

# From Attorney General to Backbencher or Opposition Legislator: The Lawyer's Continuing Duty of Confidentiality to the Former Client

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A N D R E W F L A V E L L E M A R T I N \*

## ABSTRACT

This note uses a recent incident from Manitoba to reflect on the professional duty of confidentiality owed to the Crown by a former Attorney General as lawyer. The duty of confidentiality survives the lawyer-client relationship. As a fiduciary, the lawyer cannot disclose or use the client's confidential information for her own benefit or the benefit of a third party, or against the client. These obligations constrain the former Attorney General in her conduct as an opposition legislator and suggest that she should not accept an appointment as Justice critic for her caucus. While parliamentary privilege protects the former Attorney General who breaches these obligations in the legislature from professional consequences, as an opposition legislator she is particularly vulnerable to consequences within the legislature.

**Keywords:** Manitoba; Attorney General; Confidentiality; Legal Ethics; Legislatures; Legislators; Politics.

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## I. INTRODUCTION

An Attorney General is privy to the inner workings of her government, including all the legal advice provided to it. As a recent incident from Manitoba suggests, that knowledge can be a dangerously tempting temptation for a former Attorney General, particularly an opposition legislator, to use to legitimately criticize a subsequent government or simply to embarrass it.

In late 2017, the floor-crossing prohibition in *The Legislative Assembly Act* of Manitoba was under fire.<sup>1</sup> Newly Independent MLA Steven Fletcher had mounted a *Charter* challenge to the prohibition and the Conservative government had introduced a bill that would repeal the prohibition.<sup>2</sup> The government argued that the bill would avoid using public resources to defend against Fletcher's challenge<sup>3</sup> – and Fletcher had suggested that the government could more easily and quickly save that money by conceding his challenge.<sup>4</sup> It was in this context that former Attorney General, and then-opposition MLA,<sup>5</sup> Andrew Swan made these comments in the legislature:

He's asked a number of times, well, why don't they just throw in the towel? Well, the reason they can't throw in the towel is because they've got advice, **I know**,

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<sup>1</sup> *The Legislative Assembly Act*, CCSM c L110, s 52.3.1. (Section 52.3.1 provided that an MLA who left a party's caucus, for any reason, could not join the caucus of any other party.) See Andrew Flavelle Martin, "Unconstitutional or Just Unworkable? The Life and Death of a Prohibition on Floor-Crossing in *Fletcher v the Government of Manitoba*" (2019) 42:1 *Manitoba LJ* 51 at 52-53 [Martin, "Unworkable"].

<sup>2</sup> *Canadian Charter of Rights and Freedoms*, ss 2(b), 3, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11*; Bill 4, *The Legislative Assembly Amendment Act (Member Changing Parties)*; 34th Leg, 3rd Sess, Manitoba (2017); Martin, "Unworkable", *supra* note 1 at 54.

<sup>3</sup> Manitoba, Legislative Assembly, *Debates and Proceedings*, 41-3, vol LXXI No 8B (30 November 2017) at 263, 264, 265 (Hon Heather Stefanson) [*Hansard*]; Martin, "Unworkable", *supra* note 1 at 54.

<sup>4</sup> *Hansard*, *ibid* at 266 (Steven Fletcher); Martin, "Unworkable", *supra* note 1 at 54.

<sup>5</sup> Andrew Swan, while a former Justice critic, had been replaced as Justice critic in September 2017 and, at this time, was Health critic. See Austin Grabish, "Wab Kinew reveals his inner circle, Manitoba Opposition critics" *CBC News* (21 September 2017, online: <[www.cbc.ca/news/canada/manitoba/manitoba-ndp-caucus-change-1.4300533](http://www.cbc.ca/news/canada/manitoba/manitoba-ndp-caucus-change-1.4300533)> [<https://perma.cc/J6ZF-ABHP>]).

from their own department saying, well, actually, we think there is a very arguable case that this legislation continues to be constitutional. That's the problem that this minister has.<sup>6</sup>

How did Swan know this? It is not clear. Perhaps the government had released the advice publicly. Perhaps someone had leaked the advice to Swan. But perhaps Swan knew because the same advice had been provided while he was Attorney General. If this were the case – and it may not have been – Swan by revealing this advice would have been violating his duty of confidentiality to the Crown as a former client.

In this note, I consider how the continuing duty of confidentiality applies to a former Attorney General. I explain that the former Attorney General as lawyer owes this duty to the Crown in right of the province (or Canada), that it can only be properly waived by the Lieutenant Governor in Council (or the Governor in Council, federally), and thus that the former Attorney General cannot share or use knowledge of past advice for any purposes, political or otherwise, noble or ignoble.

I begin by considering the curious position of the Attorney General as lawyer. Then I consider the possibility of waiver. I acknowledge parliamentary privilege. I then conclude by reflecting on the implications of my analysis, both for the former Attorney General as Justice critic and for legal ethics and government itself.

## II. THE ATTORNEY GENERAL AS LAWYER

As recognized by many often and elsewhere, the Attorney General is the chief law officer of the Crown.<sup>7</sup> As such, assuming she is a lawyer,<sup>8</sup> she

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<sup>6</sup> *Hansard*, *ibid* at 278 (Andrew Swan) [emphasis added]. Cited but not quoted in Martin, “Unworkable”, *supra* note 1 at 54-55.

<sup>7</sup> See e.g. *The Department of Justice Act*, CCSM c J35, s 2(a): “The minister [of Justice]... is the official legal adviser of the Lieutenant Governor and the legal member of the Executive Council”. See also s 2(1) on the explicit duties of the Attorney General. See also *Ontario v Criminal Lawyers’ Association of Ontario*, 2013 SCC 43 at para 5, [2013] 3 SCR 3.

