290–91 [Martin, “Political Activity”], arguing that this duty requires Crown prosecutors and counsel to courts or tribunals to refrain from political activity; Andrew Flavelle Martin, “Legal Ethics and Canada’s Military Lawyers” (2019) 97:1 *Can Bar Rev* 727 at 749–51, discussing the interaction of this duty with the duties of Canadian Armed Forces lawyers as military officers.

and contours of the duty based on the rules of professional conduct and the interpretation of those rules by law societies and courts.

The Present Form of the Rule on the Duty

The duty to encourage respect for the administration of justice is currently set out in rule 5.6-1 of the *FLSC Model Code*: “[a] lawyer must encourage public respect for and try to improve the administration of justice.”¹⁷ This rule on its face appears to have two component duties: one to encourage public respect for the administration of justice, and one to improve the administration of justice. However, with respect to Justice MacDonald in *Stewart v Canadian Broadcasting Corp*, it may be misleading to consider these to be “two separate directions.”¹⁸ These paired aspects are closely intertwined and indeed at least somewhat inseparable. Improving the administration of justice is clearly one way to encourage public respect for the administration of justice. Thus, though for ease I will refer primarily to the duty to encourage respect for the administration of justice, I include within that the duty to improve it.

The commentary to the rule elaborates at some length. Several elements are particularly relevant to my analysis. First, as I alluded to in the Introduction, it applies both in lawyers’ professional conduct and their extraprofessional conduct: “[t]he obligation outlined in the rule is not restricted to the lawyer’s professional activities but is a general responsibility resulting from the lawyer’s position in the community.”¹⁹ Second, “lawyer[s] in public life”—which would include the Attorney General—are cautioned to “be particularly careful...because the mere fact of being a lawyer will lend weight and credibility to public statements.”²⁰ Third, the duty prohibits not all criticism, but specifically “irresponsible allegations” and “petty” or “intemperate” or dishonest “criticism,”²¹ recognizing that criticism may be necessary and appropriate. Fourth, lawyers have a positive duty to *defend* judges against “unjust criticism,” primarily because “judges...are often prohibited by law or custom from defending themselves.”²² Indeed,

17 *FLSC Model Code*, *supra* note 1, r 5.6-1.

18 1997 CanLII 12318 (ON SC) at para 268: “[r]ule 11 contains two separate directions. The lawyer should encourage public respect for the administration of justice. In addition, the lawyer should try to improve the administration of justice.”

19 *FLSC Model Code*, *supra* note 1, r 5.6-1, commentary 1.

20 *Ibid.*

21 *Ibid.*, r 5.6-1, commentaries 1, 3.

22 *Ibid.*, r 5.6-1, commentary 3.

the wording of the rule itself indicates that the overall duty is a positive or affirmative one: lawyers not only have a duty not to discourage respect for the administration of justice but also a duty to encourage such respect.

The equivalent provisions in article 111 of the *Quebec Code of Professional Conduct of Lawyers* are:

A lawyer is a servant of justice and must support the authority of the courts. He must not act in a manner which is detrimental to the administration of justice.

He must foster a relationship of trust between the public and the administration of justice.²³

While worded differently, article 111 of the *Quebec Code* as a whole corresponds closely to rule 5.6-1 of the *FLSC Model Code*, though the elements of the *FLSC Model Code* commentary are absent from the text of article 111. Note again that the framing of the duty—in particular, to “support the authority of the courts” and to “foster a relationship of trust”—is a positive one and not merely a negative one.²⁴

The Role of the Rule and the Duty

In the 1990s, Harry Arthurs, in a theory of “ethical economy” in lawyer regulation, characterized the duty to encourage respect for the administration of justice not only as a key example of the “[m]any provisions of the Code [that] are seldom discussed and almost never enforced,” but also one that was “meant not to control lawyers’ behaviour but to offer symbolic reassurance to the public” and had merely “educational and inspirational value.”²⁵ Arthurs further observed that this duty was one of the “professional norms [that] are violated with virtual impunity.”²⁶ With great respect to Arthurs, even if the *intention* of the rule was to be “symbolic,” it should be—and has been—enforced.²⁷

23 *Quebec Code*, *supra* note 1, art 111.

24 *Ibid.*

25 Harry Arthurs, “Why Canadian Law Schools Do Not Teach Legal Ethics” in Kim Economides, ed, *Ethical Challenges to Legal Education and Conduct* (Oxford: Hart, 1998) 105 at 114.

26 HW Arthurs, “The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs” (1995) 33:4 *Alta L Rev* 800 at 802.

27 See notes 37–46.

The overall importance and meaning of the rule were more recently discussed by Justice Healey in the course of ordering costs against a lawyer personally in *Best v Ranking*:²⁸

It is part of a lawyer's special role in this society and our justice system to endeavour to maintain the public's confidence in and respect for the administration of justice.... While it is clear from the context that that rule [5.6-1 of the Law Society of Upper Canada's *Rules of Professional Conduct*] addresses a lawyer's relationship to the administration of justice and allegations made toward that institution and those positioned within it, the message is nonetheless instructive: lawyers should not advance allegations that impugn the integrity of lawyers, judges, or those who administer our legal institutions, without very solid foundation. And certainly where such allegations are baseless, unsupported by evidence, patently ridiculous and unable to support the causes of action advanced, as was the case here, a lawyer should strive to distance himself from, rather than promote, such allegations.²⁹

Note here the concept of a “very solid foundation” for allegations about the integrity of the administration of justice and its contrast not only with “baseless,” “unsupported,” and “patently ridiculous” allegations, but also those that do not support the cause of action.³⁰ There is no suggestion that a lawyer should not bring allegations where they have such a solid foundation. On appeal, the Court of Appeal emphasized that “the fact that a lawyer starts an action which is unlikely to succeed is not, on its own” problematic, and that Justice Healey did not order costs for that reason alone.³¹

I emphasize here the observation of the hearing panel of the Law Society of Upper Canada in *Law Society of Upper Canada v Ann Bruce*³² that inappropriate criticism of judges is harmful because of its effect on public respect for the administration of justice:

Although the justices are the complainants it is not the impact on them personally that was the hearing panel's concern. It was the undermining of the integrity and authority of the justice system through reckless challenges of bias and egregiously disrespectful behaviour towards the court.

28 2015 ONSC 6279 [*Best SC*], aff'd 2016 ONCA 492 [*Best CA*], leave to appeal to SCC refused, 37175 (2 February 2017).

29 *Best SC*, *supra* note 28 at para 45.

30 *Ibid* at para 45.

31 *Best CA*, *supra* note 28 at paras 50, 52.

32 2013 ONLSP 6 [*Ann Bruce*].

If left unaddressed such behavior could, over time, undermine the public's perception of cornerstone principles of the justice system: the presumption of the court's impartiality and independence.³³

In other words, unsupported allegations against judges are problematic not because such comments are an affront to the dignity of those judges, but because of the damage to the public's respect for the justice system.

The History of the Rule on the Duty

The current version of the rule, with many elements of the current commentary, first appeared in the 1974 *Code of Professional Conduct* of the Canadian Bar Association (CBA).³⁴ It was drawn from the work of the Director-General of the International Bar Association, who in 1970 wrote that "in view of the vital part played by lawyers in the administration of justice they are under an obligation to strive to maintain respect for that administration."³⁵

However, the duty can be traced back in part to the original 1920 *Canons* of the CBA.³⁶ Canon 2(2) foreshadows not only the overall duty, but also an affirmative duty to defend judges where necessary alongside a duty to file complaints about judicial conduct where appropriate: "[j]udges, not being

33 *Ibid* at para 157.

34 Canadian Bar Association, *CBA Code of Professional Conduct* (Ottawa: Canadian Bar Association, 1974) ch XII [1974 *CBA Code*]: "[t]he lawyer should encourage public respect for and try to improve the administration of justice." See also Law Society of Upper Canada, *Professional Conduct Handbook* (Toronto: The Society, 1978) r 12: "[t]he lawyer should encourage public respect for and try to improve the administration of justice."

35 Sir Thomas Lund, *Professional Ethics* (London: International Bar Association in conjunction with Sweet & Maxwell, 1970) at 27, quoted in 1974 *CBA Code*, *supra* note 34 at 49, ch XII, note 1. See also International Bar Association, *International Code of Ethics* (adopted 25 July 1956, amended 29 July 1964), rr 6 ("[a] lawyer shall always maintain due respect towards the Court") (reprinted in Lund, *supra* note 35 at 40), 17 ("[a] lawyer shall never forget that he should put first not his right to compensation for his services, but the interest of his client and the exigencies of the administration of justice") (reprinted in Lund at 42).

36 "Canons of Legal Ethics" in Canadian Bar Association, *Proceedings of the Fifth Annual Meeting of the Canadian Bar Association Held in Ottawa, Ontario, September 1st, 2nd and 3rd, 1920* (Winnipeg: Bulman Bros, 1920) at 261–64 [on file with author], reprinted as Canadian Bar Association, *Canons of Legal Ethics (Adopted by the Canadian Bar Association, September 2nd, 1920)* (Ottawa: The Association, 1955) [on file with author] [*CBA Canons*]. The Canons were officially adopted by the Law Society of Upper Canada in the first of the rulings that comprised its original 1964 *Professional Conduct Handbook* (Toronto: Law Society of Upper Canada, 1964) 1, Ruling 1.

free to defend themselves, are entitled to receive the support of the Bar against unjust criticism and complaint. Whenever there is proper ground for serious complaint of a judicial officer, it is a right and duty of the lawyer to submit the grievance to the proper authorities.”³⁷ Canon 5(5) provides that “[n]o client is entitled to receive, nor should any lawyer render, any service or advice involving...disrespect for the judicial office.”³⁸ This Canon would seem to preclude a lawyer from participating in a client’s inappropriate criticism of a judge.

Indeed, the roots of the duty can be identified even earlier, in the original 1917 by-laws of the Barreau du Québec:

Sont dérogoires à l’honneur et à l’exercice de la profession, entre autres actes, les suivants : [...]

Manquer, dans sa conduite ou dans ses paroles du respect dû aux tribunaux et aux autorités publiques; [...]

Publier ou communiquer pour publication un rapport de procédures judiciaires faux, ou injurieux pour l’honneur ou pour la dignité de la magistrature ou du Barreau.³⁹

[TRANSLATION]

Are derogatory to the honour and practice of the profession, among other acts, the following: [...]

Lacking the respect owed to courts and public authorities in conduct or in speech; [...]

Publishing or communicating for the purpose of publication, reports of judicial proceedings that are false or offensive to the honour or dignity of the judiciary or the Barreau.

Note the references to the respect due to the courts as well as to the honour and dignity of the judiciary.

37 *CBA Canons*, *supra* note 36 at canon 2(2).

38 *Ibid* at canon 5(5).

39 *Loi organique et règlements du Barreau de la province de Québec (Adoptés le 25 octobre 1917)* (Montreal: Eug Goblensky & Co, 1917) at 66–67, by-law 62, paras 5, 7 [on file with author] [1917 *Quebec by-law 62*]. All translations provided in English are unofficial and were officially only published in French.

The Interpretation of the Rule on the Duty

While the duty is quite general and open-ended, some important generalizations can be made based on the case law applying the rule. Lawyers most frequently breach this duty by making unsupported allegations against judges (whether in written submissions or otherwise),⁴⁰ by breaching court

40 These paragraphs build on Martin, “Political Activity”, *supra* note 16 at 291, notes 105–06. See e.g. *Law Society of Alberta v Rauf*, 2018 ABLs 13 at para 115 [*Rauf*], *aff’d* on appeal 2021 ABLs 3 (widely distributed letter criticizing the ethics of a recently appointed judge); *Nova Scotia Barristers’ Society v Murrant*, 2004 NSBS 12 (lawyer sending letters to judges attacking judges, purportedly in his private capacity “as a dad”); *The Law Society of Manitoba v Histed*, 2006 MBLs 6, *aff’d* 2007 MBCA 150 [*Histed*], leave to appeal to SCC refused, 32478 (24 April 2008) (referring to a judge as a “bigot” in a letter to another lawyer); *Law Society of Manitoba v Troniak*, 2009 MBLs 9 at para 50 (questioning ethics of an arbitrator in written communications with client); *Nova Scotia Barristers’ Society v Morgan*, 2010 NSBS 1 (mayor and non-practicing lawyer in a radio interview accusing courts of political bias); *Michalakopoulos c Avocats (Ordre professionnel des)*, 2010 QCTP 123 at paras 286–96, 319–26, 343–51 (false and unsupported allegations in a recusal motion), *rev’d* on other grounds 2013 QCCS 968 [*Michalakopoulos*]; *Barreau du Québec (syndic) c Racicot*, 2011 QCCDBQ 58 at paras 58–63, *aff’d* 2012 QCTP 145 (allegations in an online article); *Law Society of Upper Canada v Kimberly Lynne Townley-Smith*, 2012 ONLSHP 52 (many unfounded allegations against many judges in court filings); *Barreau du Québec (syndic) c Beaudoin*, 2012 QCCDBQ 104 at paras 1, 46–50 (unsupported allegations against the trial judge in an appeal factum); *Law Society of Upper Canada v Napal*, 2014 ONLSTH 109 at para 41 (unsupported allegations in recusal motion) [*Napal*]; *Mohamed v Canada (Citizenship and Immigration)*, 2019 FC 1537 at para 62 (unsupported criticism of decision-maker in submissions on judicial review); *Barreau du Québec (Syndic adjoint) c Dahan*, 2010 QCCDBQ 75 (letters to judges accusing many judges of misconduct); *Barreau du Québec (syndic adjoint) c Duchastel de Montrouge*, 2012 QCCDBQ 36 at paras 11, 46–52 (suggesting in a letter to a client concerning a fee dispute that judges favour lawyers when hearing fee disputes); *Barreau du Québec (syndic adjoint) v Choquette*, 2014 QCCDBQ 22 at para 90 (unsupported allegations against judges in written submissions); *Barreau du Québec (syndic adjoint) c Manzararu*, 2014 QCCDBQ 79 (accusations against decision-maker in judicial review factum); *Barreau du Québec (syndic adjoint) c Pearl*, 2016 QCCDBQ 48 (allegations against trial judge in written submissions on appeal); *Barreau du Québec (syndic adjoint) c Bolté*, 2019 QCCDBQ 68 at paras 3, 9, 43 (filing a motion that included affidavits alleging judicial corruption and written submissions on appeal alleging judicial misconduct by trial judge); *Barreau du Québec (syndic adjoint) c Allali*, 2016 QCCDBQ 51 at paras 3, 105–07, 109 (allegations of wrongdoing in post-decision letter to judge); *Barreau du Québec (syndic adjoint) c Walsh*, 2017 QCCDBQ 24 at para 21 (allegations of wrongdoing in post-decision letter to judge); *Barreau du Québec (syndic adjoint) c Blais*, 2022 QCCDBQ 27 at para 11 (in-court remarks to a judge that “votre comportement, en tant que juge de la Cour supérieure du Québec, ne sert ni l’intérêt de la justice, ni...la confiance du justiciable que vous vous devez de préserver” (“your behaviour, as a judge of the Superior Court of Quebec, serves neither the interest of justice, nor...the confidence of the litigant that must be preserved”)), submissions on leave to appeal asserting the judge’s “incapacité intellectuelle et surtout émotionnelle” and “manque d’impartialité” (“lack of

orders,⁴¹ or by enabling or encouraging a client to breach court orders.⁴²

intellectual and emotional capacity”) and accusing the Court of Appeal of bias). See also *Drolet-Savoie c Tribunal des professions*, 2017 QCCA 842 at para 14, leave to appeal to SCC refused, 37666 (21 December 2017) (comment to a journalist that in child protection proceedings, “[i]t’s not just David versus Goliath. It’s David versus two or three Goliaths”). See also *Barreau du Québec (syndic adjoint) c Robert-Blanchard*, 2018 QCCDBQ 110 at paras 261–304 (questioning a judge’s mental capacity in a Facebook posting).

- 41 See e.g. *Foster (Re)*, 2004 CanLII 66276 (NWT LS) (breaches of several orders); *Rose (Re)*, 2006 CanLII 45074 (NL LS) (failure to attend for a judgment debtor examination); *Rose (Re)*, 2008 CanLII 12817 (NL LS) (breach of court order to file a tax return); *Michalakopoulos*, *supra* note 37 at paras 358–86, 430–49, 458–63 (breach of several orders); *Barreau du Québec (syndic adjoint) c Bérubé*, 2013 QCCDBQ 34 at paras 2, 37–40 (breach of court order not to talk to a witness during their testimony, see especially paras 37, 40: “[c]ontravening a court order is undoubtedly for a lawyer one of the most serious faults in the practice of the profession...the respondent’s conduct casts a shadow over the entire profession”; *Barreau du Québec (syndic adjoint) c Bier*, 2014 QCCDBQ 18 at paras 1, 34–39 (breach of order to appear before the court); *Law Society of Ontario v Chijindu*, 2019 ONLSTH 147 at paras 91–96 (breach of a repayment order and a costs order (“if lawyers fail to obey court orders, the administration of justice can be seriously undermined. The justice system cannot function effectively if court orders are flouted, particularly by those who are responsible for upholding the law. The public cannot be expected to have respect for court orders if lawyers do not honour them” at para 92), aff’d 2020 ONLSTA 19 at paras 73–90 [*Chijindu AP*], aff’d 2021 ONSC 4872 at paras 70–73 [*Chijindu Div Ct*], leave to appeal to ONCA denied, M52681 (20 October 2021), leave to appeal to SCC refused, 40000 (9 May 2022); *Barreau du Québec (syndic adjoint) c Bala*, 2022 QCCDBQ 29 (breach of a confidentiality order over photographs in a family law case); *Barreau du Québec (assistant syndic) v Sanderson*, 2021 QCCDBQ 110 at paras 368–71 (breach of an order to cease representation of a client (see especially “[a] lawyer must respect section 111 of the Code of Professional Conduct of Lawyers whether the judgment was rendered in the context of his professional or personal life... Respondent’s failure to comply with Justice Labrie’s judgment undermines the public’s confidence in lawyers. A lawyer is an important actor in the administration of justice. The public is entitled to expect a completely different behavior from a member of the Barreau than that exhibited by Respondent herein” at paras 368, 370); *Montague (Re)*, 2021 CanLII 58007 (NL LS), notice of appeal filed 24 June 2021 and abandoned 28 September 2022, file 202101G3792 (failure to provide documents to counsel); *Law Society of Ontario v Reynolds*, 2021 ONLSTH 137 at paras 7–15, 58 (failure to pay default judgments); *Merchant v Law Society of Saskatchewan*, 2014 SKCA 56 at para 89 (failure to pay money into court) [*Merchant*]; *Law Society of Ontario v Decock*, 2021 ONLSTH 121 at paras 11–14 (paralegal, breach of a tribunal order to return funds and documents to clients). A breach of a family court support order, for which breach the lawyer was incarcerated, is also a breach. See e.g. *Law Society of Ontario v Adema*, 2020 ONLSTH 127 at paras 35–38.

- 42 See e.g. *Argiris, Re*, 1996 CanLII 466 (Ont LS) (“Mr. Argiris effectively assisted his clients in breaching a Court order, although his explanation is that it was a short term resolution and he had the best interest of his clients at heart. This is not the way lawyers in Ontario conduct themselves when they are facing a court order with which they do not agree. The proper course of conduct is to move to have it varied or to move for a stay of the order to reach an alternative arrangement. It is entirely improper to put into place

The Saskatchewan Court of Appeal has held that a breach of this duty by breaching a court order is properly an objective determination and not a subjective one:

Breaching a court order is harmful to the public and the profession, regardless of the subjective state of mind of the lawyer. It would be strange indeed if once having found on an objective basis a lawyer's actions have thwarted the spirit and letter of a court order that such conduct could be absolved by the lawyer's belief he did not thwart the order or had no intention to do so.⁴³

However, law societies in British Columbia and Ontario have held that breach of a court order will not breach this duty if the breach of the court order is reasonable and made in good faith and the conduct otherwise demonstrates respect for the administration of justice.⁴⁴

Aside from these two most common kinds of breaches, the duty is also often engaged when lawyers interact with the criminal justice system. For example, breaches of this duty include a lawyer's conviction for obstruction of justice;⁴⁵ failure to provide a breath sample;⁴⁶ insurance fraud;⁴⁷ and drug trafficking.⁴⁸ However, criminal charges in and of itself do not necessarily breach this rule and neither does signing a peace bond, as opposed to the underlying conduct.⁴⁹

There is a complex relationship between contempt of court and the duty to encourage respect for the administration of justice. Contempt of court for breach of a court order will typically breach this duty.⁵⁰ However,

other arrangements which are contrary to the court order”); *Barreau du Québec (syndic) c Petit*, 2016 QCCDBQ 56 at paras 9–10 (allowing client to have lunch with co-accused in breach of a no-contact order); *Barreau du Québec (syndic adjoint) c Gelber*, 2018 QCCDBQ 92 at paras 18, 21 (advising client to act without authority after the relevant court order); *Barreau du Québec (syndic adjoint) c Fragasso*, 2020 QCCDBQ 4 at paras 10, 111 (advising client to drive while under a prohibition order); *Guimont c Desrosiers*, 2003 CanLII 54658 (QC CDBQ), aff'd 2004 QCTP 55 (advising client to fraudulently shield assets from a seizure order).

43 *Merchant*, *supra* note 41 at para 72.

44 See *Law Society of Upper Canada v Carey*, 2017 ONLSTH 25 at paras 53–60, aff'd 2018 ONLSTA 4 at paras 29–36 [*Carey*]; *Macgregor (Re)*, 2018 LSBC 39 at para 58.

45 See *Law Society of New Brunswick v [ZZ]*, 2010 NBLBS 7.

46 See *Wentzell (Re)*, 2017 CanLII 54199 (NL LS) [*Wentzell*].

47 See *Law Society of Upper Canada v Kovtanuka*, 2018 ONLSTH 2 at para 5 (paralegal).

48 See *The Nova Scotia Barristers' Society v Calder*, 2012 NSBS 2 at paras 4–6.

49 See *Hughes v Law Society of New Brunswick*, 2020 NBCA 68 at paras 34–38.

50 See e.g. *Carey*, *supra* note 44 at para 3: “[i]n doing so the hearing panel departed from the general rule that a finding of breach of a court order and contempt of court as a result will normally establish professional misconduct.”

a breach of the duty and a finding of contempt are legally distinct, because the former is a matter for a law society and the latter is a matter for a court. The Ontario Divisional Court in *Chijindu v Law Society of Ontario* held that the Law Society may discipline a lawyer for breaching a court order even though that conduct may also constitute contempt of court, which offence is outside the jurisdiction of the Law Society.⁵¹ Moreover, a finding of contempt is not necessary for the Law Society to discipline a lawyer for the underlying conduct.⁵² Conversely, where a judge while acquitting a lawyer of contempt states that the lawyer has breached this duty and encourages the Law Society to discipline the lawyer for that breach, those comments

51 *Chijindu* Div Ct, *supra* note 41 at paras 70–73. See also *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26 at paras 20, 23, Gascon J (for the majority, though arguably *obiter*): “[t]he power to control abuse of process and the judicial process by awarding costs against a lawyer personally applies in parallel with the power of the courts to punish by way of convictions for contempt of court and that of law societies to sanction unethical conduct by their members.... These sanctions are not mutually exclusive, however. If need be, they can even be imposed concurrently in relation to the same conduct.... The courts therefore do not have to rely on law societies to oversee and sanction any conduct they may witness. It is up to the courts to determine whether, in a given case, to exercise the power they have to award costs against a lawyer personally in response to the lawyer’s conduct before them. However, there is nothing to prevent the law society from exercising in parallel its power to assess its members’ conduct and impose appropriate sanctions” [*Jodoin*]. Abella & Coté JJ dissented in *Jodoin* on other grounds: “[w]e agree that superior courts have, in theory, the power to award costs personally against counsel in the criminal context in exceptional circumstances.... The more appropriate response, if any, is to seek a remedy from the law society in question” at paras 58, 61. Quoted in part in Jeffery Miller, *Cumulative Supplement* (14 March 2022) at note 70 and accompanying text, online: <www.jeffreymiller.ca>. See also Jeffery Miller, *The Law of Contempt in Canada*, 2nd ed (Toronto: Thomson Reuters Canada, 2016) [Miller, “Law of Contempt”].

52 *Chijindu* AP, *supra* note 41 at para 89: “[r]equiring a finding of contempt of court as a precondition of a finding of professional misconduct would largely eliminate governance of the legal professions in so far as the breach of court orders is concerned. For good reason, civil contempt proceedings are rare. The criminal process involved in a civil contempt proceeding requires substantial resources and can result in loss of liberty. Only conduct that is wilful, deliberate and of a contumacious and egregious nature is civil contempt. Professional misconduct, while a serious matter, is a different matter.” In the related context of civility, see *FLSC Model Code*, *supra* note 1, r 5.1-5, commentary 1: “[l]egal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative or disruptive conduct by a lawyer, even though unpunished as contempt, may constitute professional misconduct.” See also *Histed*, *supra* note 40 at para 68 (noting as “interesting” *R v Kopyto* (1987), 62 OR (2d) 449 at 527, 39 CCC (3d) 1 (CA) [*Kopyto* CA], Dubin JA dissenting in part, rev’d on other grounds (10 October 1986), Toronto 969/86 (Ont SC) [on file with author] [*Kopyto* SC]): “although I find the appellant not guilty of the offence charged, he is not free from any disciplinary action which the Law Society may choose to institute against him.... Comments may be unprofessional even if they do not amount to criminal contempt.”

are *obiter* and do not impede the independence of the Law Society so as to preclude such discipline.⁵³

Reported decisions reveal other dimensions of this duty during the practice of law. A high-volume demand letter practice does not breach this duty.⁵⁴ Filing a meritless application for judicial review is not necessarily a breach.⁵⁵ Proposing that another lawyer withdraw a law society complaint in exchange for the withdrawal of a law society complaint against that other lawyer is a breach.⁵⁶ Requesting that all judges of the court recuse themselves because a former judge is a witness constitutes a breach.⁵⁷ Swearing an affidavit that is misleading and inaccurate because of a failure to confirm the underlying information is a breach.⁵⁸ Writing a letter to a judge while a decision is under reserve complaining about that judge's conduct breaches the duty.⁵⁹ A failure to attend a hearing due to "une erreur d'agenda majeure" (a major scheduling error) constitutes a breach of the duty,⁶⁰ as does leaving the courtroom without permission,⁶¹ appearing in court while intoxicated and consuming alcohol in court,⁶² failing to comply

53 See *Charbonneau c Québec (Tribunal des professions)*, 2005 CanLII 8978 (QC CS) at paras 25–28.

54 See *Law Society of Upper Canada v Deanna Lynn Natale*, 2013 ONLSHP 22 at paras 116–24.

55 See *Law Society of Ontario v Mazinani*, 2020 ONLSTH 123 at paras 173–85 [*Mazinani HP*], aff'd 2022 ONLSTA 6 [*Mazinani AP*].

56 *Mazinani HP*, *supra* note 55 at paras 152–72; *Mazinani AP*, *supra* note 55 at paras 168–75.

57 See *Roy c Blanchard*, 1997 CanLII 17364 (QC TP), quashed on other grounds 1998 CanLII 11640 (QC CS).

58 See *Barreau du Québec (syndic adjoint) c Côté*, 2014 QCCDBQ 17 at paras 1, 93–97. See especially para 96: "[I]orsque l'on prépare et rédige une déclaration sous serment, sachant qu'elle servira notamment à des fins judiciaires, la moindre des choses est de s'assurer de sa véracité" ("[w]hen preparing and drafting a sworn statement knowing it will be used for legal purposes, ensuring its truth is the bare minimum").

59 See *Mandron c Dury*, 2002 CanLII 61742 (QC CDBQ) at paras 40–47 (complaining about the judge's delay in issuing a decision and holding the judge responsible if the client dies from his hunger strike during that delay); *Gravel c Avocats (Ordre professionnel des)*, 2007 QCTP 38 at paras 31–32 (formal letter to decision-maker complaining that they made offensive remarks regarding the lawyer during the hearing); *Barreau du Québec (syndic adjoint) c Giannis*, 2011 QCCDBQ 97 at paras 35–50 (complaining about delay). *Doré v Barreau*, 2012 SCC 12 at paras 59–63 [*Doré*], would suggest that such a letter would reasonably breach the duty of civility if sent at any time.

60 *Barreau du Québec (syndic adjoint) c Godoy*, 2020 QCCDBQ 40 at paras 20–24, 139 (quotation at para 24).

61 *Michalakopoulos*, *supra* note 40 at paras 472–79.

62 *Wentzell*, *supra* note 46. Note that this conduct would now be a breach of the rules on the lawyer as an advocate: "[w]hen acting as an advocate, a lawyer must not... appear before a court or tribunal while under the influence of alcohol or a drug" (*FLSC Model Code*, *supra* note 1, r 5.1-2(p)).

with a judge's in-court directions,⁶³ making contradictory statements to a judge,⁶⁴ making unsupported allegations of misconduct against opposing counsel,⁶⁵ and making "repeated and reckless" in-court threats to make a complaint about the presiding judge to the Canadian Judicial Council.⁶⁶ While the Law Society of Manitoba held that submissions "equating the governance of Canadians and Manitobans with a capricious fascist dictatorship opposed to the Rule of Law" with references to Hitler constitute a breach, the Manitoba Court of Appeal later questioned this holding.⁶⁷

Based on this canvass of the case law, this duty has a broad and varied content of its own despite some overlap and reinforcement among the other duties of lawyers. Contrast here the argument by Alice Woolley that the concept of civility is unhelpful as a regulatory tool because breaches of the duty of civility are better particularized as breaches of more substantive duties.⁶⁸ Some of the breaches of the duty to encourage respect for the administration of justice do or would breach other rules—particularly the rule on civility. However, while the duty itself could be better articulated in the rules of professional conduct, it is far from an empty concept.

What is unusual about this duty is that it is simultaneously both a prohibition and a potential defence. Encouraging respect for the administration of justice will sometimes require criticism of the administration of justice.⁶⁹ In other words, a lawyer accused of violating this duty may argue that their remarks or conduct were actually necessary to fulfill this duty. While the positive duty to encourage respect for the administration of justice may be merely aspirational as a matter of professional discipline, that positive duty may be otherwise helpful to lawyers. Although I have

63 See e.g. *Barreau du Québec (syndique adjointe) c Parent*, 2019 QCCDBQ 42 at paras 9, 105.

64 See *Barreau du Québec (syndic adjoint) c Rosenberg*, 2021 QCCDBQ 23 at paras 592–96.

65 *Napal*, *supra* note 40 at paras 32–42.

66 *Ann Bruce*, *supra* note 32 at para 167.

67 *The Law Society of Manitoba v Brian Attwood Langford*, 2020 MBL 5, *aff'd* on other grounds 2021 MBCA 87 at paras 14–15.

68 See Alice Woolley, "Does Civility Matter?" (2008) 46:1 Osgoode Hall LJ 175 at 185; Alice Woolley, "Uncivil By Too Much Civility? Critiquing Five More Years of Civility Regulation in Canada" (2013) 1:1 Dal LJ 239 at 241 (now Justice Woolley of the Court of King's Bench for Alberta).

69 Cf Noel Semple, "Comment on Brooke MacKenzie, 'Professional Conduct on Social Media for Lawyers' (22 November 2022)" (28 November 2022), online (blog): <www.slw.ca>: "I have always struggled with Rule 5.6-1.... Very often the best thing one can do to improve the administration of justice is to point out its flaws. But pointing out its flaws tends to undermine public respect for it, especially when nothing changes. Overall, I think Canadian legal culture errs on the side of excessive respect, and insufficient efforts to improve."

discussed the scope of this duty as an affirmative and not merely a negative one—to “encourage respect,” not merely to refrain from discouraging respect—I recognize that it seems unlikely that a lawyer would face disciplinary proceedings for failing to take positive steps to encourage respect for the administration of justice.⁷⁰ For most lawyers in most circumstances, this positive duty is likely an aspirational one at most, at least for disciplinary purposes. However, the positive duty may sometimes be a defence against allegations of criminal or civil liability. For example, in 1986 a lawyer argued that this duty anchored a necessity defence against a charge of contempt for scandalizing the court, although the court rejected that defence on the facts of the case.⁷¹ This argument was not pursued before the Ontario Court of Appeal, which quashed the conviction based on freedom of expression under the *Canadian Charter of Rights and Freedoms*⁷² and so did not consider the necessity defence or the lawyer’s professional duty to encourage respect for the administration of justice.⁷³ Nonetheless, the judges’ characterizations of the lawyer’s comments strongly suggested that the duty in those circumstances would not constitute a defence against

70 But see e.g. *Rauf*, *supra* note 40 at para 115: “[t]he obligation to so encourage public respect is a positive obligation of membership in the [law society].”

71 *Kopyto SC*, *supra* note 52, *Trial Proceedings*, Vol 4 at 34–39/1166–71, specifically 34/1166 and 39/1171: “[i]t was contended that as a lawyer Mr. Kopyto had a duty to speak out pursuant to Rule 12 of the Rules of Professional Conduct of the Law Society of Upper Canada [now r 5.6-1].... Surely remarks calculated to lower the authority of a court cannot encourage public respect for the administration of justice. I see absolutely no merit in this argument.” See also Vol 4 at 47–48/1179–80, as quoted in Drew Fagan, “The trial of Harry Kopyto: Defence strategies draw fire”, *The Lawyers Weekly* (21 November 1986) 10 [commas added by Fagan]: “[t]hese words are a vitriolic, unmitigated attack upon the trial judge.... [Kopyto’s] comments go far beyond criticism of a decision. They show an intention to vilify, not to correct. His words, given their ordinary meaning, interfere with the fair administration of justice and are likely to lower the authority of the court and its respect in the public eye.” These reasons are also partially quoted in Miller, “Law of Contempt”, *supra* note 51 at 7. See also *Kopyto SC*, *supra* note 52, *Trial Proceedings*, Vol 4 at 48/1180: “[t]his is a blatant attack on all judges of all courts”, also quoted in Miller, “Law of Contempt”; *supra* note 51 at 7; Vol 4 at 26/1158: “I find that his words were spoken from anger not conscience.”

72 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

73 *Kopyto CA*, *supra* note 52. See Miller, “Law of Contempt”, *supra* note 51 at 205 (“the misconception persists, popularly and in the legal profession, that the court [in *Kopyto*] struck down scandalizing prosecutions as unconstitutional”), 211 (“conventional wisdom has it that *Kopyto* marks the death-knell for scandalizing prosecutions in Canada, never mind that notionally the defence has survived the decision”).

professional discipline.⁷⁴ More recently, Justice Abella in dissenting reasons of the Supreme Court of Canada held that this duty—more specifically the aspect of the duty requiring lawyers to improve the administration of justice—supports a defence of qualified privilege in defamation, such as where a lawyer warns other lawyers about problems with an expert witness.⁷⁵ The majority, however, held that it was unnecessary to decide the point because the defence was defeated by other factors.⁷⁶

PART 2: CLAUDE WAGNER (QUEBEC)

Against this backdrop, I now turn to case studies involving Attorneys General. I begin with Claude Wagner of Quebec.

Scattered throughout the sparse Canadian legal literature on the Attorney General, one will occasionally find passing reference to Claude Wagner as Attorney General of Quebec. Such references are typically two-fold: first, Wagner was reprimanded by the Barreau for a 1965 speech that was critical of a judge; and second, the reprimand was quashed on the basis of ministerial immunity.⁷⁷ These accounts leave many questions

74 *Charter*, *supra* note 72, s 2(b). See *Kopyto CA*, *supra* note 52 at 459–60, Cory JA: “a gross breach of professional responsibility...in the poorest possible taste...no more than the whining of an unhappy loser. It was unreasonable, unprofessional and unworthy of even the most marginal and most recent member of the profession. It was, in a word, disgraceful...no more than the puerile manifestation of petulant pique” (quoted in part in Miller, “Law of Contempt”, *supra* note 51 at 7). See also *Kopyto CA* at 495, Goodman JA: “[t]he words used constitute an intemperate, vitriolic and undiplomatic criticism of a court decision. The mode of expression is unworthy of a member of the bar,” 527, Dubin JA: “[a]s a member of the bar of this province, the appellant’s statement was disgraceful, and...a gross breach of professional responsibility.”

75 See *Bent v Platnick*, 2020 SCC 23 at paras 226–29, 237–38, 252, Abella J dissenting [*Bent*]. See specifically para 226, where Abella J discusses both the duty to encourage respect for the administration of justice and the duty to the profession (see e.g. *FLSC Model Code*, *supra* note 1, r 2.1-2).

76 *Bent*, *supra* note 75 at para 125, Côté J for the majority.

77 The most detailed account comes in a 1995 chapter by John Ll. J. Edwards, then (and still) the leading commentator on the role of the Attorney General. John Ll 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: “[t]he 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 a 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 during the minister’s speech. An essential part of the attorney general’s unsuccessful defence before the Montreal Bar Council was that his actions were outside

unanswered, chief among them are these: What was the criticism? Why was it inappropriate in the eyes of the Barreau? What was the relevance, if any, to the Barreau of Wagner's role as the Attorney General and Minister of Justice? In this Part, I provide an account of these events in order to answer these questions and others.

The Speech

As quoted in the reasons of the Barreau, the problematic passage of Wagner's speech was as follows:

En juin dernier, dans une petite ville d'une région rurale de la province, deux individus coursaient. L'un d'eux, dans la course, tuait une passante alors que son compagnon en blessait grièvement une autre.

Le premier individu attend présentement son procès aux Assises. L'autre a fui les lieux de l'accident pour être finalement repéré quelques jours plus tard, grâce au travail de la Sûreté Provinciale. À la suite de nombreuses remises de la cause, l'avocat produisait devant la Cour, en chambre, le 30 août, une confession de jugement hors la présence du porte-parole de la Couronne et le juge condamnait l'individu à \$25 d'amende, à \$39 de frais avec interdiction de conduire pendant trois mois.

L'accusé trouvé coupable n'était même pas présent. Il n'a pas remis son permis de conduire au greffier et son avocat, qui avait seul pris connaissance du jugement dans la chambre du juge, s'est abstenu de lui conseiller de remettre ce permis conformément au jugement.

Trois semaines plus tard, le même chauffard conduisait illégalement une automobile et était impliqué dans un accident qui causa la mort du père et de la mère de sept enfants en bas âge. Qu'en pensez-vous? Comment voulez-vous que la justice soit respectée comme il se doit lorsque des membres de notre ordre agissent ainsi?⁷⁸

the disciplinary jurisdiction of the professional body. There followed a series of convoluted appeal proceedings culminating in a very brief judgment by the Quebec Court of Appeal, in *Barreau de Montreal v Wagner* [1968], declaring that the disciplinary powers of the bar did not extend to the minister of justice when exercising the executive powers of the Crown."

78 *Wagner (Re)* (4 November 1966), (Barreau de Montréal) [*Wagner (Re)*], as published in "Texte intégral du jugement et de la sentence dans l'affaire Wagner-Bérubé" *La Presse* (5 November 1966) 11; "La condamnation de Claude Wagner" *Le Devoir* (5 November 1966) 1 ["La condamnation de Claude Wagner"]. The speech was published as Hon Claude Wagner, "Causerie prononcée par l'honorable Claude Wagner, c.r., ministre de la Justice de la Province De Québec, le dimanche 10 octobre 1965 : la légalité au service de la vérité" (1965) 25:8 RB 502 at 505 [*Wagner Speech*].

[TRANSLATION]

Last June, in a small town of this province, two individuals were racing cars. One of them, in the race, killed a passerby while his companion seriously injured another.

The first individual is currently awaiting trial in the Court of Assizes. The other fled the scene of the accident before he was apprehended a few days later, thanks to the work of the Provincial Police. Following numerous postponements of the case, the lawyer produced before a judge, in chambers, on August 30, an admission of guilt without the presence of the crown attorney, and the judge condemned the individual to a \$25 fine and \$39 in costs, with a three-month driving ban.

The accused was not even present. He did not hand over his driver's license to the clerk, and his lawyer, who alone had seen the judgment in the judge's chambers, refrained from advising him to hand over the license in accordance with the judgment.

Three weeks later, the same driver was driving an automobile illegally and was involved in an accident which caused the death of the father and mother of seven young children. What do you think? How do you expect justice to be respected as it should be when members of our Order act in this manner?

In short, the problematic claim was that an impaired driver who had caused several deaths had not surrendered their license after a previous impaired driving conviction—because the judge pronounced the sentence in the absence of the driver and defence counsel failed to inform the driver that their license had been suspended.

Four points are worth noting about the speech and its aftermath. First, in the days after the speech, both the judge and the defence counsel vehemently denied Wagner's account.⁷⁹ Second, although Wagner did not name the accused, the Crown prosecutor, defence counsel, or the judge, the Barreau held that “[l]’affaire à laquelle Me Wagner se référait était facilement identifiable par de nombreuses personnes” (“[t]he case to which Mr. Wagner referred to was easily identifiable by many”).⁸⁰ Third, Wagner appeared to be primarily criticizing the defence counsel—particularly in

79 See André Fortin, “Le juge Jean-Paul Bérubé réfute les ‘accusations’ portées par Me Wagner”, *Le Soleil* (19 October 1965) 12; “Je n’ai rien à me reprocher et demanderai au Barreau de la Province d’examiner ma conduite (Me Antonio Dubé)”, *Le Soleil* (19 October 1965) 12.

80 Wagner (Re), *supra* note 78; “La condamnation de Claude Wagner”, *supra* note 78.

posing the question: “Comment voulez-vous que la justice soit respectée comme il se doit lorsque *des membres de notre ordre* agissent ainsi ?” (“How do you expect justice to be respected as it should be when *members of our Order* act in this manner?”)⁸¹ Nonetheless, it was the judge, not defence counsel, who made the complaint to the Barreau. Likewise, the impact on the judge, not on defence counsel, was the primary concern of the Barreau. Fourth, it seems clear that Wagner was attempting—at least in part—to improve the administration of justice by identifying a recent shortcoming and exhorting fellow lawyers to do better.

Surprisingly, the part of the speech for which the Barreau proposed disciplining Wagner was not widely reported in the media.⁸² Instead, the coverage focused on Wagner’s call for the Barreau to reform itself. In Wagner’s words:

Jamais, dans l’histoire du Barreau, a-t-il été aussi nécessaire qu’au moment présent, de réviser nos attitudes, de renouveler nos cadres, de modifier nos règlements, de transformer nos mentalités qui s’accrochaient à la tradition au détriment du progrès, d’écarter l’immobilisme nuisible aux intérêts de la société. Si le Barreau réussit à comprendre qu’il est au service de la population, qu’il n’a pas été conçu pour se servir de la population, il n’aura pas de difficultés à adopter, avec fermeté, des positions conformes à cet esprit.⁸³

[TRANSLATION]

Never in the history of the Barreau has it been as necessary as at the present time to review our attitudes, renew our frameworks, modify our regulations, transform our mentalities which clung to tradition to the detriment of progress, and to combat legal rigidity harmful to the interests of society. If the Barreau succeeds in understanding that it is at the service of the population, that it was not conceived to take advantage of the population, it will have no difficulty in firmly adopting positions in keeping with this spirit.

81 Wagner Speech, *supra* note 78 at 505 [emphasis added].

82 But see Lorenzo Paré, “Que fait le Barreau?”, *L’Action* (13 October 1965) 4.

83 Wagner, as quoted in “Le Barreau a besoin d’une réforme en profondeur”, *Le Nouvelliste* (11 October 1965) 6. See also Martin Pronovost, “Messieurs du Barreau, qu’est-ce que vous attendez pour jeter dehors les vendeurs du temple?—Wagner”, *La Presse* (12 October 1965) 1–2; “Le ministre : une poignée d’indésirables soulève le mépris contre la profession”, *Le Devoir* (11 October 1965) 1–2; Lewis Seele, “Wagner Presses for Clean-Up in Courts”, *Montreal Gazette* (11 November 1965) 23.

Wagner was adamant that the failures of individual lawyers had damaged public confidence in the profession as a whole.⁸⁴ These parts of Wagner's speech were not, at least explicitly, relevant to the disciplinary action taken by the Barreau. However, there was at least some public suspicion that Wagner was being disciplined for criticizing the Barreau. For example, an editorial cartoon in the newspaper, *L'Action*, pictured Wagner, with a huge bump on the head from a bar or pipe labelled "Barreau," above which was written "\$100.00," with the caption "Wagner: Ça va, je ne contredirai plus le barreau" ("Wagner: Okay, I will no longer challenge the Barreau").⁸⁵

The Barreau

What exactly was the breach? According to the Barreau, the speech constituted a breach not because Wagner had criticized a judge, but because several key factual assertions in the speech were incorrect and Wagner, in relying on a police report, had failed to take reasonable steps to confirm them. (Wagner immediately challenged the factual findings of the Barreau in a public statement).⁸⁶ The failure to take reasonable steps was especially problematic—not less problematic—because Wagner was the Minister of Justice.⁸⁷ Indeed, the Barreau rejected Wagner's assertion of ministerial immunity. In doing so, the Barreau made two key points. As a factual matter, it was clear from the text of the speech that Wagner was speaking both as a lawyer and as Minister of Justice. As a matter of law, all members of the Barreau are subject to its rules, whether or not they hold public office—although the Barreau recognized the Minister's "plus grande latitude de

84 See e.g. Wagner, as quoted in "Le ministre : une poignée d'indésirables soulève le mépris contre la profession", *Le Devoir* (11 October 1965) 1–2: "[s]ouvent, par notre conduite collective, nous avons provoqué le mépris et le sarcasme" ("[o]ften, through our collective conduct, we have provoked sarcasm and contempt").

85 Editorial Cartoon, *L'Action* (15 November 1966) 4.

86 See "La déclaration de Me Wagner" *La Presse* (5 November 1966) 11: "Je suis en désaccord avec le résumé des faits rendus publics par le conseil du Barreau de Montréal" ("I disagree with the summary of the facts published by the council of the Barreau de Montréal").

87 *Wagner (Re)*, *supra* note 78: "[d]e telles remarques, lorsqu'elles sont faites, et même si elles sont faites de bonne foi, ne devraient l'être qu'après que des précautions raisonnables ont été prises pour vérifier l'exactitude des faits, spécialement dans le cas présent où l'avocat qui les a prononcées était le ministre de la Justice de la province de Québec et un membre ex-officio du Conseil général du Barreau de la province de Québec" ("[t]hese types of remarks, when made, even if made in good faith, should only be made after reasonable care has been taken to ascertain the veracity of the facts, especially in the present case where the lawyer who made these remarks was the Minister of Justice of Quebec and an ex-officio member of the General Council of the Barreau of the province of Quebec") [emphasis added].

traiter de sujets d'intérêt public" ("greater latitude in addressing subjects of public interest").⁸⁸ The reasons of the Barreau strongly suggest that if the criticism had been factually accurate, it would not have breached the duty—though there is no explicit statement to that effect.

The Barreau held that Wagner had violated multiple rules. This included article 66, which would now fall under the duty to encourage respect for the administration of justice, and article 84, which would now be subsumed into the general duty of civility:

(66) L'avocat doit servir la justice et soutenir l'autorité des tribunaux. Jamais il ne doit compromettre l'Honneur et la dignité du Barreau. Il doit être fidèle à ses clients, loyal et courtois envers ses confrères. Il est donc tenu d'observer scrupuleusement les devoirs que lui imposent les règles, traditions et usages professionnels.

(84) L'avocat a le devoir de maintenir à l'égard des tribunaux une attitude respectueuse dans sa conduite et ses paroles.

(85) Il ne peut publier ou communiquer pour publication un rapport de procédures judiciaires faux ou injurieux pour l'honneur ou la dignité de la magistrature.⁸⁹

[TRANSLATION]

(66) The lawyer must serve justice and uphold the authority of the courts. The lawyer must never compromise the honour and dignity of the Barreau. He must be faithful to clients, loyal and courteous to his colleagues. He is therefore required to scrupulously observe the duties imposed by the rules, traditions and professional practices.

(84) The lawyer has a duty to maintain a respectful attitude towards the courts in his conduct and his words.

(85) He may not publish or communicate for publication a report of judicial proceedings that is false or offensive to the honour or dignity of the judiciary.

While article 85 does not have a clear modern equivalent, and might appear as written to encompass legitimate criticism, it too would appear to be subsumed under the duty to encourage respect for the administration of

88 *Wagner (Re)*, *supra* note 78; "La condamnation de Claude Wagner", *supra* note 78.

89 *Quebec Code*, *supra* note 1, arts 66, 84–85.

justice. Although articles 66, 84, and 85 do not clearly indicate a duty to improve the administration of justice, improvement is clearly one way to encourage public respect.

The Barreau ordered a reprimand, a fine of \$100, and costs.

The Judicial Review and the Appeal

In the aftermath of the decision by the Barreau, Wagner not only said that ministers should be immune from regulation by the Barreau—indeed, from any consequences other than those imposed by the legislature⁹⁰—but even proposed exempting government lawyers from the jurisdiction of the Barreau.⁹¹ An editorial in *Le Soleil* adopted these arguments for ministerial immunity: “[l]’existence du Barreau est indispensable: elle garantit ses membres contre la sujétion au pouvoir public et permet de protéger la population contre les ‘brebis galeuses’ du droit. Mais il n’est pas de son ressort de la protéger contre les ministres, ni celui de la Justice ni les autres” (“[t]he existence of the Barreau is vital: it guarantees its members against subjection to public power and allows the population to be protected against the ‘bad apples’ of the law. But it is not its responsibility to protect against ministers, nor the Justice nor the others”).⁹² In his application for judicial review, Wagner emphasized the importance of this immunity, as a Minister, from discipline by the Barreau.⁹³

90 See “Wagner demande à un tribunal de réviser la décision du barreau”, *La Presse* (18 November 1966) 43. See e.g. Éditorial, “M. Wagner et le Barreau”, *L’Action* (15 November 1966) 4: “[i]l pourrait profiter du droit de tout député de présenter un projet de loi à la Législature pour protéger les ministres contre d’autres jugements que ceux de la Chambre et de l’électorat” (“[h]e could benefit from using the right to propose a bill to the Legislature to protect ministers from judgements other than those of the House and the electorate”). See Martin, “Lawyer-Politicians”, *supra* note 2 at 27: “[a] different policy concern is whether enforcement of ethical rules against lawyer-politicians could result in a backlash by legislators against law societies, and possibly against self-regulation itself. At the lowest level, this could consist of statutory amendments to remove the authority to discipline lawyers for all or certain conduct while in political office.”

91 See Réginal Martel, “Wagner songe à faire affranchir du Barreau les avocats du gouvernement”, *La Presse* (9 November 1966) 1–2. The Barreau opposed this proposal, see e.g. François Trepannier, “Le Barreau entend garder juridiction sur les avocats haut placés au ministère de la Justice”, *La Presse* (7 January 1967) 1–2.

92 “Éditorial: l’affaire Wagner”, *Le Soleil* (9 November 1966) 4.

93 See “Texte intégral de la requête”, *La Presse* (18 November 1966) 43, specifically at paras 8–9.

With the exception of one reference to “toutes les informations qu[e] [Wagner] possède” (“all of the information at [Wagner’s] disposal”),⁹⁴ the application judge on judicial review did not address the alleged substantive breach but instead focused on the ministerial immunity issue in quashing the order of the Barreau.⁹⁵ The judge emphasized not only that any person may comment on procedure and sentence, but that “c’est le droit et le devoir du Ministre de la Justice de rechercher, signaler, rapporter et même dénoncer les cas où, d’après son jugement et avec l’aide de toutes les informations qu’il possède, il y aurait eu mauvaise administration de la justice” (“it is the right and duty of the Minister of Justice to seek out, flag, report and even denounce cases where, according to his judgment and with the help of all the information at his disposal, there has been a maladministration of justice”)⁹⁶ and that the case discussed in the speech was such a maladministration. The application judge also found that Wagner was speaking as Minister of Justice and not as a lawyer. With respect, this finding seems dubious and unsupported (at least by the reasons of the Barreau).⁹⁷

While the Court of Appeal upheld the quashing on the basis of Crown immunity, Chief Justice Tremblay did note that he did not completely agree with the reasons of the application judge.⁹⁸ Instead, Chief Justice Tremblay held that, insofar as the speech was given in Wagner’s capacity as Minister of Justice, the application judge was correct to quash the decision of the Barreau.⁹⁹

Although it is not my focus in this article, I note and emphasize here that I have elsewhere questioned the concept of ministerial immunity for Attorneys General from law society discipline and argued that such blanket

94 *Wagner c Barreau de Montréal* (Qc SC), as published in “Le jugement du juge Philippe Pothier dans la cause de M. Claude Wagner contre le Barreau de Montréal” *Le Clairon (Saint-Hyacinthe)* (1 December 1966) 12 [*Wagner c Barreau de Montréal* (Qc SC)] (See Appendix), aff’d *Barreau (Montréal) c Wagner* (1967), [1968] BR 235 (CA) [*Wagner c Barreau CA*].

95 *Wagner c Barreau SC*, *supra* note 94.

96 *Wagner c Barreau de Montréal* (Qc SC), *supra* note 94.

97 See e.g. “Le Barreau a besoin d’une réforme en profondeur”, *Le Nouvelliste* (11 October 1965) 6, quoting Wagner’s speech: “[j]e me félicite également d’avoir accepté votre invitation parce que, pour la première fois depuis que j’ai assumé mes fonctions de ministre de la Justice, je rencontre les membres du Barreau et je m’adresse à eux. Non seulement en tant que ministre, mais surtout en confrère” (“I am also pleased to have accepted your invitation because, for the first time since I assumed my duties as Minister of Justice, I am meeting the members of the Barreau and addressing them, not only as minister, but above all as a colleague”).

98 *Wagner c Barreau CA*, *supra* note 95 at 237.

99 *Ibid.*

immunity is inconsistent with case law superseding *Wagner*.¹⁰⁰ Thus it is unclear, both as a factual and legal matter, whether the judicial review judge and the Court of Appeal were correct to quash the Barreau's actions on that basis.

The Lessons

While the disciplinary action was quashed, the substantive analysis by the Barreau, insofar as it was unquestioned by the courts on judicial review and on appeal, remains important. Two major lessons about the duty to encourage respect for the administration of justice can be drawn from the Wagner speech and its fallout. The first is about the difficult though necessary balance required for compliance with the duty and the second is about accuracy in criticism of the judiciary.

The first lesson is that the duty requires lawyers to engage in a difficult and delicate balance in their criticism and defence of courts and judges. Consider the comments by the judge on judicial review about the duty and responsibility of the Minister of Justice:

CONSIDERANT que c'est le droit et le devoir du Ministre de la Justice de rechercher, signaler, rapporter et même dénoncer les cas où, d'après son jugement et avec l'aide de toutes les informations qu'il possède, il y aurait eu mauvaise administration de la justice ;

CONSIDERANT qu'une sentence excessive ou trop minime imposée à un individu convaincu de crime ou d'infraction de même qu'une procédure illégale, irrégulière ou insolite employés lors d'une conviction, constitue dans l'opinion de la Cour une mauvaise administration de la justice ;

CONSIDERANT que, sans s'immiscer dans les décisions des tribunaux chargés de redresser des sentences inadéquates, toute personne, et à plus forte raison le Ministre de la Justice, peut dire ce qu'il pense de la procédure qui a été suivie et du châtement qui a été infligé dans telle ou telle instance.¹⁰¹

¹⁰⁰ See Martin, "AG Immunity", *supra* note 9 at 422–26 (arguing that the holding in *Wagner c Barreau CA*, *supra* note 95, may have been incorrect at the time and is certainly incorrect now).

¹⁰¹ *Wagner v Barreau de Montréal (Qc SC)*, *supra* note 94.

[TRANSLATION]

CONSIDERING that it is the right and the duty of the Minister of Justice to investigate, flag, report and even denounce cases where, according to his judgment and with the help of all the information at his disposal, there has been a maladministration of justice;

CONSIDERING that an excessive or too minimum sentence imposed on an individual convicted of a crime or offense as well as any illegal, irregular or unusual procedures employed during the conviction, constitutes in the opinion of the Court a maladministration of justice;

CONSIDERING that, without interfering in the decisions of the courts responsible for redressing inadequate sentences, anyone, and even more so the Minister of Justice, may express his views on the procedure that was followed and the punishment that was levied in that instance.

The judge held that Wagner made these comments in his role as Minister and not as a lawyer. Nonetheless, the judge's references to "le droit et le devoir du Ministre de la Justice" ("the right and the duty of the Minister of Justice") to denounce errors in the justice system, and moreover the ability of "toute personne, et à plus forte raison le Ministre de la Justice" ("anyone, and even more so the Minister of Justice") to comment on those errors, would apply equally to the duty of lawyers to encourage respect for the administration of justice and to improve it. If the defence counsel and the judge had indeed acted improperly, Wagner would seemingly have a duty to identify and explain those errors, even to publicize them, in the hope of improving the conduct of lawyers and judges—*i.e.* the administration of justice—in the future. To comply with the duty without breaching it thus appears to require careful balancing. In turn, the difficulty of this balancing and the problems of hindsight suggest that law societies should allow a significant role for the reasonable judgment of the individual lawyer.

This brings me to the second lesson from *Wagner*, which partly explains how a lawyer is to determine and maintain this balance: a lawyer who criticizes a judge, and presumably another lawyer, must take reasonable steps to confirm the factual information underlying the criticism.¹⁰² While the Barreau did hold that this obligation to take reasonable steps

102 *Quebec Code, supra* note 1, art 19: "[a] lawyer must not, directly or indirectly, publish, broadcast, communicate or send writings or comments which are false or which he should know are false or assist anyone in doing so." There is no equivalent provision in the *FLSC Model Code, supra* note 1.

applied particularly to the Minister of Justice, it would apply to all lawyers—although the content of reasonable steps would be calibrated to the particular circumstances. As I mentioned above, the application judge on judicial review did note that Wagner had made the speech based on the information within Wagner's control. In my view, this is at most a qualifier on the legal proposition identified by the Barreau. A "reasonable steps" requirement impedes—potentially among other things—unsupported criticism. I acknowledge that some may suggest that such a requirement will have a chilling effect on lawyers' criticism of judges. Even if it does, this requirement seems necessary and important, if not unavoidable.

In this respect, the Wagner matter suggests that where the rules of professional conduct require a lawyer's criticism of judges to be supported by "a bona fide belief in its real merit,"¹⁰³ a *bona fide* belief should be understood as requiring a lawyer to take reasonable steps to confirm the factual basis of the criticism.

While there are some indications that the duty may have previously required deserved criticism to be made privately instead of publicly, on balance it seems that both private and public criticism are appropriate. Recall that the *CBA Canons* stated that "[w]henver there is proper ground for serious complaint of a judicial officer, it is a right and duty of the lawyer to submit the grievance to the proper authorities."¹⁰⁴ However, the *CBA Canons* did not explicitly state that the grievance must *only* be submitted to those authorities and cannot *also* be made public. Similarly, the 1917 Barreau by-laws prohibited lawyers from making not only *false* accounts of judicial proceedings, but also accounts injurious to the honour or dignity of the judiciary.¹⁰⁵ There is no indication from the duty itself, in any of its various forms at the time of the Wagner speech or later, that deserved criticism should be made privately instead of publicly. Indeed, subsequent case law suggests that private criticism can be as much a breach of this duty as public criticism.¹⁰⁶

To the extent that the decision of the Hearing Panel of the Law Society of British Columbia in *Laarakker (Re)*¹⁰⁷ suggests otherwise, that decision appears to be incorrect. *Laarakker* was a decision about the duty of civility,

103 *FLSC Model Code*, *supra* note 1, r 5.6-1, commentary 3.

104 *CBA Canons*, *supra* note 36 at canon 2(2).

105 1917 *Quebec by-law* 62, *supra* note 39 at para 7: "un rapport de procédures judiciaires *faux*, ou *injurious* pour l'honneur ou pour la dignité de la magistrature" ("a report of judicial proceedings that are *false* or *offensive* to the honour or dignity of the judiciary").

106 See e.g. *Histed*, *supra* note 40.

107 2011 LSBC 29 [*Laarakker*], penalty at 2012 LSBC 2.

not about the duty to encourage respect for the administration of justice. However, the comments of the panel suggest that criticism of another lawyer should be made solely to that lawyer's regulator.¹⁰⁸ Presumably, this admonition would apply also to allegations of judicial misconduct. With respect, it is quite possible, if not probable, that some conduct that discourages respect for the administration of justice will not lead to disciplinary sanctions or even disciplinary proceedings. If the duty of lawyers was to merely refer problematic conduct to law societies and judicial councils and then to repeat, echo, or publicize denunciations by those bodies, that duty would be an anemic—if not a hollow one—that recognizes little role for professional judgment and individual duty.

The caveat to this second lesson comes by analogy to *Groia v Law Society of Upper Canada*, in which Justice Moldaver held that incorrect allegations of misconduct against other lawyers goes to competence instead of civility.¹⁰⁹ From the facts of *Groia*, it seems that this holding by Justice Moldaver was about legally incorrect, not factually incorrect, allegations of misconduct. Nonetheless, as competence goes beyond legal knowledge, it could be that factually incorrect allegations of misconduct against judges likewise go to competence and not to the duty to encourage respect for the administration of justice. Insofar as allegations of misconduct that are incorrect—whether factually or legally—necessarily harm respect for the administration of justice, in my respectful view, they would squarely violate this duty, though they may also simultaneously violate the duty of competence.

PART 3: ROGER KIMMERLY (YUKON)

One of the rare law society decisions concerning a serving Attorney General is *Law Society of Yukon v Kimmerly*.¹¹⁰ Since the underlying incident and its fallout were recently the subject of an excellent article by the Honourable Ronald Veale and Andrea Bailey,¹¹¹ I provide here only a brief description of the key facts. *Kimmerly* at its core is about judicial independence, as emphasized by Veale and Bailey,¹¹² but it is also inseparably intertwined with the duty to encourage respect for the administration of justice.

108 *Ibid* at paras 45–46.

109 2018 SCC 27 at paras 95–96 [*Groia*], Moldaver J for the majority. On the duty of competence, see e.g. *FLSC Model Code*, *supra* note 1, r 3.1-2; *Quebec Code*, *supra* note 1, art 21.

110 [1988] LSDD No 1 (Yk LS) [*Kimmerly*].

111 Hon Ronald Veale & Andrea Bailey, “The Crest Affair: Judicial Independence and Yukon’s Supreme Court” (2020) 50 *Northern Rev* 219.

112 *Ibid* at 231.

At issue in *Kimmerly* were comments the Attorney General made in media interviews. Kimmerly's Department had instructed that the territorial Coat of Arms be hung behind the bench in the courtrooms in a new courthouse.¹¹³ A judge ordered the Coat of Arms removed, as a perceived intrusion on the appearance of judicial independence, and in the interim the Coat of Arms was covered.¹¹⁴ When asked about the incident in the interview, the Attorney General replied: "[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... There's no independence issue here at all in my view."¹¹⁵ The Attorney General was also quoted in a local newspaper, saying not only that "the entire matter is silly," but also that "the cloaking over of the coat of arms is insulting to the public."¹¹⁶

After a complaint had been made, Kimmerly stated in a letter to the Law Society that, "I am cognizant of my role with respect to the judiciary and my responsibilities in that regard," but emphasized his duty to "defend" the government and asserted that "my comments on this particular issue were, in my view, responsible to both of my aforesaid duties."¹¹⁷

The ultimate reasons in *Kimmerly* focus on the interaction primarily between the duty to encourage respect for the administration of justice and the rule of professional conduct on a lawyer in public office (providing that such a lawyer is held to the same standard as a lawyer in practice).¹¹⁸ A decision of the law society executive, which was later quashed, concluded that "Mr. Kimmerly, during the interview in question, acted in his capacity as Minister of Justice and, while his remarks may have been impolite and impolitic, he could not be found to be deserving of censure or disciplinary action."¹¹⁹ The subsequent Committee of Inquiry, in dismissing the complaint, explicitly balanced Kimmerly's duties as a lawyer with his duties as Minister of Justice, including "his freedom to make fair and reasonable

113 *Kimmerly*, *supra* note 110.

114 *Ibid*; Veale & Bailey, *supra* note 111 at 223.

115 *Kimmerly*, *supra* note 110.

116 Veale & Bailey, *supra* note 111 at 223.

117 *Ibid* at 226.

118 At the time, the duty was codified in r XII of the 1974 *CBA Code*, *supra* note 34, which had been adopted in the Yukon statute on the legal profession: "[t]he lawyer should encourage public respect for and try to improve the administration of justice." This language is nearly identical to the current version of the rule. For the current rule on lawyers in public office, see *FLSC Model Code*, *supra* note 1, r 7.4-1. For an analysis of *Kimmerly* in the interpretation of this rule, see Martin, "Lawyer-Politicians", *supra* note 2 at 15-16.

119 Veale & Bailey, *supra* note 111 at 228.

comment in the exercise of his right to speak out.”¹²⁰ The Committee did make the following key observations:

One can argue now that softer phrases might have been chosen by the member, but the Committee is not unmindful of the realities of political life and the position of the member as Minister of Justice at the end of a telephone.... [J]ustice is not a “cloistered virtue” and...comments in situations such as this cannot and should not be taken out of context or constrained unless they clearly amount to comments which any thinking person would conclude to have “brought the administration of justice into disrepute.”¹²¹

Unfortunately for my purposes, the reasons do not explicitly indicate whether the comments would warrant discipline of a lawyer other than the Minister of Justice.¹²² Reasonable people can disagree over whether that indication was implicit, but in my view, there is too little in the written decision to conclude either way.

These comments in *Kimmerly* reinforce the lesson from the Wagner incident that, given the careful balancing required to comply with the duty without breaching it, law societies should allow a significant role for the reasonable judgment of the individual lawyer. More specifically, this incident suggests that there is a high threshold for criticism of judges to violate the duty to encourage respect for the administration of justice and that the inquiry is a contextual one. It is unclear whether the specific “any thinking person” standard was meant to apply to lawyers other than the Attorney General. I emphasize that I have elsewhere criticized this explicit balancing approach to the rule on lawyers in public office as being contrary to the plain language of the provision.¹²³ While *Kimmerly* made the comments in 1986, and so the *Canadian Charter of Rights and Freedoms* was in force, there is no mention of the *Charter* in the reasons of the Law Society.¹²⁴

120 *Kimmerly*, *supra* note 110. Veale & Bailey, *supra* note 111 at 230, cite conflicting evidence by expert witnesses, with one characterizing the remarks as “petulant pique of a politician” and one characterizing them as “sensible” and “understandable.”

121 *Kimmerly*, *supra* note 110.

122 Veale & Bailey, *supra* note 111 at 231. The authors characterized this as “a relatively sparsely-reasoned decision.”

123 Martin, “Lawyer-Politicians”, *supra* note 2 at 16, 35–36. See e.g. *FLSC Model Code*, *supra* note 1, r 7.4-1 (“[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”).

124 *Charter*, *supra* note 72.

Nonetheless, the balancing exercise around the Attorney General speech in *Kimmerly* does seem to foreshadow *Charter* freedom-of-expression considerations, as more recently articulated in the civility cases of *Doré* (on a letter to a judge) and *Histed* (on a letter to counsel criticizing judges).¹²⁵ The Court in *Histed* framed the issue as “the proper balance between the constitutional right to freedom of expression and the need to regulate the conduct of members of the legal profession.”¹²⁶ Indeed, while *Histed* is often referenced to as a civility case, the rule on the duty to encourage respect for the administration of justice was one of several rules that were engaged in *Histed* and challenged by the lawyer on *Charter* grounds.¹²⁷

Whereas the decisions of the Barreau in *Wagner* and of the Law Society in *Kimmerly* appear to balance the lawyer's duty to encourage respect for the administration of justice with other duties, in my view the more analytically sound approach is to recognize that balancing *within* the analysis of the duty to encourage respect for the administration of justice. The duty to encourage respect for the administration of justice necessarily involves a balancing of apparently competing imperatives. It requires lawyers to defend the judiciary as well as to criticize it where appropriate. It is the balance between these two imperatives that comprises the duty. In its balancing and contextual approach, and although it does not consider ministerial immunity, *Kimmerly* is nonetheless quite consistent with the reasons on the judicial review in *Barreau c Wagner* insofar as both recognize public comment on the justice system as the appropriate and necessary role of the Attorney General.¹²⁸

At the same time, the result of that balancing determination on the facts of *Kimmerly* might be different today. In my view, given the strict approach of the law societies regarding incivility towards judges in *Doré* and *Histed*, both of which were upheld on judicial review, *Kimmerly* now seems quite lenient—although leniency, at least in the context of civility, seems apparent from the more recent decision in *Groia*.¹²⁹

125 *Doré*, *supra* note 59; *Histed*, *supra* note 40.

126 *Histed*, *supra* note 40 at para 1.

127 *Ibid* at paras 13, 44. The others were rules on integrity, civility, upholding the integrity of the legal profession, and “observ[ing] the rules of professional conduct set out in the Code in the spirit as well as in the letter.”

128 See also *Wagner c Barreau de Montréal* (Qc SC), *supra* note 94 and accompanying text.

129 *Doré*, *supra* note 59; *Histed*, *supra* note 40; *Groia*, *supra* note 109.

PART 4: PETER MACKAY (CANADA)

I now turn to the more recent conduct of Peter MacKay as Minister of Justice and Attorney General for Canada in 2014.¹³⁰ In contrast to the Wagner and Kimmerly incidents, which suggest that compliance with the rule requires delicate balancing and that law societies should allow a significant role for the reasonable judgment of the individual lawyer, this incident reinforces that some conduct is so problematic as to eliminate or exceed even a significant role for balancing. While MacKay was never disciplined for this conduct—for whatever reason—the scenario remains valuable as a case study.

In the *Reference re Supreme Court Act, ss 5 and 6*, the Supreme Court of Canada determined that judges of the Federal Court and Federal Court of Appeal were ineligible for the three seats on the Supreme Court of Canada that are allocated to Quebec, quashing the Prime Minister's appointment of Justice Marc Nadon.¹³¹ Months after the release of the decision, the Prime Minister's Office made a statement implying that Chief Justice McLachlin had inappropriately attempted to contact the Prime Minister regarding the *Reference* and that MacKay advised the Prime Minister that such a call would be "inadvisable and inappropriate."¹³² The Chief Justice made a statement the next day explaining that the call to the Minister of Justice and Attorney General of Canada, in which the Chief Justice requested to speak to the Prime Minister, occurred well before the *Reference* was made to the Court and was intended merely to inform the Minister and the Prime

¹³⁰ 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 at 73 (now Senator Cotter): "an unseemly, and unprecedented, attack on the integrity of the Chief Justice of the Supreme Court of Canada, Beverley McLachlin, by the Prime Minister of Canada and the Attorney General of Canada...the unprincipled performance of the Attorney General of Canada in this controversy was an exceptional and troubling occurrence and serves as a cautionary tale." See also Hugo Cyr, "The Bungling of Justice Nadon's Appointment to the Supreme Court of Canada" (2014) 67 SCLR (2d) 73 at 76, note 14. See also Sanderson, *supra* note 3 at 116–17, who gives a concise account of the saga with a similar focus to my own account (though without explicit reference to the duty to encourage respect for the administration of justice). See also Carissima Mathen & Michael Plaxton, *The Tenth Justice: Judicial Appointments, Marc Nadon, and the Supreme Court Act Reference* (Vancouver and Toronto: UBC Press, 2020) at 124–39. I have suggested that the authors gave insufficient attention to the role of MacKay: Andrew Flavelle Martin, "But Why Him? A Review of *The Tenth Justice: Judicial Appointments, Marc Nadon, and the Supreme Court Act Reference* by Carissima Mathen and Michael Plaxton" (2021) 44:2 Dal LJ 677 at 5–6.

¹³¹ 2014 SCC 21 [*Reference*].

¹³² Cotter, *supra* note 130 at 74–75; Tonda MacCharles, "Harper Refuses to Take Call from Judge", *The Toronto Star* (2 May 2014) A6; Sanderson, *supra* note 3 at 116.

Minister that there may be a live issue as to the eligibility of judges of the Federal Court of Appeal generally.¹³³ On the same day, MacKay made the following comments in Halifax:

Clearly there was an issue over a pending appointment and after having spoken to the chief justice, it was my considered opinion that that call shouldn't take place...It was ultimately his (Harper's) decision whether he spoke to her or not, but I just felt as justice minister that it was not an appropriate call.¹³⁴

MacKay was later asked about the matter in the House: "can the Attorney General tell us whether he considers it part of his job to ensure that there are never any attempts to intimidate the courts?"¹³⁵ In response, MacKay reinforced the Prime Minister's original comments in explaining why he advised the Prime Minister to decline the call from the Chief Justice: "[m]y office was contacted by the office of the Chief Justice. After I spoke with her on that call I was of the considered opinion that the Prime Minister did not need to take her call. Neither the Prime Minister nor I would ever consider calling a judge where that matter is or could be before the court of competent jurisdiction."¹³⁶ (Confusingly, while MacKay said that he "rejec[t]ed the premise of that question," he went on to say that "of course the role of the minister of justice and attorney general of Canada is to uphold the integrity of the entire justice system.")¹³⁷ As Elizabeth Sanderson notes in an account of this situation, MacKay's statements in the House "left legal observers puzzled and concerned."¹³⁸ While MacKay in the House statements seemed to choose words more carefully than in the Halifax statement, the meaning of the House statement is readily discernable though slightly less explicit than the meaning of the Halifax statement.

MacKay's conduct has received little attention in the legal literature, perhaps because there is little uncertainty that it was phenomenally

133 Office of the Chief Justice of Canada, "For Immediate Release" (2 May 2014), online: <decisions.scc-csc.ca>.

134 Canadian Press, "MacKay offers few new details on Supreme Court spat", *The News (New Glasgow)* (3 May 2014) 15.

135 *House of Commons Debates*, 41-2, No 80 (5 May 2014) at 4919 (Hon Thomas Mulcair) [Canada *Hansard*], as referenced in Sanderson, *supra* note 3 at 116.

136 Canada *Hansard*, *supra* note 135 at 4919 (Hon Peter MacKay), as quoted in Cotter, *supra* note 130 at 75, quoted partially in Sanderson, *supra* note 3 at 116.

137 Canada *Hansard*, *supra* note 135 at 4919 (Hon Peter MacKay), as quoted in Sanderson, *supra* note 3 at 117.

138 Sanderson, *supra* note 3 at 116.

wrongful. Brent Cotter (now Senator Cotter) explains that MacKay as a lawyer, indeed the Chief Law Officer of the Crown, had a duty not to merely stay silent, but a positive duty to defend the Chief Justice.¹³⁹ Cotter characterizes MacKay's failure to do so not only as "a stain on the office of the Attorney General of Canada," but indeed as a breach of the duty to encourage respect for the administration of justice.¹⁴⁰ While Cotter suggested that MacKay as Attorney General was immune to professional discipline for this misconduct,¹⁴¹ with great respect that suggestion appears to be mistaken.¹⁴² Nonetheless, as with *Wagner*, the immunity issue is peripheral to my analysis here.

The criticism of Chief Justice McLachlin that was explicit in MacKay's Halifax statement and readily inferable from MacKay's House statement was both factually and legally incorrect. As a factual matter, the Chief Justice was calling not to discuss specific potential litigation, but to inform the Minister and the Prime Minister of the potential for a legal challenge. As a legal matter, as indicated in the Chief Justice's statement, it is completely appropriate for a Chief Justice to discuss the needs of their Court with the Minister of Justice, and potentially the Prime Minister, when there is a vacancy. Indeed, the recently revised edition of *Ethical Principles for Judges* provides that "Chief Justices and other judges with administrative responsibilities will necessarily have contact and interaction with the executive branch of government, including attorneys general, deputy attorneys general, and court services officials. These engagements are appropriate provided that the

139 Cotter, *supra* note 130 at 76–77.

140 *Ibid* at 76–77. See also Adam Dodek, as quoted in Cristin Schmitz, "MacKay fell short as AG, lawyers say", *The Lawyers Weekly* (30 May 2014) 1: "I am surprised and disappointed by the conduct of the Minister of Justice because he should be defending the independence of the judiciary, not impugning the integrity of the Chief Justice and the Supreme Court of Canada, which has the potential to undermine the rule of law... We should expect the highest level of conduct from the Minister of Justice and Attorney General of Canada. He is no ordinary politician and no ordinary lawyer. He has a duty, as the chief legal officer of the Crown, to defend the administration of justice and the rule of law"; Michael Bryant, "By politicizing judicial appointments, Harper risks constitutional crisis", *The Globe and Mail* (19 May 2014), online: <www.theglobeandmail.com>: "[t]he incident marks the complete breakdown of the constitutional relationship between the executive and judicial branches, threatening Canadians' confidence that their government has an effective judicial watchdog to protect them against political hubris and worse." In the same op-ed, Bryant also characterized MacKay as "politically impotent" and "feckless."

141 Cotter, *supra* note 130 at 77; Dodek, as quoted in Schmitz, *supra* note 140.

142 See also *Wagner c Barreau de Montréal* (Qc SC), *supra* note 94 and accompanying text; Martin, "AG Immunity", *supra* note 9 at 420–21. Senator Cotter was surely correct insofar as referring to parliamentary privilege.

interactions are not partisan in nature.”¹⁴³ Any Chief Justice would rightly be concerned that a particular class of appointments could be challenged, which would leave the court shorthanded until that challenge was resolved—even more so on a relatively small court like the Supreme Court of Canada, with its nine justices. That the Supreme Court of Canada might ultimately decide such a challenge does not change this reality.

While a complaint was reportedly made to the Nova Scotia Barristers' Society as MacKay's licensing body, specifically alleging that MacKay had violated the duty to encourage respect for the administration of justice, MacKay was never disciplined for that alleged breach.¹⁴⁴ However, a complaint was made to the International Commission of Jurists.¹⁴⁵ In response, the Commission held that “the criticism [by Harper and MacKay] was not well-founded...[s]uch public criticism could only have a negative impact on public confidence in the judicial system and in the moral authority and integrity of the judiciary, and thereby on the independence of the judiciary in Canada.”¹⁴⁶

If MacKay's Law Society had pursued discipline, and if ministerial immunity was not a bar to discipline, what arguments might MacKay have made in defence? There would appear to be at least five such arguments, of which only the first would be successful—and only partially.

The first such argument would be parliamentary privilege. Parliamentary privilege would preclude any law society discipline for MacKay's House statement.¹⁴⁷ However, the positive nature of the duty to encourage respect for the administration of justice narrows the effective impact of parliamentary privilege. The positive duty would apply to MacKay at all times. While MacKay cannot be disciplined for making unfounded allegations against the Chief Justice while in the House, parliamentary privilege does not relieve MacKay of the positive duty to defend the Chief Justice against allegations made by others, at least while outside of the House. Moreover, the first—and more explicitly problematic—statement was made outside the House.

Second, MacKay might have argued that the only enforceable duty is a negative one and not a positive one, such that all lawyers, including MacKay,

143 Canadian Judicial Council, *Ethical Principles for Judges* at 44, 5.B.4 (Ottawa: The Council, 2021), online: <cjc-ccm.ca>.

144 See e.g. Schmitz, *supra* note 140

145 See e.g. Cotter, *supra* note 130 at 76.

146 Letter from Wilder Tayler, Secretary General of the International Commission of Jurists, to Dr. Gerald Heckman (23 July 2014) at 7, online (pdf): <www.icj.org>, quoted in Cotter, *supra* note 130 at 76.

147 See e.g. Martin, “AG Immunity”, *supra* note 9 at 429–30.

only have a duty not to actively discourage respect for the administration of justice. Under this argument, any positive duty contained in the rules of professional conduct is merely aspirational. The first problem with this argument is that it is contrary to the wording of the rule and its commentaries. The second problem with this argument is that, even if MacKay's interpretation of the rule was correct, MacKay did not remain silent.

Third, on the facts, MacKay may have argued that the precise wording of the House statement did not actually violate the duty and that the purported derogatory implications of that statement were drawn by the media and other listeners. If one breaks MacKay's comments into two parts, both parts are true and in themselves do not disparage the Chief Justice:

- i. "[T]he Prime Minister did not need to take her call."
- ii. "Neither the Prime Minister nor I would ever consider calling a judge where that matter is or could be before the court of competent jurisdiction."

There are many potential reasons why it might have been unnecessary for the Prime Minister to take the call—MacKay did not actually say in this House statement that it would have been *inappropriate* for the Prime Minister to do so. One would certainly hope that the second part was true, *i.e.* "[n]either the Prime Minister nor I would ever consider calling a judge where that matter is or could be before the court of competent jurisdiction." It is the juxtaposition of the two parts in all the context that inescapably encourages listeners to understand the conduct of the Chief Justice as wrongful and indeed to doubt her integrity. That is, it seems inescapable that listeners could reasonably interpret the remarks as impugning the integrity of the Chief Justice and that the remarks were intended to be so interpreted—or at least remarkably reckless, if not actually so intended. MacKay's Halifax statement leaves no doubt of this intention.

Fourth, MacKay may have argued that the duty to improve the administration of justice required him to call out judicial misconduct. However, given that MacKay knew or should have known that the allegations were unsupported and misleading, and that there was in fact no judicial misconduct to call out, this argument would be unsuccessful. Moreover, the appropriate mode for that criticism, if deserved, would have been a complaint to the Canadian Judicial Council. The fact that MacKay made such a complaint neither before nor after the statement from the Prime Minister's Office suggests that MacKay knew the accusation was illegitimate or at least that there was a serious possibility that the Council would reject the

accusation as baseless—and that the purpose of the statements was not to encourage respect for or to improve the administration of justice, but to attack the Chief Justice in retaliation for ruling against the government.

MacKay's strongest argument aside from parliamentary privilege would have been that the duty of loyalty to the client prevented MacKay from publicly criticizing the Prime Minister and might have even required supporting the Prime Minister's allegations. Although as Attorney General, the client was the Crown and not the Prime Minister,¹⁴⁸ it seems obvious that the Prime Minister made those remarks in their official role. Under this argument, the duty to encourage respect for the administration of justice applied in this specific context only to lawyers other than MacKay (and presumably subordinate government lawyers). The challenge with this argument is that the duty of loyalty to the client is never absolute and is often counterbalanced by other duties. Moreover, when faced with apparently conflicting duties to the administration of justice and to the client, a better reconciliation of those duties would be to publicly remain silent instead of publicly supporting the Prime Minister's allegations.

Assuming that a disciplinary panel would reject these arguments, it seems likely that they would go on to find that MacKay had breached the duty to encourage respect for the administration of justice by making such statements. But what about MacKay's positive duty to defend courts from criticism? This situation—where the client or a representative of the client has publicly expressed unsupported criticism of judges—is a special one where a lawyer may indeed attract discipline for a failure of the positive duty.

In this context, MacKay likely had a duty to caution the Prime Minister about the Office's statement and to advise the Prime Minister to retract

148 See e.g. *DOJ Act*, *supra* note 13, s 4: “[t]he Minister [of Justice] is the official legal adviser of the Governor General”; *Ontario v Criminal Lawyers’ Association of Ontario*, 2013 SCC 43 at para 5, referring to Attorneys General as “the Chief Law Officers of the Crown”; *FLSC Model Code*, *supra* note 1, r 3.2-3: “[a]lthough a lawyer may receive instructions from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, the lawyer must act for the organization in exercising his or her duties and in providing professional services.” See also *FLSC Model Code*, r 3.2-3, commentary 1: “[a] lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors and employees. While the organization or corporation acts and gives instructions through its officers, directors, employees, members, agents or representatives, the lawyer should ensure that it is the interests of the organization that are served and protected.”

or correct the statement.¹⁴⁹ If the Prime Minister refused to do so, MacKay would have had to correct the statement himself; if MacKay determined that it could not be done, there was at least the discretion, if not the duty, to withdraw and resign. If discretionary on its face, the duty to encourage respect for the administration of justice makes resignation necessary and unavoidable in the circumstances. If the Prime Minister had merely rejected MacKay's advice but gone no further, that rejection would constitute a sound basis for a "serious loss of confidence between the lawyer and the client" (specifically where "the client refuses to accept and act upon the lawyer's advice on a significant point") that would allow MacKay to withdraw and thus resign.¹⁵⁰ Again, while withdrawal on that basis is optional, not mandatory, it would appear to be necessary and unavoidable to fulfill the duty to encourage respect for the administration of justice. If the Prime Minister had instead instructed MacKay to repeat or confirm the criticism of the Chief Justice and had persisted in those instructions even after MacKay had explained that it would be unethical for MacKay to follow them, then MacKay would have been required to withdraw.¹⁵¹

These duties are reinforced by the duty of the lawyer not to "assist or permit" any "dishonest or dishonourable" conduct by the client.¹⁵² Criticism that the lawyer knows or should know is factually or legally incorrect would be dishonourable, as would inappropriate criticism, particularly given that the judge cannot defend themselves against any criticism.¹⁵³

However, if MacKay had resigned,¹⁵⁴ it could have plausibly been argued that there was no obligation or even discretion for MacKay to

149 Consider also *Quebec Code*, *supra* note 1, art 115: "[a] lawyer must not encourage a client, witness or other person to do or say anything which he could not do or say himself in respect of a judge, tribunal, member of a tribunal or any other participant in the justice system."

150 *FLSC Model Code*, *supra* note 1, r 3.7-2 and commentary 1.

151 See e.g. *ibid*, r 3.7-7(b): "[a] lawyer must withdraw if...a client persists in instructing the lawyer to act contrary to professional ethics"; *Quebec Code*, *supra* note 1, arts 49(2), (4): "[a] lawyer must cease to act for a client, except where a tribunal orders otherwise...if, notwithstanding the lawyer's advice, the client or a representative of the client persists in contravening a legal provision or in inciting the lawyer to do so; [or]...if the client persists in exercising a recourse or filing proceedings that the lawyer considers abusive."

152 *FLSC Model Code*, *supra* note 1, r 5.1-2(b): "[w]hen acting as an advocate, a lawyer must not...knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable."

153 See above *FLSC Model Code*, *supra* note 1, r 5.6-1, commentary 3 and accompanying text.

154 See e.g. Bryant, *supra* note 140, as quoted by Sanderson, *supra* note 3 at 117: "[i]n another era, the justice minister would have resigned."

publicly announce the reasons for the resignation.¹⁵⁵ Thus with much respect, I disagree in part with Cotter's observation that "MacKay was obliged to intervene privately and to dissent publicly from the views of the Prime Minister."¹⁵⁶ While I think MacKay would have been justified in dissenting publicly and should have done so, it is not clear that there was an *obligation* to do so.¹⁵⁷

The MacKay scenario thus provides two important lessons about the duty to encourage respect for the administration of justice. First, building on the Wagner and Kimmerly incidents, the MacKay scenario does provide additional lessons about public criticism of judges. Recall that *Wagner* suggests that a lawyer must take reasonable steps to confirm that any criticism of judges is factually correct. Less clear, but presumably following from that holding, is that in order for that criticism to be *bona fide*,¹⁵⁸ a lawyer must also take reasonable steps to confirm that the criticism is legally correct. The MacKay scenario reinforces this duty to take reasonable steps to confirm that the criticism is legally correct—though MacKay clearly knew or should have known that his criticism was legally incorrect. The MacKay scenario more squarely suggests that a lawyer should avoid factually correct statements from which a reasonable person could infer factually or legally incorrect criticism. While *Kimmerly* suggests that the threshold for a breach should be high, at least for the Attorney General and possibly for all lawyers, the comments by MacKay and the reasonable, if not intended, interpretation of those comments are far from borderline.

The second lesson from the MacKay scenario is that a lawyer must withdraw where a client refuses to retract, or persists in, factually or legally incorrect criticism of a judge—unless the lawyer is able to renounce such criticism themselves. This unusual situation is a rare one where the positive duty is no longer merely aspirational, and thus a lawyer may face discipline for a breach of that positive duty. The duty to encourage respect for the administration of justice transforms what would otherwise be an optional withdrawal into a mandatory withdrawal. Where that lawyer is the Attorney General, withdrawal would appear to require resignation. In other

155 For an argument that the Attorney General has at least the discretion to announce their reasons for withdrawal, see Andrew Flavelle Martin, "The Attorney General as Lawyer (?): Confidentiality Upon Resignation from Cabinet" (2015) 38:1 Dal LJ 147.

156 Cotter, *supra* note 130 at 76.

157 See e.g. Michael Bryant, as quoted in Schmitz, *supra* note 140: "[i]t's the obligation of the attorney general to stand up for the chief justice, at least behind closed doors, and in another era, the attorney general would speak up publicly to the prime minister."

158 *FLSC Model Code*, *supra* note 1, r 5.6-1, commentary 3.

words, the rule on mandatory withdrawal is not exhaustive of the situations in which withdrawal is mandatory.¹⁵⁹ The combination of the rule on optional withdrawal and the duty to encourage respect for the administration of justice requires a lawyer to repudiate or withdraw.

PART 5: MERE (PUBLIC) INACTION?

In this Part, I consider instances of apparent inaction by Attorneys General. These situations are not about merely refraining from attacking the judiciary, but instead about what an Attorney General should and must do to defend the judiciary against attacks by others—particularly attacks from other members of the Cabinet. These circumstances potentially present a much more difficult situation for the Attorney General. When a Premier or another minister makes inappropriate criticisms of a specific judge or judges generally, does the Attorney General have a duty to denounce that criticism publicly, or to merely take steps internally to persuade that person to apologize for (or at least clarify) those remarks? What if the person nonetheless refuses to do so despite the efforts of the Attorney General? The contrasting scenarios of Ken Rostad, Ron Basford, and Rob Nicholson reinforce and contour the lesson about resignation and denunciation from the MacKay scenario discussed in the previous Part.

Ken Rostad (Alberta)

Ken Rostad was Attorney General for Alberta in 1994 when Premier Ralph Klein made some controversial remarks about judges. The incident and its fallout became part of the basis of motions for stays of criminal charges in *R v Campbell*, grounded in the *Charter* right to “an independent and impartial tribunal.”¹⁶⁰ An Alberta provincial court judge refused to

159 *FLSC Model Code*, *supra* note 1, r 3.7-7. For existing examples of mandatory withdrawal that are not listed in rule 3.7-7 but are otherwise required by the rules of professional conduct, see Alice Woolley & Amy Salyzyn, *Understanding Lawyers' Ethics in Canada*, 3rd ed (Toronto: LexisNexis Canada, 2023) at 143-44; *FLSC Model Code*, *supra* note 1, rr 3.4-1 (conflicts of interest), 3.2-7 (among other things “[a] lawyer must never ... knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct.”), 3.2-8 (conduct by organizational client).

160 (1994), 25 Alta LR (3d) 158, [1995] 2 WWR 469 (QB) [*Campbell* cited to Alta LR], *aff'd Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3, 150 DLR (4th) 577 [PEI Judges Reference cited to SCR]; *Charter*, *supra* note 72, s 11(d).

sit after learning of proposed pay cuts for judges.¹⁶¹ One might argue that such action warranted a respectful but firm response from the Attorney General.¹⁶² However, that is not what followed. Instead, Alberta Premier Ralph Klein stated in an interview that “[w]hoever appoints should be able to un-appoint.... It seems to me if we have the power to hire, then we ought to have the power to fire.”¹⁶³

When the issue arose in the legislative assembly of Alberta, Klein acknowledged that there was a process required to remove a provincial court judge:

There is no doubt about it: we hire judges. There is no doubt about it: we hire Provincial Court judges. As a matter of fact, for the last two to be hired, I recall quite clearly signing the order-in-council along with the Lieutenant Governor. There is a process, yes. And I stand to be corrected. To fire a Provincial Court judge also involves an OC, but there is a procedure that involves, I believe, the Judicial Council and the chief judge, I will have the hon. Justice minister supplement as to what that procedure is.¹⁶⁴

Rostad then clearly affirmed the importance of, and the government's respect for, judicial independence: “there's no doubt that the Constitution sets out that the judiciary is an independent body, and in fact our democracy is predicated on that. I can affirm that the government of Alberta thinks that the judicial independence concept is paramount.”¹⁶⁵

However, the further question asking Rostad to denounce Klein's original comments—“Mr. Speaker, will the Minister of Justice agree that the comments made by the Premier went way too far – way too far – because they became a threat, a threat to the judiciary that is completely improper?”—was rejected by the Speaker.¹⁶⁶ There is thus no way to know what Rostad's answer would have been. Immediately thereafter, Klein, after being asked whether “he made a big mistake in threatening the court,”¹⁶⁷

161 See Diana Coulter, “Klein's remarks stir legal storm”, *Edmonton Journal* (3 May 1994) A1, 1994 WLNR 3190690 [Coulter, “Klein's Remarks”].

162 Thanks to Adam Dodek on this point.

163 Coulter, “Klein's Remarks”, *supra* note 161. See also Kathleen Engman, “Klein must retract, law society says”, *Edmonton Journal* (4 May 1994) A1, 1994 WLNR 3215241: “[i]n a speech to newspaper editors Tuesday [May 3] in Calgary, Klein reiterated that the judge's decision to absent himself from court was a ‘labor problem’ and said if he were chief provincial court Judge Ed Wachowich, ‘I would fire the guy.’”

164 Alberta, Legislative Assembly, *Alberta Hansard*, 23-2 (2 May 1994) at 1578 (Hon Ralph Klein).

165 *Ibid* at 1578 (Hon Ken Rostad).

166 *Ibid* at 1578 (Laurence Decore).

167 *Ibid* at 1578 (Laurence Decore).

emphasized “I want to make this quite clear: I would never interfere in the conduct of an officer of the court and the administration of justice, and no one in this caucus would”—but again repeated that where a judge refused to work, “I think that there is something fundamentally wrong with that.”¹⁶⁸ The next day, after a similar question was posed to the Deputy Premier, Rostad emphasized that “[w]e have made it emphatically clear that this government thinks the paramount thing is judicial independence, and we stand behind that.... [T]he Premier’s comments of yesterday were very clear and were not in error.”¹⁶⁹

While Klein refused to apologize,¹⁷⁰ he did subsequently send the Chief Justice of the Provincial Court a letter of “clarification” claiming that his comments had been “misinterpreted”:

Dear Chief Judge Wachowich:

I am writing this to you as the Chief Judge of the Province of Alberta in response to your request to clarify my Government’s position on the issue of the independence of the judiciary. I have always respected and will continue to respect that independence. It is unfortunate that certain comments I made concerning a Judge have been misinterpreted to suggest otherwise.

More particularly, I am well aware of the Provincial Court Judges Act and the process set out in it for issues involving judicial conduct. I have no intention or desire to interfere with that process. I accept that it properly provides for judicial independence including security of tenure which keeps Judges secure against interference by the executive in any manner other than as set out in the Act.

Let me assure you that nothing I said was intended to in any way impinge on the judicial independence of the Provincial Court. I have great respect for the Judges of the Provincial Court. I have no doubt that everyone attending before the Provincial Court will receive a full and fair hearing by it as an independent and impartial tribunal.

I hope this letter will set this matter straight and end any controversy.¹⁷¹

168 *Ibid* at 1578 (Hon Ralph Klein).

169 *Ibid* at 1622 (Hon Ken Rostad).

170 See e.g. Diana Coulter, “No apology to court, says Klein”, *Edmonton Journal* (5 May 1994) A7, 1994 WLNR 3137648.

171 *Campbell*, *supra* note 160 at 274–75.

Klein however refused to make the letter public,¹⁷² which refusal presumably represented a lost opportunity to mitigate the damage done to the public's respect for the administration of justice.

The reasons in *Campbell* make no mention of Rostad other than quoting his remarks in the legislative assembly. While Chief Justice Lamer in the *PEI Judges Reference* mentioned Klein's statements, no reference was made to Rostad and his responsibility as Minister of Justice.¹⁷³

It seems obvious that one or more lawyers cautioned Klein privately about the impact of the impugned remarks, planned or advised on the form and content of the Premier's response to the question in the legislative assembly, and drafted or advised on the form and content of the clarification letter. Indeed, the letter shows at least some movement from Klein's comments in the legislative assembly. Presumably this lawyer was Rostad, perhaps in conjunction with other lawyers from the Department of Justice. But did Rostad have a duty to go further, to denounce Klein's comments or to resign? Given Klein's written and oral "clarifications," and Rostad's own remarks, the situation was adequately resolved in my view. Klein's comments appear to be the minimum necessary. Indeed, the "clarification" letter should have been made public. However, it would seem foolhardy to realistically expect anything more from Klein. A denunciation by Rostad would have been gratuitous and would have likely violated the duty of loyalty to the client. There would seem to be little if any reason for Rostad to resign. But what about if the Premier had refused to clarify the remarks or even persisted in similar remarks tending to threaten judicial independence? This brings me to Ron Basford.

172 See Diana Coulter, "Judges get Klein's letter of clarification", *Edmonton Journal* (7 May 1994) A1 [Coulter, "Letter"].

173 *PEI Judges Reference*, *supra* note 160 at para 286: "I have decided not to comment on the remarks made by Premier Klein in the time period following the implementation of the salary reduction in Alberta, except to say that they were unfortunate and reflect a misunderstanding of the theory and practice of judicial independence in Canada.... I note, and am comforted by the fact, that Premier Klein effectively distanced himself from those remarks later on in a letter he sent to Chief Judge Wachowich of the Alberta Provincial Court, in which he stated that he was 'well aware' of the process established to deal with judicial conduct, and that he had 'no intention or desire to interfere with that process.'" See e.g. Larry Johnsrude, "Klein censured by chief justice", *Edmonton Journal* (19 September 1997) A3, 1997 WLNR 4119638. With respect to both Johnsrude and Klein, "censured" seems perhaps an overstatement.

Ron Basford (Canada)

Ron Basford was federal Minister of Justice and Attorney General in late 1975 when André Ouellet, federal Minister of Consumer and Corporate Affairs, made the following statement after the acquittal of sugar companies for anti-competitive behaviour: “I will ask Ron Basford [the Attorney General] to launch an appeal. I find this judgment completely unacceptable. I think it is a silly decision. I just cannot understand how a judge who is sane could give such a verdict. It is a complete shock and I find it a complete disgrace.”¹⁷⁴ In response to a question in the House of Commons about this statement, the Minister further commented, “I want to say that I have full confidence in Canadian justice. It was an extremely important case. I think we had an excellent case. Perhaps we did not have a good judge, but that does not prevent me from having excellent reasons to see to justice.”¹⁷⁵ Basford, pressed in the House of Commons to adopt or repudiate Ouellet’s statement, said: “[t]he judge in question was obviously acting in accordance with his duties and authority as a judge, and in accordance with the law as he saw it. We are considering the judgment in the case very carefully to determine whether an appeal should be made or not, and a decision will be taken on the best advice we can receive.”¹⁷⁶ After this answer, in response to the repeated question, Basford maintained the position: “I have just said the judge was acting in accordance with what he perceived the law to be and I intend to go no further.”¹⁷⁷

174 “Acquittal angers Corporate Affairs Minister: Ouellet renews call for appeal in sugar firms ruling”, *The Globe and Mail* (22 December 1975) 8 [“Acquittal”]; *Re Ouellet (Nos 1 and 2)*, 1976 CanLII1250 (QC CA) [Ouellet].

175 *House of Commons Debates*, 30-1, vol 10 (20 December 1975) at 10222 (Hon André Ouellet) [Canada Hansard II]; “Acquittal”, *supra* note 174.

176 *Canada Hansard II*, *supra* note 175 at 10223 (Hon Ron Basford).

177 *Ibid* at 10223 (Hon Ron Basford). See also *ibid* at 10234 (Hon Ron Basford): “[o]n the point of order raised by the hon. member for St. John’s East (Mr. McGrath), Beauséne is quite clear in both citation 149(j) and 152(4) that the type of remarks that are deemed to be unparliamentary, as the hon. member for Fundy-Royal (Mr. Fairweather) has indicated, are those that cast reflections upon the conduct of judges, or a personal attack or censure. My colleague made it clear that that was not what he was engaged in. He indicated clearly that it was not the type of remark he was intending to make.... I indicated that I did not want to go any further, and I refused in the question period to go any further with the questions of the hon. member for St. John’s East because, as I indicated, in my view the judge in this particular case was acting in the course of his duties. It is a matter which may or may not be appealed upon the advice and decision of myself and departmental officials, and I do not think it would be proper for me to go further.”

Even though Ouellet's original remarks would lead to a contempt conviction that was upheld on appeal,¹⁷⁸ he demonstrated little remorse. Later, the same day as his "good judge" remarks, Ouellet gave a weak apology:

I must say, Mr. Speaker, that I did not mean to attack a Superior Court justice personally and that I did not do so. If I have given that impression, I am sorry and I apologize. I resent the fact that the hon. member...is trying to give to my remarks an interpretation which was not intended. I did say and I repeat that the judgment which was passed yesterday in the case of sugar surprises me, disappoints me and even dismays me. I fully trust the judiciary, as I said in answer to the hon. member's question.... He should have paid attention to my reply. At no time did I try to cast aspersion on the judiciary.¹⁷⁹

Indeed, although the Court of Appeal quashed the portion of the contempt sentence requiring an apology, one of the judges on the appeal criticized Ouellet's "half-apologies."¹⁸⁰ Ouellet later resigned from Cabinet while the appeal from his contempt conviction was before the courts. However, there was no explicit or even implicit penance in Ouellet's resignation. Instead, Ouellet expressed concern about his own rights.¹⁸¹

There is of course no way to know whether Basford cautioned Ouellet privately, although if he did then those efforts would appear to have been largely unsuccessful. Could—and should—Basford have clearly and emphatically denounced Ouellet's attack? Given Ouellet's apparent intransigence, should Basford have resigned? What steps short of

178 *Ouellet*, *supra* note 174.

179 Canada *Hansard* II, *supra* note 175 at 10234 (Hon André Ouellet). Basford reinforced this weak apology: see above note 176 and accompanying text.

180 *Ouellet*, *supra* note 174 at 103, Montgomery JA: "[i]t is appellant's subsequent conduct that I find impossible to condone. His half-apologies, attempting to place the blame upon the press, I regard as an aggravation rather than as an extenuation, and still more so his technical defences, such as his unwarranted attempts to take shelter behind his immunity as a Member of Parliament."

181 See *House of Commons Debates*, 30-1, vol 11 (16 March 1976) at 11822 (Hon André Ouellet): "[b]oth during and after the trial, I refrained from any public statement on that case. Recently, as a result of a clearly calculated indiscretion, my case has given rise to a highly partisan political debate. It has become quite clear to me in the past few days that my most basic rights, not so much before the courts, but especially before the public at large, as a defendant appealing a decision, could be seriously jeopardized by that political debate, while even my own resolution to keep silent—which goes back to the beginning of my trial—is questioned and used against me by some people. I repeat, I strongly intend to keep that resolution."

resignation would be sufficient to encourage respect for the administration of justice by defending the judiciary against Ouellet's criticism?

In my view, Basford's duty as a lawyer likely required him to convince Ouellet—or ideally the Prime Minister—to fully apologize and reinforce support and respect for the independent judiciary, or to do so personally, as had Rostad in Alberta. If Basford indeed made such efforts, Ouellet and the Prime Minister evidently refused to do so in a meaningful way. If Basford was unwilling or unable to do so himself, whether on the basis of his duty of loyalty or other considerations, then resignation was necessary. Recall that in the face of Ouellet's second statement, Basford offered a very weak defence of the judge. Ouellet's conduct and the refusal of the Prime Minister to impose any public consequence on Ouellet would constitute a sound basis for optional withdrawal, as in the MacKay scenario.¹⁸² Likewise, the duty to encourage respect for the administration of justice would require this otherwise optional withdrawal. Like MacKay, if Basford had resigned, he may have credibly argued that his duty of loyalty to the client precluded publicly disclosing the reasons for the resignation. However, it may be that the statements of a Minister, as opposed to those of a Prime Minister or Premier, are less likely to represent the official position of the Crown as the client of the Attorney General—and the interests of such a mere Minister are less likely to be contiguous with the interests of the Crown as the client than those of the Prime Minister.¹⁸³ Thus, Basford might have considered a public repudiation of Ouellet's statement to be more consistent with the duty of loyalty to the Crown as a client than MacKay might have considered a public repudiation of the Prime Minister's statement.

More broadly, these requirements would apply to any lawyer where the client or the client's representatives either refuse to retract or persist in inappropriate criticism of the judiciary.

Would it be possible for an Attorney General to do less than Basford or for a Minister to do less than Ouellet? Unfortunately, yes. This brings me to Rob Nicholson.

Rob Nicholson (Canada)

In February 2011, the federal Minister of Citizenship, Immigration and Multiculturalism, Jason Kenney, gave an unprecedented speech. Kenney

¹⁸² *FLSC Model Code*, *supra* note 1, r 3.7-2, commentary 1.

¹⁸³ Thanks to a reviewer on this point.

harshly criticized the Federal Court and the Federal Court of Appeal for interference in immigration matters, which Kenney framed as being “in the spirit of constructive dialogue between the legislative branch and the judiciary”:

[I]t strikes me as a good time to take a deeper look at a recurring challenge to any attempt to reform Canada's immigration system, which is how the Federal Court interprets the laws that Parliament has passed. And this is where I have some real concerns.... [E]ven the best efforts to reform our immigration system are not sufficient if they are not supported by the courts.... [P]roblems like this are too frequently created by judges who indulge in intrusive and heavy-handed review of decision making by the designated quasi-judicial decision makers in our system.... Cases in which, seemingly on a whim, or perhaps in a fit of misguided magnanimity, a judge overturns the careful decisions of multiple levels of diligent, highly trained public servants, tribunals, and even other judges. I believe most Canadians share my concern about such decisions. And I fear that such decisions do serious harm to the overall immigration system and prevent it from doing more good for deserving immigrants. And they undermine public confidence in the government's ability to enforce our laws as passed by Parliament, and therefore in the entire system.¹⁸⁴

While the focus of the remarks was the Federal Court and the Federal Court of Appeal, Kenney in the speech also criticized sentencing decisions in criminal cases.

A few days later, the federal Minister of Justice was called upon in the House of Commons to defend the judiciary against Kenney's criticism—with specific reference to the duty of the Minister of Justice “to preserve the integrity of our legal system.”¹⁸⁵ Instead of the Minister of Justice or a parliamentary assistant answering the question, Kenney responded

184 Hon Jason Kenney, “Speaking Notes for the Honourable Jason Kenney, P.C., M.P. Minister of Citizenship, Immigration and Multiculturalism at an Event at the Faculty of Law, University of Western Ontario” (11 February 2011), online: <www.canada.ca>.

185 *House of Commons Debates*, 40-3, No 131 (15 February 2011) at 8196–97 (Geoff Regan): “Mr. Speaker, while the Minister of Citizenship, Immigration and Multiculturalism is insulting and denigrating the Canadian courts and attacking the integrity of judges, the Minister of Justice sits and does nothing. He preaches about law and order but does not practise what he preaches. His oath of office is to preserve the integrity of our legal system. Has he forgotten his oath or does he share his colleague's opinion?”

by accusing the opposition Liberals of not wanting to deport “foreign criminals.”¹⁸⁶

Kenney’s speech was widely criticized, though the criticism was focused on Kenney and not on Nicholson.¹⁸⁷ However, when asked about the CBA’s criticism of the speech—“[y]our public criticism of judges who follow the law but not the government’s political agenda is an affront to our democracy and freedoms”—Kenney’s office remained unrepentant: “[i]n fact, [Kenney] looks forward to giving more such speeches in the months ahead.”¹⁸⁸ Indeed, given that Kenney’s spokesperson would later comment that “the minister does not have less speech rights than someone else,”¹⁸⁹ it seems quite clear that Kenney had resisted any cautions Nicholson might have expressed.

As with Basford and Ouellet, there is of course no way to know whether Nicholson cautioned Kenney privately, although if so, those efforts would appear to have been unsuccessful. And as with Basford and Ouellet, Nicholson’s duty as a lawyer likely required convincing Kenney—or ideally the Prime Minister—to affirm the government’s confidence in the judiciary and its commitment to judicial independence, to do so personally, or to resign. Whereas Ouellet gave a weak apology, Kenney gave none at all—making the obligations on Nicholson clearer than those on Basford and, thus, making Nicholson’s failure even more serious than that of Basford.

PART 6: DISCUSSION AND CONCLUSIONS

The duty to encourage respect for the administration of justice is a complex one. On the one hand, the duty is open-ended and potentially vast. On the other hand, the dual nature of the duty—both positive and negative—means that the duty may be both grounds for discipline and a defence against discipline. Unlikely though it seems that any lawyer, even the

186 *Ibid* at 8197 (Hon Jason Kenney).

187 See e.g. Audrey Macklin & Lorne Waldman, “When cabinet ministers attack judges, they attack democracy”, *The Globe and Mail* (18 February 2011) A17, 2011 WLNR 3232187 [no mention of Nicholson]. See also Richard Foot, “Supreme Court chief justice takes on Kenney; Beverley McLachlin answers immigration minister’s criticism of Federal Court decisions”, *Vancouver Sun* (15 August 2011) B1, 2011 WLNR 16122241 (no mention of Nicholson).

188 Mia Rabson, “Bar association spans Kenney for publicly taking judges to task”, *Winnipeg Free Press* (24 February 2011) A6 [again, no mention of Nicholson].

189 *Ibid*. I note in passing that this comment, like the speech itself, is a flagrant rejection of the principle of judicial independence.

Attorney General, would be disciplined for a failure to meet the positive duty, that positive duty may provide a defence for a purported violation of the negative duty. While my focus in this article has been the context of professional discipline, attempts to use that positive duty as a defence against criminal and civil immunity demonstrate the potential utility and impact of the duty beyond the disciplinary context.

The case studies I have considered in this article provide important lessons about the duty to encourage respect for the administration of justice, even if those lessons are not particularly surprising. The lesson from *Wagner* is that a lawyer must take reasonable steps in the circumstances to confirm the factual accuracy of any criticism of the judiciary. Based on *Kimmerly*, I suggest that compliance with the duty requires careful calibration by the lawyer, given that the duty is a complex one that encourages appropriate criticism where warranted while prohibiting problematic criticism. As an analytical matter, the necessary balancing exercise should be internal to the duty itself, instead of balancing the duty against the other roles or responsibilities of the lawyer. Law societies should recognize the complexity of that determination by allowing reasonable latitude for public criticism of judges. I suggest that even accepting such reasonable latitude, some conduct—such as that of Peter MacKay—is so problematic as to constitute a clear breach that balancing must not be allowed to permit.

Two lessons come from the MacKay scenario. I suggest that lawyers must take reasonable steps in the circumstances to confirm not only the factual accuracy of any criticism of the judiciary, but also its legal accuracy in order for that criticism to be *bona fide* as required by the rules of professional conduct.¹⁹⁰ Moreover, a lawyer's conduct should be judged purposively and by the reasonable interpretation of the public—a carefully worded statement that does not violate the duty on its face, but that is a breach by its clearly understood meaning, remains a breach.

Finally, the MacKay, Rostad, Basford, and Nicholson scenarios demonstrate the impact of the lawyer's duty to encourage respect for the administration of justice when a client inappropriately criticizes the judiciary. The lawyer must make good-faith efforts to urge the client to discontinue and apologize for such criticism. If those efforts are unsuccessful, the lawyer must repudiate that criticism themselves or, if they are unable to do so as a result of the duty of loyalty, must withdraw. For an Attorney General, withdrawal in turn likely leads to resignation.

190 *FLSC Model Code*, *supra* note 1, r 5.6-1, commentary 3.

I emphasize in closing that whether any specific lawyer—Attorney General or otherwise—faces professional discipline in any specific case is not necessarily an accurate measure or reflection of whether the conduct in question was wrongful. The mere fact that MacKay was not disciplined for his abhorrent attack on the Chief Justice does not mean that other lawyers, including but not limited to Attorneys General, cannot and should not learn from this wrongdoing and thus avoid such wrongdoing themselves. The same goes for Nicholson's sins of omission. Neither should the conduct of Wagner or Kimmerly be emulated because they were not successfully disciplined. From a practical perspective, I have elsewhere criticized both ministerial immunity as applied in *Wagner* and the balancing approach to the rule on lawyers in public office as applied in *Kimmerly*.¹⁹¹ From a principled perspective, there is nothing prudent or honourable about taking a risk or calling the law society's bluff. I would be mortified if any lawyer were to interpret the absence of any discernable professional consequences (or political consequences, for that matter) for MacKay's conduct, or even that of Wagner or Kimmerly, as permission to do the same or worse themselves. That would be a cynical and dangerous lesson to draw—especially for Attorneys General. Indeed, this is yet another context in which the oft-repeated observation of John Ll. J. Edwards holds true: the most important bulwark against misconduct like that by MacKay is the “strength of character, personal integrity, and strength of commitment” of the Attorney General.¹⁹² These duties are at their root a matter of honour, but one which the rules of professional conduct convert into a regulatory and legal imperative.¹⁹³

My primary goal in this article has been to draw lessons for lawyers generally. Nonetheless, these lessons are particularly important for the Attorney General. While this duty applies to the private and public conduct of all lawyers, the visibility of the Attorney General and the resultingly powerful ability to encourage or discourage respect for the administration of justice means that the most important enforcement of this duty is against the Attorney General. In my view, the Attorney General in respect of this duty—like all professional duties of lawyers—should be held to the same standard as all lawyers. The suggestions by the courts in *Wagner* and

191 See above notes 118 and 123, and accompanying text.

192 John Ll J Edwards, *The Attorney-General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984) at 69, quoted in the Hon A Anne McLellan, *Review of the Roles of the Minister of Justice and Attorney General of Canada* (June 28, 2019) at 11, online: <pm.gc.ca>.

193 See above notes 152–53, and accompanying text.

the Law Society in *Kimmerly* that this professional duty must be balanced against the duties of the office of the Attorney General, or even that this duty is trumped by the duties of that office, are problematic insofar as they create a lower standard for the Attorney General than for all other lawyers. Indeed, as per the Barreau in *Wagner*, the government resources available to the Attorney General may require them to make more efforts than other lawyers to confirm the basis of any criticism of the judiciary before that criticism is made.

Moreover, despite the indication in the rules of professional conduct that discipline of lawyers in public office will typically not be a regulatory priority,¹⁹⁴ given the importance of the duty to encourage respect for the administration of justice and the power and visibility of the Attorney General, law societies should seriously consider disciplinary proceedings against such lawyers for such breaches.

While the duty of the Attorney General to defend the judiciary may have a constitutional basis, albeit an imprecise one,¹⁹⁵ the duty of the Attorney General as a lawyer to encourage respect for the administration of justice provides a supplemental and indeed independent basis for that duty, particularly given my recent questioning of the scope and power of ministerial immunity.¹⁹⁶ Thus, any change—deliberate or otherwise—to the underlying constitutional convention will not change the professional duty of the Attorney General as a lawyer. Although the case studies I have explored here illustrate the political and other challenges facing the Attorney General in fulfilling their duty to encourage respect for the administration of justice, they by no means suggest that the Attorney General should be exempt from that duty. Indeed, the Attorney General should set an example for the rest of the bar. These case studies do, however, reveal that that duty is a nuanced one and that the Attorney General should be given some limited leeway in meeting that obligation.

194 *FLSC Model Code*, *supra* note 1, r 7.4-1, commentary 2: “[g]enerally, the Society is not concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely upon the lawyer’s integrity or professional competence may be the subject of disciplinary action.”

195 See e.g. Sanderson, *supra* note 3 at 117; Stephenson, *supra* note 5.

196 See above note 100 and accompanying text.

APPENDIX

**Causerie prononcée par l'honorable
Claude Wagner, c.r., ministre de la
Justice de la Province de Québec,
le dimanche 10 octobre 1965¹⁹⁷**

LA LÉGALITÉ AU SERVICE DE LA VÉRITÉ

C'est avec une joie fraternelle que je vous accueillais, monsieur le président, accompagné de votre délégation, à mes bureaux, il y a quelque temps. Je me félicite, aujourd'hui, d'avoir accepté, à cette occasion, de participer à votre congrès annuel. Je m'en félicite pour bien des raisons. D'abord, parce qu'en nous invitant, mon épouse et moi, à passer quelques heures avec vous, dans cette ville, vous me rappelez des souvenirs de jeunesse et vous me fournissez l'occasion de revivre une période de ma petite histoire que je n'oublie pas.

Grâce au travail et au courage de mon père, il y a trente ans, je puis aujourd'hui contribuer modestement, mais avec vigueur, à une meilleure administration de la justice. Mon père avait contribué, dans cette ville, à la création d'un orchestre symphonique qui, j'aime à croire, n'a pas été étranger à l'existence harmonieuse qu'on y trouve. Je sais que, de nos jours, les initiatives d'ordre musical reçoivent l'encouragement du gouvernement. Mais, à cette époque lointaine, il n'en était pas question et les mérites des pionniers en étaient d'autant plus grands.

**Speech delivered by the Honorable
Claude Wagner, Q.C., Minister of
Justice of the Province of Quebec,
Sunday, October 10, 1965**

LEGALITY IN THE SERVICE OF TRUTH

It was with joy that I welcomed you, Mr. President, accompanied by your delegation, to my offices some time ago. I am delighted on this occasion today, to participate in your annual congress. I am pleased for many reasons. Firstly, because by inviting my wife and me to spend a few hours with you in this city, you bring back memories of my youth and you give me the opportunity to relive an unforgettable period in my history.

Thanks to the work and courage of my father, thirty years ago, today I can contribute modestly, but vigorously, to the betterment of the administration of justice. My father had contributed, in this city, to the creation of a symphony orchestra which, I like to believe, was not foreign to the pleasant nature found here. I know that nowadays musical initiatives receive support from the government. But, in those older times, this was out of the question, and the merits of these pioneers were all the greater for it.

197 Honourable Claude Wagner, "Causerie prononcée par l'honorable Claude Wagner, c.r., ministre de la Justice de la Province De Québec, le dimanche 10 octobre 1965 : la légalité au service de la vérité" (1965) 25:8 RB 502.

Je me félicite également d'avoir accepté votre invitation parce que, pour la première fois depuis que j'ai assumé mes fonctions de ministre de la Justice, je rencontre les membres du barreau et je m'adresse à eux, non seulement en tant que ministre, mais surtout en confrère. Quand on a suspendu la toge momentanément, on aime quand même la reprendre en esprit et par le cœur, dans des circonstances comme celles-ci.

Il n'existe pas de plus noble profession au monde que celle qui nous voue à la recherche de la justice. Je ne connais pas de plus belle vocation que celle qui nous amène au prétoire, à la défense de la justice.

Enfin, je me réjouis de me trouver parmi les membres de l'Association du barreau rural de la Province, parce que, vous et moi, nous sommes maintenant guidés par un bâtonnier général qui, en quelques mois, a réussi à imprimer à la conduite des affaires du barreau une direction dynamique et nouvelle dont nous avons tant besoin.

Comme avocat et comme ministre de la Justice, je souscris avec enthousiasme aux idées de réforme en profondeur qu'il a énoncées devant vous et je l'assure publiquement qu'il saura toujours trouver au ministère de la Justice un indéfectible appui et une oreille attentive pour mener à bien la lourde tâche qui lui incombe.

Monsieur le bâtonnier Prévost vous disait, au cours de ce congrès, et je cite :

Si les services d'avocats, en dispensateurs de la justice, sont incomplets, trop lents et trop coûteux, s'ils ne sont pas à la portée de la moyenne de la population, nous serons emportés par une vague populaire à laquelle nous serons incapables de résister.

I am also pleased to have accepted your invitation because, for the first time since I assumed my duties as Minister of Justice, I am meeting the members of the Barreau and addressing them, not only as minister, but above all as a colleague. When we have hung up our robes momentarily, we still like to take them back in spirit and heart, in circumstances like these.

There is no nobler profession in the world than that which dedicates us to the pursuit of justice. I do not know of a finer vocation than that which brings us to the courtroom, to the defense of justice.

Finally, I am delighted to find myself among the members of the Association du Barreau Rural of the province, because you and I are now guided by a president who, in a few months, has succeeded in bringing new dynamic leadership to the Barreau that we so badly needed.

As a lawyer and as Minister of Justice, I enthusiastically support the ideas of deep reform that he has set out before you and I would like to state publicly that he will always be able to find unwavering support and an attentive ear at the Department of Justice to help carry out the difficult task incumbent on him.

President Prévost said to you, during this congress, and I quote :

If the services of lawyers, as distributors of justice, are incomplete, too slow and too costly, if they are not within reach of the general population, we will be swept away by a populist wave which we will be unable to resist.

Jamais, dans l'histoire du barreau, a-t-il été aussi nécessaire qu'au moment présent, de réviser nos attitudes, de renouveler nos cadres, de modifier nos règlements, de transformer nos mentalités qui s'accrochaient à la tradition au détriment du progrès, d'écarter l'immobilisme nuisible aux intérêts de la société. Si le barreau réussit à comprendre qu'il est au service de la population, qu'il n'a pas été conçu pour se servir de la population, il n'aura pas de difficultés à adopter, avec fermeté, des positions conformes à cet esprit.

Si le barreau hésite à se lancer résolument dans la voie du renouvellement, la société, elle, n'hésitera pas à s'en charger elle-même. Il n'est plus suffisant, aujourd'hui, de croire que le port de la toge de laine ou de la toge de soie nous revête d'une personnalité exceptionnelle qui nous permette d'être à l'écart et au-dessus de nos concitoyens. Bien au contraire! Parce que la communauté nous a désigné une place de choix, parce qu'elle a conféré aux représentants de la loi des privilèges particuliers, elle s'attend en retour que les privilégiés seront ses serviteurs et non ses maîtres. Le barreau n'est pas différent des autres organismes de l'Etat et de l'Eglise qui, en ces temps-ci, révisent leurs positions devant une évolution sociale trop longtemps retardée. Il appartient au barreau de décider s'il veut demeurer dans un autre âge, à la remorque d'institutions, de procédures et de traditions vétustes, ou s'il préfère grandir dans des cadres nouveaux et vigoureux.

Ce n'est pas sans raison que le peuple a perdu beaucoup de respect pour le barreau comme pour la magistrature: nous n'avons pas toujours mérité, et ce n'est pas du masochisme de ma part, ce respect que nous exigeons. Souvent, par notre conduite collective, nous avons provoqué

Never in the history of the Barreau has it been as necessary as at the present time to review our attitudes, renew our frameworks, modify our regulations, transform our mentalities which clung to tradition to the detriment of progress, and to combat legal rigidity harmful to the interests of society. If the Barreau succeeds in understanding that it is at the service of the population, that it was not conceived to take advantage of the population, it will have no difficulty in firmly adopting positions in keeping with this spirit.

If the Barreau hesitates to resolutely embark on this path of renewal, society will not hesitate to take charge of it itself. It is no longer enough today to believe that wearing a wool or silk robe gives us a position in society above our fellow citizens. Quite the contrary! Because the community has designated us a place of choice, because it has conferred particular privileges on the representatives of the law, it expects in return that the privileged will be its servants and not its masters. The Barreau is no different from other governmental and Church bodies which, in these times, are revising their positions in the face of a social revolution that has been delayed for too long. It is up to the Barreau to decide whether it wants to remain in the past, with antiquated institutions, procedures, and obsolete traditions, or whether it prefers to grow in new and exciting ways.

It is not without reason that the people have lost a lot of respect for the Barreau, as well as for the judiciary: we have not always deserved, and it is not masochism on my part, this respect that we demand. Often, through our collective conduct, we have provoked sarcasm and contempt.

le sarcasme et le mépris. Il était grand temps que nous nous réveillions! Nous pouvons maintenant entrevoir, dans les prochaines années, un regain de vitalité pour cet Ordre que nous avons toujours voulu grand, impressionnant, noble et sage, mais qui a servi bien souvent de paravent derrière lequel on devinait parfois beaucoup d'hypocrisie. Je n'ai pas l'intention, messieurs, ai-je besoin de le souligner, de vanter vos mérites et de rappeler vos gloires, je préfère vous inviter, avec moi, à un examen de conscience, afin que nous puissions découvrir ensemble si véritablement dans notre conduite, dans nos actes, dans nos propos, dans nos exemples, nous plaçons la vérité au-dessus de la légalité.

A titre divers, soit comme avocat en pratique privée, soit comme procureur de la couronne, soit comme juge, soit comme procureur général et ministre de la Justice, je fus amené à des constatations qui m'ont inspiré ce que j'ai à vous dire. Si, aujourd'hui, en octobre 1965, nous commençons à entrevoir dans toute sa laideur le spectacle du crime organisé à tous les niveaux de la société, n'allez pas croire qu'il s'agisse là d'un événement soumis, n'allez pas croire que cette gangrène qui a pourri la société ait poussé comme un champignon vénéneux au cours d'une seule nuit.

N'allez pas croire, non plus, que si les ravages de cette plaie se font sentir autant dans les milieux ruraux que dans les milieux urbains, il s'agisse d'un phénomène soudain. Lentement, depuis une dizaine d'années, le mal nous a gagnés, encouragé en partie par l'apathie de la population, en partie aussi par les complices qui se retrouvent à tous les échelons de la société.

It is high time we woke up! We can now glimpse, in the coming years, a renewed vitality for this profession which we have always wanted to be grand, impressive, noble and wise, but which has often served as a screen behind which we divine hypocrisy. I do not intend, gentlemen, need I underline it, to extol your merits and recall your successes. I prefer to invite you to an examination of conscience with me, so that we can discover together if truly in our conduct, in our deeds, in our words, in our examples, we place truth above legality.

In various capacities, either as a lawyer in private practice, or as a Crown prosecutor, or as a judge, or as Attorney General and Minister of Justice, I have made observations that inspired what I have to say. If today, in October 1965, we are beginning to glimpse in all its ugliness the spectre of organized crime at all levels of society, do not think that this is a submissive event, do not believe that this illness that has rotted society has grown like a poisonous mushroom overnight.

Do not think, either, that if the ravages of this plague are felt as much in rural areas as in urban areas, it is a new phenomenon. Slowly, over the past ten years or so, evil has won us over, encouraged in part by the apathy of the population, and in part by accomplices who are found at all levels of society.

Le mal est fait. Il faut maintenant réviser nos méthodes de lutte contre le crime. Cette révision est en marche depuis quatre ans. Elle a débuté au moment où à Montréal, l'équipe des procureurs de la couronne, dont j'étais membre à l'époque, a réussi à établir que le crime n'était pas toujours l'œuvre d'individus agissant solitairement.

Là où nos traditions et notre formation juridique nous apprenaient à déceler, dans des crimes individuels, l'œuvre d'individus ou de petits groupes d'individus, nous avons maintenant compris que ces délits n'étaient pas le fruit du hasard mais l'exécution systématique d'un plan d'opérations criminelles.

Notre travail a progressé, les découvertes sont devenues de plus en plus stupéfiantes, l'ampleur du crime organisé est devenue manifeste et nous avons abouti aux événements dramatiques de ces derniers temps. Vous devez maintenant emboîter le pas dans cette lutte.

Si le crime syndiqué doit maintenant, enfin, vous préoccuper tout autant que ceux qui ont la mission de veiller d'une façon plus immédiate à l'administration de la justice, vous ne devez pas oublier, messieurs, que votre profession d'avocat vous impose des responsabilités lourdes, où les exigences morales côtoient la légalité.

Il me semble que vous devez servir la vérité et la morale publique avec la même énergie dont vous faites montre à défendre la légalité. Je vous donne immédiatement un exemple concret d'un acte qui déshonore l'avocat qui y a tenu un rôle important.

En juin dernier, dans une petite ville de la Province, deux individus rivalisaient de vitesse en automobiles. L'un d'eux, dans la course, tuait une passante alors que son compagnon en blessait grièvement une autre.

The damage is done. We must now revise our methods of fighting crime. This reform has been in the works for four years. It began when in Montreal, the team of crown prosecutors, of which I was a member at the time, succeeded in establishing that crime was not always the work of individuals acting alone.

Where our traditions and our legal training taught us to detect, in isolated crimes, the work of individuals or small groups of individuals, we have now understood that these offenses were not random but rather the systematic execution of the plans of organized crime.

Our work has progressed, the discoveries have become more and more staggering, the scale of organized crime has become apparent, and we have come to the dramatic events of recent times. You must now follow suit in this struggle.

If organized crime should now, finally, concern you just as much as those who are directly responsible for supervising the administration of justice, you must not forget, gentlemen, that your profession as a lawyer imposes heavy responsibilities, where moral requirements rub shoulders with legality.

It seems to me that you ought to serve truth and public morals with the same energy that you display in defending legality. I will immediately give you a concrete example of an act that dishonors the lawyer who played an important role in it.

Last June, in a small town of this province, two individuals were racing cars. One of them, in the race, killed a passerby while his companion seriously injured another.

Le premier individu attend présentement son procès en Cour d'assises. L'autre a fui les lieux de l'accident pour être finalement appréhendé quelques jours plus tard, grâce au travail de la Sûreté provinciale. A la suite de nombreuses remises de la cause, l'avocat produisait devant un juge, en chambre, le 30 août, un aveu de culpabilité hors de la présence du porte-parole de la couronne et le juge condamnait l'individu à \$25 d'amende et à \$39 de frais, avec interdiction de conduire pendant trois mois.

L'accusé n'était même pas présent. Il n'a pas remis son permis de conduire au greffier, et son avocat, qui avait seul pris connaissance du jugement dans la chambre du juge, s'est abstenu de lui conseiller de remettre ce permis conformément au jugement.

Trois semaines plus tard, le même chauffard conduisait illégalement une automobile et était impliqué dans un accident qui causa la mort du père et de la mère de sept enfants en bas âge. Qu'en pensez-vous? Comment voulez-vous que la justice soit respectée comme il se doit lorsque des membres de notre Ordre agissent ainsi?

Ne nous leurrions pas. Il y a des manquements graves à l'éthique professionnelle qui provoquent des tragédies.

Voilà pourquoi je vous exhorte avec amitié, avec sincérité, mais en toute connaissance de dossiers, de renseignements, de rapports et de causes dont j'ai la responsabilité, je vous exhorte, messieurs, à agir de manière à retrouver l'entier respect de la société. Facilitez la tâche des honnêtes gens qui ne demandent pas mieux que de voir en vous les représentants de la justice.

Ne soyez pas l'avocat qui suggère à son client de maquiller la vérité, de mentir et de se parjurer. Soyez l'avocat qui souligne à son client l'importance de dire la vérité, toute la vérité, rien autre chose que la vérité.

The first individual is currently awaiting trial in the Court of Assizes. The other fled the scene of the accident before he was apprehended a few days later, thanks to the work of the Provincial Police. Following numerous postponements of the case, the lawyer produced before a judge, in chambers, on August 30, an admission of guilt without the presence of the crown attorney, and the judge condemned the individual to a \$25 fine and \$39 in costs, with a three-month driving ban.

The accused was not even present. He did not hand over his driver's license to the clerk, and his lawyer, who alone had seen the judgment in the judge's chambers, refrained from advising him to hand over the license in accordance with the judgment.

Three weeks later, the same driver was driving an automobile illegally and was involved in an accident which caused the death of the father and mother of seven young children. What do you think? How do you expect justice to be respected as it should be when members of our Order act like this?

Let's face it. There are serious breaches of professional ethics happening that cause tragedies.

This is why I urge you with friendship, with sincerity, but with full knowledge of the facts, information, reports, and cases for which I am responsible, that I urge you, gentlemen, to act in such a way as to regain society's respect. Help the honest people who ask nothing more than to see in you the representatives of justice.

Do not be the lawyer who suggests to his client to disguise the truth, to lie and to perjure himself. Be the lawyer who emphasizes the importance of telling the truth, the whole truth and nothing but the truth.

Ne soyez pas l'avocat qui propose à son client ou à ses témoins de se dérober à la comparution ou l'assignation, prévoyant ainsi retarder à une date plus propice et devant un juge moins sévère le jour du procès. Soyez l'avocat ponctuel, à la disposition du tribunal parce qu'il sait que devant tout juge il a raison d'espérer une justice égale, efficace et expéditive.

Ne soyez pas l'avocat qui se ferme les yeux ou les ouvre à moitié pour accepter en honoraires le produit des crimes de son client. Il est tellement facile d'oublier pour un instant la provenance des deniers et de tranquilliser sa conscience en ne posant pas de questions! Mais la loi prévoit la même peine pour le voleur que pour le receleur, et la morale condamne avec la même force et le voleur et le receleur.

Ne soyez pas l'avocat qui négocie en sous-main avec les victimes d'un crime, dans le but d'obtenir le retrait d'une plainte, évitant ainsi une condamnation à son client. Les tractations de ce genre ne sont jamais dans l'intérêt d'une saine justice. Soyez l'avocat qui défend son client avec habileté, mais sans artifices, et qui n'a pas besoin de recourir au [maquignonnage] sous le manteau de la justice.

Ne soyez pas l'avocat qui, avec un sourire entendu, conseille et prépare le faux alibi de l'assassin ou du voleur à main armée et qui emploie, pour faire cette besogne, directement ou indirectement des bandits de bas étage, des prostituées, des parjures à raison de \$50 ou \$100.

Vous perdrez peut-être vos causes, mais les criminels seront punis et réhabilités quand sera possible. Vous dormirez tranquilles, votre devoir bien accompli.

Ne soyez pas l'avocat qui suggère ou qui facilite la fabrication de faux documents pour tromper la justice. Soyez plutôt

Do not be the lawyer who proposes to his client or his witnesses to evade appearances or summons on the day of the trial, thus planning to delay to a more propitious date and before a more agreeable judge. Be the punctual lawyer, at the disposal of the court because he knows before every judge is the hope of equal, efficient and speedy administration of justice.

Do not be the lawyer who turns a blind eye to accept as fees the proceeds of his client's crimes. It is easy to forget for a moment where the money comes from and ease your conscience by not asking questions! But the law provides the same penalty for the thief as for the recipient, and morality condemns with the same force both the thief and the receiver.

Do not be the lawyer who negotiates behind the scenes with the victims of a crime, with the aim of obtaining the withdrawal of a complaint from the court, thus avoiding a conviction of his client. Be the lawyer who skilfully, but without artifice, defends his client, and who does not need to resort to horse-trading under the cloak of justice.

Do not be the lawyer who, with a knowing smile, advises and prepares the false alibi of the murderer or the armed robber, and who employs, directly or indirectly, low-ranking bandits, prostitutes, and perjurers at a rate of \$50 or \$100 to carry this out.

You may lose your cases, but criminals will be punished and rehabilitated when possible. You will sleep peacefully, your duty well done.

Do not be the lawyer who suggests or who facilitates the production of false documents to circumvent justice. Rather, be

l'avocat qui sait trouver dans la jurisprudence les véritables documents utiles à sa cause.

Ne soyez pas l'avocat qui s'abaisse à corrompre des officiers en loi pour s'assurer la clientèle d'un accusé. Soyez l'avocat dont la réputation, dont la probité, dont la compétence saura lui attirer la clientèle sans qu'il ait recours à ces rabatteurs obscurs qui se tapissent dans l'ombre des geôles.

Ne soyez pas l'avocat qui, par les louches manœuvres, obtient qu'on lui remette la liste des jurés avant un terme d'assises, dans le but de s'en servir directement ou indirectement, par l'entremise d'employés ou de clients, pour influencer les jurés à venir.

Ne soyez pas l'avocat complice de cautions professionnelles au pourcentage, qui permettent à un récidiviste d'être libéré ou de s'enfuir lorsqu'il se fait pincer.

Ne soyez pas l'avocat à la solde annuelle de la haute pègre qu'il connaît, pour être disponible en tout temps à servir les intérêts de ces individus.

Ne soyez pas l'avocat complice de faillites frauduleuses, de syndicats véreux, d'ajusteurs malhonnêtes. Soyez l'avocat qui sait refuser l'argent du crime!

Nous n'avons pas le droit de nous illusionner. A l'heure actuelle, il existe au sein du barreau une poignée dévastatrice d'indésirables. Ils se sont justifiés à leurs yeux et continuent à se justifier envers leur conscience et devant la société, en invoquant qu'ils ne sont que les porte-parole, que les haut-parleurs d'un individu qui a droit à une défense pleine et entière devant les tribunaux.

Pourquoi faut-il parfois que le principe de défense pleine et entière soit le synonyme du mot collusion?

the lawyer who knows how to find in case law the real documents useful to the case.

Do not be the lawyer who stoops to bribing officers of the law to secure the clientele of an accused. Be the lawyer whose reputation, whose probity and whose competence will win him clients without having to resort to those obscure recruiters who lurk in the shadows of the jail cells.

Do not be the lawyer who, by shady maneuvers, obtains the list of jurors before a trial, with the aim of using it directly or indirectly, through employees or clients, to influence the jurors to come.

Do not be the lawyer complicit to percentage-based professional sureties, who allow a repeat offender to be released or to flee when he gets caught.

Do not be the lawyer on the annual payroll of the criminal underworld to which they are acquainted, to be available at all times to serve the interests of these people.

Do not be the lawyer complicit to fraudulent bankrupts, crooked trustees, dishonest adjusters. Be the lawyer who knows how to refuse the proceeds of crime!

We have no right to delude ourselves. Today, there exists a dangerous handful of undesirables within the Barreau. They have justified themselves in their own eyes and continue to justify themselves to their conscience and to society, through invocations that they are only the spokespersons, only the loudspeakers of an individual who has the right to a full defence before the courts.

Why does the notion of a full defense sometimes have to be synonymous with the word collusion?

Malheureusement, dans le passé, la discipline à l'intérieur du barreau n'a pas été celle qui met fin à des raisonnements aussi fallacieux. Il est stupéfiant de rencontrer tant de naïveté chez des gens intelligents. Il y en a d'autres, dans cette poignée d'indésirables, qui sont plus à plaindre qu'à condamner, parce que ceux-là sont veules, qu'ils ont peur des clients qu'ils ont imprudemment acceptés pour s'assurer des honoraires plantureux.

L'attrait de l'argent, les menaces, les pressions de toutes sortes, la peur, mais ne sont-ce pas là des choses que tous les avocats connaissent et particulièrement ceux du ministère public?

Est-ce que les procureurs de la couronne à Montréal et à Québec, qui livrent une lutte sans merci à la pègre depuis quatre ans, ont cédé aux offres de pots-de-vin? Ont-ils démissionné devant des menaces directes ou des pressions qui affluent de tous côtés? Non.

Je ne prétends pas, messieurs, que ces hommes que je connais soient des surhommes! Mais je les salue parce qu'ils ont dans l'esprit autre chose que l'appât du gain, parce qu'ils ont dans l'âme autre chose que l'idéal d'une relative tranquillité. Je les admire parce qu'ils ont le courage de servir la société malgré tous les risques, jusqu'au comble de leurs forces. Sans leur ténacité, sans leur attachement indéfectible à leur code d'éthique professionnelle, ils n'auraient pu et nous n'aurions pu atteindre les résultats qui, déjà, affolent, au Québec et par tout le pays, le crime organisé.

En terminant, je n'ai qu'un souhait à formuler. Puisse-nous conjuguer nos efforts pour que le barreau du Québec, renouvelé, régénéré, démocratisé, place résolument la Légimité au service de la Vérité!

Unfortunately, in the past, the disciplinary measures of the Barreau have not put an end to such fallacious reasoning. It is amazing to find so much naivety in intelligent people. There are others, in this handful of undesirables, who are more to be pitied than condemned, because they are spineless, they are afraid of the clients they have imprudently accepted to ensure lavish fees.

The lure of money, threats, pressures of all kinds, fear...but aren't these things that all lawyers know, and especially those in the public prosecutor's office?

Have the crown prosecutors in Montreal and Quebec, who have been waging a merciless fight against the underworld for four years, yielded to offers of bribes? Did they resign in the face of direct threats or pressures pouring in from all sides? No.

I do not claim, gentlemen, that these men I know are supermen! But I salute them because they have something else in mind than the lure of profit, because they have something in their soul other than the ideal of relative tranquility. I admire them because they have the courage to serve society despite all the risks, to the fullest of their strength. Without their tenacity, without their unflinching adherence to their code of professional ethics, they could not and we could not have achieved the results which are already driving organized crime in Quebec and across the country into a panic.

In closing, I have only one wish to make. May we combine our efforts so that the Barreau du Québec, renewed, regenerated, democratized, resolutely places Legality at the service of Truth!

Wagner (re)¹⁹⁸

La présente plainte résulte d'un discours prononcé à Drummondville par Me Claude Wagner, C.R., le 10 octobre 1965, pendant qu'il était Ministre de la Justice pour la Province de Québec, devant les membres de l'Association du Barreau Rural de la province de Québec réunis à Drummondville, et en particulier du passage suivant :

« En juin dernier, dans une petite ville d'une région rurale de la province, deux individus couraient. L'un d'eux, dans la course, tuait une passante alors que son compagnon en blessait grièvement une autre.

Le premier individu attend présentement son procès aux Assises. L'autre a fui les lieux de l'accident pour être finalement repéré quelques jours plus tard, grâce au travail de la Sûreté Provinciale. À la suite de nombreuses remises de la cause, l'avocat produisait devant la Cour, en chambre, le 30 août, une confession de jugement hors la présence du porte-parole de la Couronne et le juge condamnait l'individu à \$25 d'amende, à \$39 de frais avec interdiction de conduire pendant trois mois.

L'accusé trouvé coupable n'était même pas présent. Il n'a pas remis son permis de conduire au greffier et son avocat, qui avait seul pris connaissance du jugement dans la chambre du juge, s'est abstenu de lui conseiller de remettre ce permis conformément au jugement.

Wagner (Re)

The present complaint arises from a speech delivered in Drummondville by Mr. Claude Wagner, Q.C., on October 10, 1965, while he was Minister of Justice for the province of Quebec, before the members of the Association du Barreau Rural of the province of Quebec gathered in Drummondville, and in particular from the following passage:

“Last June, in a small town of a rural area of the province, two individuals were racing. One of them, in the race, killed a passerby while his companion seriously injured another.

The first individual is currently awaiting trial at the Assizes. The other fled the scene of the accident and was finally spotted a few days later, thanks to the work of the Provincial Police. Following numerous postponements of the case, the lawyer produced before the Court, in chambers, on August 30, a confession of judgment without the presence of the Crown spokesman and the judge sentenced the individual to a \$25 fine, to \$39 in fees with a three-month driving ban.

The convicted accused was not even present. He did not surrender his driver's license to the clerk and his lawyer, who alone had seen the judgement in the judge's chamber, refrained from advising him to surrender the license in accordance with the judgement.

198 As published in “Texte intégral du jugement et de la sentence dans l'affaire Wagner-Bérubé” *La Presse* (5 November 1966) 11; “La condamnation de Claude Wagner” *Le Devoir* (5 November 1966) 1.

Trois semaines plus tard, le même chauffard conduisait illégalement une automobile et était impliqué dans un accident qui causa la mort du père et de la mère de sept enfants en bas âge. Qu'en pensez-vous? Comment voulez-vous que la justice soit respectée comme il se doit lorsque des membres de notre ordre agissent ainsi?»

Copies du discours qui contenait ces paroles et qui reçut une grande publicité, furent mises à la disposition des représentants de la presse à Québec et à Drummondville pour publication après 3:00 heures de l'après-midi le 10 octobre 1965.

Il est allégué dans la plainte logée devant le Conseil qu'en prononçant ces remarques, Me Claude Wagner a commis des actes dérogatoires à l'honneur et à la dignité de la profession et s'est rendu coupable d'infractions aux Règlements du Barreau, ayant plus particulièrement enfreint les articles 66, 84 et 85 desdits Règlements.

Les articles 66, 84 et 85 des Règlements du Barreau se lisent comme suit:

(66) L'avocat doit servir la justice et soutenir l'autorité des tribunaux. Jamais il ne doit compromettre l'Honneur et la dignité du Barreau. Il doit être fidèle à ses clients, loyal et courtois envers ses confrères. Il est donc tenu d'observer scrupuleusement les devoirs que lui imposent les règles, traditions et usages professionnels.

Les règles énoncées aux règlements 66 à 145 inclusivement ne restreignent en aucune manière les juridictions respectives du Conseil général, du Conseil Provincial de discipline, des Conseils de sections ou de leurs comités de discipline sous les dispositions des art. 22 et 44 de la Loi du Barreau et n'excluent pas l'existence

Three weeks later, the same driver was driving an automobile illegally and was involved in an accident that killed the father and mother of seven young children. What do you think? How do you expect justice to be properly respected when members of our order act in this manner?"

Copies of the speech containing these words, which received much publicity, were made available for publication to representatives of the press in Quebec City and Drummondville after 3:00 p.m. on October 10, 1965.

It is alleged in the complaint lodged before the Council that in making these remarks, Mr. Claude Wagner committed acts derogatory to the honour and dignity of the profession and was guilty of offences under the By-laws of the Barreau having more particularly contravened sections 66, 84 and 85 of the said By-laws.

Sections 66, 84 and 85 of the By-laws of the Barreau read as follows:

(66) The lawyer must serve justice and support the authority of the courts. He must never compromise the honour and dignity of the Barreau. He must be loyal to his clients, loyal and courteous to his colleagues. He is therefore required to scrupulously observe the duties imposed on him by rules, traditions and professional practices.

The rules set out in by-laws 66 to 145 inclusively do not in any way restrict the respective jurisdictions of the General Council, the Provincial Disciplinary Council, the Section Councils or their Disciplinary Committees under the provisions of Arts. 22 and 44 of the Barreau Act and do not exclude the existence of

d'autres devoirs également impérieux qui n'y seraient pas définis ; celui qui enfreint ces règles et devoirs commet un acte dérogatoire à l'honneur et à la dignité du Barreau.

(84) L'avocat a le devoir de maintenir à l'égard des tribunaux une attitude respectueuse dans sa conduite et ses paroles.

(85) Il ne peut publier ou communiquer pour publication un rapport de procédures judiciaires faux ou injurieux pour l'honneur ou la dignité de la magistrature.

Devant le Conseil, Me Wagner exposa les prétentions suivantes :

(a) Qu'en autant qu'il a été invité à adresser la parole devant l'Association du Barreau Rural de la province de Québec, à titre de Ministre de la Justice, il n'était pas soumis à la Loi du Barreau ou aux Règlements du Barreau pour ses paroles ou ses actes à cette occasion ;

(b) Qu'en se basant sur un rapport reçu de la Police Provinciale du Québec en service à La Rivière-du-Loup, et mis à sa disposition, il avait raison de croire que ses paroles constituaient un exposé véridique et sincère concernant un sujet d'intérêt public.

Le Conseil a rejeté l'objection qui fut présentée, quant à sa juridiction d'entendre cette plainte, considérant qu'un membre du Barreau demeure sujet aux dispositions de la Loi du Barreau et des Règlements du Barreau tant qu'il est membre de l'Ordre, qu'il occupe ou non un poste public. De plus, le texte du discours indique clairement que si Me Wagner parlait comme Ministre de la Justice, il parlait également comme avocat. Même en accordant à un Ministre de la Couronne la plus grande latitude de traiter de sujets d'intérêt public, le Conseil ne peut accepter le principe qu'une infraction à la Loi du Barreau

other equally compelling duties which are not defined therein; anyone who violates these rules and duties commits an act derogating from the honour and dignity of the Barreau.

(84) The lawyer has a duty to maintain a respectful attitude towards the courts in his conduct and in his words.

(85) He may not publish or communicate for publication a report of judicial proceedings that is false or offensive to the honour or dignity of the judiciary.

Before the Council, Mr. Wagner made the following submissions:

(a) That, as long as he was invited to address the Association du Barreau Rural of the province of Quebec as Minister of Justice, he was not subject to the Barreau Act or the By-laws of the Barreau for his words or actions on that occasion;

(b) That, on the basis of a report received and made available to him from the Québec Provincial Police stationed at Rivière-du-Loup, it was reasonable for him to believe that his words constituted a true and sincere statement on a matter of public interest.

The Council rejected the objection that was raised with regard to its jurisdiction to hear this complaint, considering that a member of the Barreau remains subject to the provisions of the Barreau Act and the By-laws of the Barreau as long as he is a member of the Order, whether or not he holds a public office. Moreover, the text of the speech clearly indicates that if Mr. Wagner spoke as Minister of Justice, he also spoke as a lawyer. Even in granting a Minister of the Crown the greatest discretion to deal with matters of public interest, the Council cannot accept the principle that an offence under the Barreau Act or

ou aux Règlements du Barreau cesse d'être une infraction par le seul fait que l'avocat qui la commet est un Ministre de la Couronne.

Quant au plaidoyer de justification, il est devenu évident, lors de l'audition, lorsque le rapport de la police provinciale fut produit comme exhibit, que ce dernier ne contenait rien qui ait pu justifier les déclarations suivantes :

- (a) Que la cause à laquelle il est référé avait été continuée à plusieurs reprises ;
- (b) Qu'un plaidoyer de culpabilité, par écrit, avait été produit devant la Cour en chambre, plutôt que devant le Tribunal siégeant en public;
- (c) Que le plaidoyer de culpabilité et la sentence avaient été prononcés en l'absence du Procureur de la Couronne.

En réalité, la cause n'avait été continuée qu'une seule fois et ce devant le Tribunal, le plaidoyer écrit de culpabilité avait été produit devant le Tribunal en présence du Procureur de la Couronne et la sentence n'avait été prononcée qu'après que le Procureur de l'accusé eut exposé les faits de la cause qui eux-mêmes furent admis par le Procureur de la Couronne.

Bien que plusieurs des faits relatés dans l'extrait du discours ci-dessus reproduit étaient exacts ou substantiellement exacts, l'insertion, dans le discours, de faits qui n'étaient pas exacts et qui n'étaient aucunement justifiés par les renseignements que Me Wagner avait à sa disposition, avait pour but d'attirer l'attention de l'assemblée et de ceux qui pourraient subséquentement lire ce discours sur un cas d'abus grave du pouvoir judiciaire par un membre de la Magistrature. L'affaire à laquelle Me Wagner se référait était facilement identifiable par de nombreuses personnes comme étant celle de monsieur Simard,

the By-laws ceases to be an offence by the mere fact that the lawyer is a Minister of the Crown.

As for the plea of justification, it became clear at the hearing, when the provincial police report was produced as an exhibit, that it contained nothing that could justify the following statements:

- (a) That the case to which it is referred had been continued several times;
- (b) That a guilty plea, in writing, had been made before the Court in Chambers, rather than before the Tribunal sitting in public;
- (c) That the guilty plea and sentence were made in the absence of the Crown Attorney.

In reality, the case had been continued only once, and this, before the Tribunal, the written plea of guilt had been filed before the Tribunal in the presence of the Crown Attorney and the sentence had been pronounced only after the accused's lawyer had set out the facts of the case, which in themselves were admitted by the Crown Attorney.

Although several of the facts recounted in the extract from the speech reproduced above were accurate or substantially accurate, the insertion in the speech of facts which were not exact and which were in no way justified by the information which Mr. Wagner had at his disposal, was intended to draw the attention of the assembly and of those who might subsequently read this speech on a case of serious abuse of the judicial power by a member of the Judiciary. The case to which Mr. Wagner referred was easily identifiable by many as that of Mr. Simard, who had appeared before Bérubé J. of the

qui avait comparu devant le juge Bérubé de la Cour des Sessions de la Paix de la Rivière-du-Loup et le discours eut pour effet d'affecter la réputation et la probité du Juge, ainsi que la réputation et la probité de l'avocat de Simard qui pouvait être aussi facilement identifié.

En autant que les remarques, auxquelles il est référé ci-dessus, étaient faites dans le but d'indiquer à ceux qui pourraient les entendre, à ceux qui pourraient les lire ou à ceux qui pourraient en entendre parler, qu'il y avait eu un abus du pouvoir judiciaire et en autant que cet incident pouvait être facilement identifié, ce discours attaquait sérieusement la réputation du juge Bérubé et eut pour effet de diminuer la confiance du public dans une de ses institutions les plus chères, soit l'Administration de la Justice. De telles remarques, lorsqu'elles sont faites, et même si elles sont faites de bonne foi, ne devraient l'être qu'après que des précautions raisonnables ont été prises pour vérifier l'exactitude des faits, spécialement dans le cas présent où l'avocat qui les a prononcées était le ministre de la Justice de la province de Québec et un membre ex-officio du Conseil général du Barreau de la province de Québec. Non seulement des précautions raisonnables et adéquates n'ont pas été prises par Me Wagner pour vérifier l'exactitude de ses affirmations concernant la façon dont il fut disposé de l'accusation portée contre Simard, mais ces affirmations étaient complètement contraires aux faits.

Le Conseil en est venu à la conclusion qu'en prononçant les paroles auxquelles il est référé ci-dessus, Me Wagner a commis un acte dérogeant à l'honneur et à la dignité de la profession et s'est rendu coupable des infractions prévues aux Règlements 66, 84 et 85 des Règlements du Barreau de la province de Québec.

Court of Sessions of the Peace of Rivière-du-Loup and the speech had the effect of affecting the reputation and probity of the Judge, as well as the reputation and probity of Simard's lawyer who could also be easily identified.

In so far as the remarks, referred to above, were made in order to indicate to those who might hear them, to those who might read them or to those who might hear about them, that there had been an abuse of the judicial power and in so far as this incident could be easily identified, this speech seriously attacked the reputation of Judge Bérubé and had the effect of reducing public confidence in one of its dearest institutions, namely the Administration of Justice. Such remarks, when made, and even if made in good faith, should be made only after reasonable precautions have been taken to verify the accuracy of the facts, especially in the present case where the lawyer who made them was the Minister of Justice of the province of Quebec and an ex-officio member of the General Council of the Bar of the province of Québec. Not only were reasonable and adequate precautions not taken by Mr. Wagner to verify the accuracy of his assertions concerning the manner in which he disposed of the charge against Simard, but these assertions were completely contrary to the facts.

The Council came to the conclusion that, in uttering the words referred to above, Mr. Wagner committed an act derogating from the honour and dignity of the profession and was guilty of the offences set out in sections 66, 84 and 85 of the By-laws of the Barreau of the province of Québec.

En prenant une décision sur la sentence qui doit être prononcée, le Conseil a pris en considération la contribution de Me Wagner à l'administration de la Justice dans cette province et a également considéré que nonobstant le fait que le discours ait été prononcé le 10 octobre 1965, il n'est pas à la connaissance du Conseil que Me Wagner ait jugé à propos de faire des excuses au Juge Bérubé. Il semble qu'après avoir constaté l'absence de justification des remarques qu'il avait faites, et après réflexion, il eut été dans l'ordre que Me Wagner présente ses excuses. La grande publicité qui fut donnée au discours de Me Wagner, ainsi que la publicité qui a suivi l'annonce par la presse que le Conseil avait rendu une décision sur le mérite de la plainte furent également prises en considération.

Sur le tout, le Conseil conclut unanimement :

- (a) Que Me Wagner s'est rendu coupable des infractions prévues aux règlements 66, 84 et 85 des Règlements du Barreau de la province de Québec;
- (b) Il réprimande Me Claude Wagner, et le condamne à payer une amende de \$100, et les frais de la présente plainte.

MONTREAL, ce 4 novembre 1966
AJ Campbell, Bâtonnier.

In making a decision on the sentence to be pronounced, the Council took into consideration Mr. Wagner's contribution to the administration of justice in this Province and also considered that, notwithstanding the fact that the speech was delivered on October 10, 1965, it is not to the Council's knowledge that Mr. Wagner had deemed it appropriate to make an apology to Judge Bérubé. It seems that after noting the lack of justification for the remarks he had made, and on reflection, it was in the order that Mr. Wagner apologized. The great publicity that was given to Mr. Wagner's speech, as well as the publicity that followed the announcement by the press that the Council had rendered a decision on the merit of the complaint, were also taken into consideration.

On the whole, the Commission unanimously concludes:

- (a) That Mr. Wagner was guilty of the offences set out in sections 66, 84 and 85 of the By-laws of the Barreau of the province of Québec;
- (b) It reprimands Mr. Claude Wagner, and sentences him to pay a fine of \$100, and the costs of this complaint.

MONTREAL, November 4, 1966
AJ Campbell, President

Wagner c Barreau de Montréal
(Qc SC)¹⁹⁹

CANADA
PROVINCE DE QUEBEC
District de Montréal
No. 723-178

COUR SUPERIEURE
Ce 28^e jour de novembre 1966

PRESIDENT :
L'HON. JUGE PHILIPPE POTHIER

CLAUDE WAGNER, membre de l'Assemblée législative de la province de Québec, avocat, conseil de la Reine, de la ville de Montréal, district de Montréal, et y résidant au numéro 11894 de la rue Zotique-Racicot.

contre

BARREAU DE MONTREAL, corporation légalement constituée ayant son siège social dans la Ville de Montréal, district de Montréal, au numéro 100 est, rue Notre-Dame, et son CONSEIL,

Intimés

et

MONSIEUR LE JUGE JEAN PAUL BERUBE, Juge de la Cour des Sessions de la Paix, de Rivière-du-Loup, district de Kamouraska,

Mis-en-cause

LA COUR, saisie de la requête en révision du requérant ayant entendu les parties par leurs procureurs, examiné la procédure et les pièces produites et DELIBERE ...

ATTENDU que par sa requête le requérant demande de l'autoriser à faire émettre un bref d'assignation pour évoquer devant

Wagner c Barreau de Montréal
(Qc SC)

CANADA
PROVINCE OF QUEBEC
District of Montreal
Issue 723-178

SUPERIOR COURT
This 28th day of November, 1966

PRESIDENT:
HON. JUSTICE PHILIPPE POTHIER

CLAUDE WAGNER, Member of the Legislative Assembly of the province of Quebec, Lawyer, Queen's Counsel, of the City of Montreal, District of Montreal, and residing there at number 11894 Zotique-Racicot Street.

against

BARREAU DE MONTREAL, a legally constituted corporation having its head office in the city of Montreal, district of Montreal, at number 100 east, Notre-Dame Street, and its COUNCIL,

Respondents

and

JUDGE JEAN PAUL BERUBE, Judge of the Court of Sessions of the Peace, Rivière-du-Loup, district of Kamouraska,

Intervener

THE COURT, seized of the motion for review of the applicant having heard the parties by their prosecutors, examined the procedure and the documents produced and DELIBERATED ...

WHEREAS by his motion the applicant requests that he be authorized to issue a writ of summons to refer to this Court a

199 As published in "Le jugement du juge Philippe Pothier dans la cause de M. Claude Wagner contre le Barreau de Montréal" *Le Clairon (Saint-Hyacinthe)* (1 December 1966) 12.

cette Cour une décision du Barreau de Montréal rendue le 4 novembre 1966 se lisant comme suit: (art. 846 C.P.C.).

«Sur le tout, le Conseil conclut unanimement:

a) Que Me Wagner s'est rendu coupable des infractions prévues aux Règlements 66, 84 et 85 des Règlements du Barreau de la province de Québec;

b) Il réprimande Me Claude Wagner et le condamne à payer une amende de \$100 et les frais de la présente plainte»;

ATTENDU que le Barreau de Montréal est une corporation légalement constituée en vertu des Lois de cette Province et qu'en conséquence il est soumis au pouvoir de surveillance ou de contrôle de la présente Cour; (art. 33 C.P.C)

ATTENDU que la requête en évocation ou en révision prévue par la loi peut être présentée lorsqu'il y a défaut ou excès de juridiction par le tribunal inférieur; (846 C.P.C. par. 1)

ATTENDU que le juge de la présente Cour à qui telle requête est soumise doit être d'avis que les faits allégués dans la requête justifient les conclusions recherchées; (847 C.P.C.)

ATTENDU que l'on allègue en substance dans la présente requête:

a) que le requérant était, le 10 octobre 1965, lors d'un discours qu'il a prononcé à Drummondville devant l'Assistance du Barreau Rural de la province de Québec, Ministre de la Justice dans le Gouvernement de cette province en plus d'être avocat au Barreau de Montréal;

b) que comme Ministre de la Justice, il a la surveillance de toutes les matières qui concernent l'administration de la justice en cette province;

decision of the Barreau de Montreal rendered on November 4, 1966, which reads as follows: (art. 846 C.P.C.).

“On the whole, the Council unanimously concludes:

(a) That Mr. Wagner was guilty of the offences set out in Regulations 66, 84 and 85 of the By-laws of the Law Society of the province of Quebec;

(b) It reprimands Mr. Claude Wagner and sentences him to pay a fine of \$100 and the costs of this complaint”;

WHEREAS the Barreau de Montreal is a corporation legally constituted under the Laws of this Province and is therefore subject to the power of supervision or control of this Court; (art. 33 C.P.C.)

WHEREAS the motion for evocation or review provided for by law may be brought where there is a lack or excess of jurisdiction by the lower court; (846 C.P.C at para. 1)

WHEREAS the judge of this Court to whom such motion is submitted must be of the opinion that the facts alleged in the motion justify the conclusions sought; (847 C.P.C.)

WHEREAS the substance of this motion alleges:

(a) that the applicant was, on October 10, 1965, during a speech he gave in Drummondville before the Assistance of the Association du Barreau Rural of the province of Quebec, Minister of Justice in the Government of this province in addition to being a lawyer at the Barreau de Montreal;

(b) that, as Minister of Justice, he shall have the supervision of all matters concerning the administration of justice in this province;

c) que comme tel il est appelé à exprimer des opinions à tous endroits où il peut croire que ses propos serviront à une meilleure administration de la justice;

d) que la mise en application des lois par les tribunaux et la procédure y relative sont des questions concernant l'administration de la justice et relèvent du ministre de la justice;

e) qu'au cours de la causerie que le requérant a prononcé le 10 octobre 1965, devant l'Association du Barreau Rural, et particulièrement lorsqu'il a tenu les propos qui ont fait l'objet de la plainte du mis en cause devant les intimés, il était dans l'exercice de son droit d'exprimer une opinion sur la mise en application des lois par les tribunaux;

f) qu'en conséquence les intimés n'avaient aucune juridiction sur la conduite du requérant qui n'agissait pas, dans les circonstances, comme avocat et membre du Barreau;

CONSIDERANT que c'est le droit et le devoir du Ministre de la Justice de rechercher, signaler, rapporter et même dénoncer les cas où, d'après son jugement et avec l'aide de toutes les informations qu'il possède, il y aurait eu mauvaise administration de la justice;

CONSIDERANT qu'une sentence excessive ou trop minime imposée à un individu convaincu de crime ou d'infraction de même qu'une procédure illégale, irrégulière ou insolite employés lors d'une conviction, constitue dans l'opinion de la Cour une mauvaise administration de la justice;

CONSIDERANT que, sans s'immiscer dans les décisions des tribunaux chargés de redresser des sentences inadéquates, toute personne, et à plus forte raison le Ministre de la Justice, peut dire ce qu'il

(c) that as such he is called to express opinions wherever he may believe that his words will be used for the better administration of justice;

(d) that the enforcement of laws by the courts and the procedure relating thereto are matters concerning the administration of justice and are the responsibility of the Minister of Justice;

(e) that during the applicant's speech before the Association du Barreau Rural on October 10, 1965, and particularly when he made the statements which were the subject of the intervener's complaint before the respondents, he was exercising his right to express an opinion on the application of laws by the courts;

(f) that, consequently, the respondents had no jurisdiction over the conduct of the applicant who was not, in the circumstances, acting as a lawyer and a member of the Barreau;

CONSIDERING that it is the right and duty of the Minister of Justice to investigate, flag, report and even denounce cases where, according to his judgment and with the help of all the information at his disposal, there has been maladministration of justice;

CONSIDERING that an excessive or a too minimal sentence imposed on a person convicted of a crime or offence, as well as an unlawful, irregular or unusual procedure used in the conviction, constitutes in the opinion of the Court a maladministration of justice;

CONSIDERING that, without interfering in the decisions of the courts responsible for redressing inadequate sentences, any person, more so the Minister of Justice, may express his view of the procedure

pense de la procédure qui a été suivie et du châtement qui a été infligé dans telle ou telle instance;

CONSIDERANT que les propos dont on lui a fait grief ont été prononcés par le requérant non comme simple individu, ni comme avocat et membre du Barreau, mais dans l'exécution de ses fonctions comme Ministre de la Justice;

CONSIDERANT que, même si le requérant a avisé ses auditeurs, au début de cette causerie, qu'il s'adressait à eux « non seulement en tant que ministre, mais surtout en confrère », il n'en reste pas moins que c'est à titre de Ministre de la Justice qu'il a employé cette expression pour donner un caractère plus intime à la réunion et au sujet qu'il devait traiter;

CONSIDERANT d'ailleurs que si tels propos ont eu pour effet de léser quelqu'un, celui qui les a prononcés restera toujours assujetti aux tribunaux de droit commun pour répondre des dommages qu'il aurait pu causer;

CONSIDERANT que dans les circonstances, il y a une contestation évidente et sérieuse au sujet de la juridiction que peuvent avoir les intimés dans l'examen et la sanction de la conduite du requérant dans l'occasion ci-haut décrite ;

CONSIDERANT qu'une étude des faits qui ont donné lieu à la présente requête a amené la Cour à l'avis qu'ils pouvaient justifier les conclusions recherchées.

POUR CES MOTIFS, LA COUR AUTORISE l'émission d'un bref d'assignation adresse aux intimés et au mis en cause leur enjoignant de suspendre toutes procédures en cette affaire et d'en transmettre le dossier au greffe de la Cour Supérieure, dans un délai de quinze jours, ainsi que toutes les pièces s'y rapportant, frais à suivre.

J.C.S

which has been followed and the punishment that was levied in that instance;

CONSIDERING that the remarks with which he was accused were made by the applicant not as a private individual, nor as a lawyer and member of the Barreau, but in the performance of his duties as Minister of Justice;

CONSIDERING that, even though the applicant informed his listeners, at the beginning of this talk, that he was addressing them "not only as a minister, but above all as a colleague", the fact remains that it was in his capacity as Minister of Justice that he used this expression to give a more intimate character to the meeting and to the subject he was to deal with;

CONSIDERING, moreover, that if such statements have had the effect of harming someone, the person who made them will always remain subject to the ordinary courts to answer for any damages he may have caused;

CONSIDERING that in the circumstances there is a clear and serious challenge as to the jurisdiction which the respondents may have in examining and sanctioning the applicant's conduct on the occasion described above;

WHEREAS a study of the facts which gave rise to the present motion led the Court to the opinion that they could justify the conclusions sought.

FOR THESE REASONS, THE COURT AUTHORIZES the issue of a writ of summons addressed to the respondents and the intervener ordering them to suspend all proceedings in this case and to transmit the file thereof to the office of the Superior Court, within fifteen days, as well as all the documents relating thereto, costs to follow.

J.C.S.

**Barreau de Montréal c Wagner
(QCCA)²⁰⁰**

BARREAU DE MONTREAL, *appellant* v.
WAGNER, *intimé* and BERUBE,
mis en cause

*Requête en vertu des articles 846 et s. C.P.—
Appel d'un jugement autorisant l'émission du
bref d'assignation requis en pareil cas*

*Obligation de la Cour d'appel de tenir
pour avérés les faits exposés dans la requête—
Autorisation ne pouvant être accordée que
dans le cas où la cour est d'avis que ces faits
justifient les conclusions recherchées—C.P.,
art. 846, 847, 850.*

Sur l'appel d'un jugement de la Cour supérieure autorisant l'émission du bref d'assignation sur une requête formée en vertu des articles 648 et suivants du Code de procédure civile, la cour d'appel, qui doit rendre le jugement que le premier juge aurait dû rendre, doit, comme celui-ci, tenir pour avérés les faits exposés dans la requête et ne peut accorder l'autorisation demandée que si elle est d'avis que ces faits justifient les conclusions recherchées.

M. le juge en chef Tremblay et MM. les juges Casey, Taschereau, Owen et Brossard.—No 9779 (C.S. 723,178).—Montréal, 14 juin 1967.—Jean-Paul Gagné, c.r.; L.-P. de Grandpré, c.r., conseil, pour l'appellant.—Ahern, Laurent-E. Bélanger, c.r., de Brabant et Nuss, pour l'intimé.

APPEL d'un jugement de la Cour supérieure (Montréal) rendu par M. le juge Pothier (28 novembre 1966) accordant l'autorisation d'émettre un bref d'assignation en vertu de l'article 847 C.P. Jugement confirmé quant à son dispositif.

Requête en vertu des articles 846 et s. C.P.

**Barreau de Montréal c Wagner
(QCCA)**

BARREAU DE MONTREAL, *appellant*
v. WAGNER, *respondent* and BERUBE,
impleaded party

*Motion under Sections 846 and s. C.P.—
Appeal from a judgment authorizing the
issuance of the writ of summons required in
such a case*

*Obligation of the Court of Appeal to
take as true the facts set out in the motion—
Authorization can only be granted where the
court is of the opinion that these facts justify
the conclusions sought—C.P., art. 846, 847,
850.*

On an appeal from a judgment of the Superior Court authorizing the issuance of the writ of summons on a motion brought under articles 846 and following of the Code of Civil Procedure, the Court of Appeal, which must render the judgment that the trial judge should have rendered, must, like the trial judge, take as true the facts set out in the motion and may only grant the authorization requested if he is of the opinion that these facts justify the conclusions sought.

Mr. Chief Justice Tremblay and Justices Casey, Taschereau, Owen et Brossard.—No 9779 (C.S. 723,178).—Montréal, 14 June 1967.—Jean-Paul Gagné, Q.C.; L.-P. de Grandpré, Q.C., counsel for the appellant.—Ahern, Laurent-E. Bélanger, Q.C., of Brabant et Nuss, for the respondent.

APPEAL from a judgment of the Superior Court (Montreal) rendered by Mr. Justice Pothier (November 28, 1966) granting authorization to issue a writ of summons under article 847 C.P. Judgment affirmed as to its disposition.

Motion under articles 846 and s. CP

²⁰⁰ *Barreau de Montréal c Wagner*, [1968] BR 235 (CA).

M. le juge en chef Tremblay. Le 10 octobre 1965, l'intimé, qui était alors membre du Barreau de Montréal, député à l'Assemblée législative et ministre de la Justice du Québec, prononce une causerie devant les membres du Barreau rural. Le mis en cause porte plainte au Barreau de Montréal, déclarant que cette causerie contenait une attaque injustifiée de sa conduite comme juge. Par décision, le Conseil du Barreau de Montréal fait droit à la plainte et impose une sanction à l'intimé. Celui-ci se pourvoit par requête en révision (art. 846 et s. C.P.). Par jugement, un juge de la Cour supérieure autorise la délivrance du bref d'assignation (art. 847 C.P.). C'est de ce jugement qu'est appel.

Le deuxième alinéa de l'article 847 C.P. énonce:

Le juge à qui la requête est présentée ne peut autoriser la délivrance du bref d'assignation que s'il est d'avis que les faits allégués justifient les conclusions recherchées.

Le juge doit donc tenir pour avérés les faits exposés dans la requête.

D'un autre côté, l'article 850 C.P., qui permet l'appel de la décision du juge, ne contient aucune disposition spéciale quant aux pouvoirs de notre cour sur cet appel. Nous devons donc rendre le jugement que le juge de la Cour supérieure aurait dû rendre et, par conséquent, je dois aussi tenir pour avérés les faits exposés dans la requête.

Or, les paragraphes 12 et 18 de la requête se lisent ainsi:

12. Ayant été invité, à titre de ministre de la Justice, par le Barreau rural de la Province de Québec, votre requérant a accepté l'invitation et prononcé à ce titre une causerie, à Drummondville, le 10 octobre 1965;

Mr. Chief Justice Tremblay. On October 10, 1965, the respondent, who was then a member of the Barreau de Montreal, Member of the Legislative Assembly and Minister of Justice of Quebec, gave a speech to the members of the Barreau rural. The impleaded party filed a complaint with the Barreau de Montreal, stating that this speech contained an unjustified attack on his conduct as a judge. The Conseil du Barreau de Montréal upheld the complaint and imposed a sanction on the respondent. The latter appeals by motion for review (art. 846 and s. C.P.). Upon judgment, a justice of the Superior Court authorized the issuance of the writ of summons (art. 847 C.P.). It is from this judgment that the appeal is made

The second paragraph of article 847 C.P. states:

The judge to whom the motion is presented may only authorize the issuance of the writ of summons if he is of the opinion that the facts alleged justify the outcome sought.

The judge must therefore consider the facts set out in the application to be true.

On the other hand, article 850 C.P., which allows appeals of the judge's decision, does not contain any special provision as to the powers of our court on this appeal. We must therefore render the judgment that the judge of the Superior Court should have rendered and, consequently, I must also consider the facts set out in the motion to be true.

Therefore, paragraphs 12 and 18 of the application read as follows:

12. Having been invited, as Minister of Justice, by the Barreau rural of the province of Quebec, the petitioner accepted the invitation and gave a speech in this capacity, in Drummondville, on October 10, 1965;

18. Malgré l'immunité et les droits de votre requérant, plus haut mentionnés, le Conseil du Barreau de Montréal a décidé de procéder à l'instruction de la plainte et plusieurs séances d'enquête et audition eurent lieu, les intimés assumant ainsi des pouvoirs de discipline sur votre requérant et un droit de regard et de surveillance sur ses actes comme ministre de la Couronne.

J'interprète ces deux paragraphes comme déclarant que les circonstances dans lesquelles l'intimé prononça sa causerie sont telles que cette causerie constituait l'exercice des pouvoirs que la loi confère au ministre de la Justice. Il s'agit là d'une allégation mixte de faits et de droit. Les faits, ce sont les circonstances. Je n'ai pas à me demander, à ce stade, si la preuve des circonstances pourra être apportée. Je dois les tenir pour avérées.

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.

Ceci ne veut pas dire que je suis d'accord avec tous les motifs qu'il invoque. Au contraire, et je le dis avec respect, je suis d'avis qu'il est allé beaucoup trop loin. Il prononce sur des points qu'il n'avait pas à décider. Pour éviter toute ambiguïté, le seul avis que j'exprime est que, tenant pour acquis que les circonstances dans lesquelles l'intimé prononça la causerie en question sont telles qu'il exerçait alors les pouvoirs que lui confère la loi à titre de ministre de la Couronne, le premier juge a eu raison d'autoriser la délivrance du

18. Despite the immunity and rights of the petitioner, mentioned above, the Conseil du Barreau de Montréal decided to proceed with the investigation of the complaint and several inquiries and hearings took place, the respondents thus assuming powers of discipline over the applicant and a right of inquiry and supervision over his acts as Minister of the Crown.

I interpret these two paragraphs as declaring that the circumstances in which the respondent gave his speech were such that the speech constituted an exercise of the powers conferred by law upon the Minister of Justice. This is a mixed question of fact and law. The facts and the circumstances are one and the same. I do not ask, at this stage, whether proof of the circumstances can be provided. I must take them at face value.

When the Minister of Justice exercises the powers conferred on him by law, he is carrying out the executive powers of the Crown and he is acting on behalf of the Crown. However, "no act of the Legislature affects the rights or prerogatives of the Crown, unless they are included therein by an express provision" (art. 9 C.C.). The law of the Barreau does not fall under this exception, and I am of the opinion that the operative part of the trial judge's judgment is well founded.

This does not mean that I agree with all the reasons he gives. On the contrary, and I say this with respect, I think his reasons go too far. He rules on questions that he did not have to decide. To avoid any doubt, the only opinion I express is that, assuming that the circumstances in which the respondent gave the speech in question were such that he was then carrying out the powers conferred on him by law as Minister of the Crown, the trial judge was correct in allowing the writ of summons to be issued. I do not rule on

bref d'assignation. Je ne me prononce sur aucun des autres motifs énoncés par le premier juge.

Je rejetterais l'appel avec dépens.

Mr. Justice Casey. Je suis d'accord avec M. le juge en chef.

M. le juge Taschereau. Je partage l'opinion de M. le juge en chef Tremblay.

M. le juge Owen. Assuming the facts alleged in the *requête en révision* to be true, I am of the opinion that they justify the conclusion in the judgment appealed from which authorizes the issue of the writ of summons. I would confirm this conclusion, without expressing any opinion on the reasons set out in the judgment in question, and I would dismiss the present appeal with costs.

M. le juge Brossard. Je partage l'opinion de M. le juge en chef Tremblay; comme lui, pour les raisons qu'il donne et sous les réserves qu'il exprime, je rejetterais cet appel avec dépens.

any of the other grounds elucidated by the trial judge.

I would dismiss the appeal with costs.

M. le juge Casey. I agree with the Chief Justice.

Mr. Justice Taschereau. I agree with Chief Justice Tremblay.

Mr. Justice Owen. En supposant vrais les faits allégués dans la requête en révision, je suis d'avis qu'ils justifient la conclusion du jugement en appel qui autorise la délivrance du bref d'assignation. Je confirmerais cette conclusion, sans me prononcer sur les motifs énoncés par le premier juge, et je rejetterais l'appel avec dépens.

Mr. Justice Brossard. I agree with Chief Justice Tremblay; for the reasons he gives and with the reservations he expresses, I would, like him, dismiss this appeal with costs.