<sup>8</sup> For a discussion of the non-lawyer Attorney General, see Andrew Flavelle Martin, “The Attorney General as Lawyer (?): Confidentiality upon Resignation from Cabinet” (2015) 38:1 Dal LJ 147 at 166-69.

is bound by the lawyer's duty of confidentiality.<sup>9</sup> This duty is owed to the client, i.e. the Crown in right of Canada or the province.

Vis-à-vis the lawyers in her department, the Attorney General may look and feel in some ways like a client or a representative of the client. While the Attorney General provides legal advice to Cabinet, that advice does not form in a vacuum and rarely originates in the mind and by the hand of the Attorney General herself. The vast majority of that advice comes from departmental lawyers to the Attorney General. Thus the Attorney General may appear to be in the situation of a representative of the client, receiving advice from lawyers and relaying it to her colleagues and superiors who are also officers of the client. Nonetheless, the Attorney General is, as a matter of law, a lawyer in this circumstance. As such she owes to the client the same duties that any lawyer owes to any client – among them, a duty of confidentiality.

The lawyer's duty of confidentiality is broad, encompassing “all information concerning the business and affairs of a client acquired in the course of the professional relationship”.<sup>10</sup> Moreover, the duty of confidentiality is owed to both current and former clients alike: “The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, *whether or not differences have arisen between them.*”<sup>11</sup> The fact that the former Attorney General has been replaced as chief law officer of the Crown does not affect her continuing duty of confidentiality.

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<sup>9</sup> Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2009, last amended 2019), r 3.3-1, online: Federation of Law Societies of Canada <[www.flsc.ca](http://www.flsc.ca)> [<https://perma.cc/X96C-LJ4G>] [*FLSC Model Code*]. Law Society of Manitoba, *Code of Professional Conduct* (Winnipeg: LSM 2010), r 3.3-1, online: <<https://lawsociety.mb.ca/wp-content/uploads/2019/12/ENG-Code-of-Professional-Conduct-2020-02-05.pdf>> [<https://perma.cc/AZ97-BN2S>] [*Manitoba Code*] is substantively identical.

<sup>10</sup> *FLSC Model Code*, *supra* note 9, r 3.3-1, commentary 3. *Manitoba Code*, *supra* note 9, r 3.3-1, commentary 3 is identical.

<sup>11</sup> *FLSC Model Code*, *supra* note 9, r 3.3-1, commentary 3 [emphasis added]. *Manitoba Code*, *supra* note 9, r 3.3-1, commentary 3 is identical.

As a fiduciary,<sup>12</sup> a lawyer is prohibited not only from disclosing her client's confidential information but also from otherwise using that information for her own benefit, or the benefit of a third party, or to the client's detriment.<sup>13</sup>

This rule against use is rarely applied in the case law, but that rarity does not imply a lack of importance. A leading case, and a brazen violation of this obligation, is *Szarfer v Chodos*, in which the lawyer used his client's confidential information to have an affair with the client's spouse.<sup>14</sup> A more extreme example is where the lawyer uses information that the client is vulnerable to initiate a sexual relationship with the client.<sup>15</sup> A more mundane example is the purchase of real estate from a client, where the lawyer knows the client's intended sales price and immediate need for money.<sup>16</sup>

What creates strangeness here is the nature of responsible government and the apolitical civil service in Canada. In a change of government, the Attorney General is replaced but the Crown and its departmental lawyers remain. Assuming no change in the relevant factual and legal circumstances, the departmental lawyers will presumably (and properly) give the same advice to the new Attorney General and Cabinet as they gave to the previous Attorney General and Cabinet on the same matter. The previous Attorney General, if still a legislator, is now in opposition. She has special knowledge of the legal advice being given to the current government, by virtue of remembering the legal advice that was given to

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<sup>12</sup> *FLSC Model Code*, *supra* note 9, r 3.3-2, commentary 1: "The fiduciary relationship between a lawyer and a client forbids the lawyer or a third person from benefiting from the lawyer's use of a client's confidential information." *Manitoba Code*, *supra* note 9, r 3.3-2, commentary 1 is identical.

<sup>13</sup> *FLSC Model Code*, *supra* note 9, r 3.3-2: "A lawyer must not use or disclose a client's or former client's confidential information to the disadvantage of the client or former client, or for the benefit of the lawyer or a third person without the consent of the client or former client." See also *Manitoba Code*, *supra* note 9, r 3.3-2, which is substantively identical.

<sup>14</sup> *Szarfer v Chodos* (1986), 54 OR (2d) 663, 27 DLR (4th) 388 (HC), *aff'd* (1988) 66 OR (2d) 350 (CA).

<sup>15</sup> *The Law Society of Upper Canada v Mark Elliott Joseph*, 2003 CanLII 39550 at paras 17-20, [2003] LSDD No 34.

<sup>16</sup> *Law Society of Saskatchewan v Abrametz*, 2017 SKLSS 4 at paras 68-75, *var'd* on other grounds (costs), 2018 SKCA 37.

her government. Indeed, as part of her Majesty's loyal opposition, her appropriate role is to criticize the decision and actions of the current government.

Consider a hypothetical example around the floor-crossing prohibition. Departmental lawyers advise Attorney General X that there is a high likelihood that the floor-crossing prohibition is constitutional. She may, or may not, convey that advice to Cabinet. After an intervening change in government, X is now an opposition legislator. She can make a credible guess as to what legal advice is currently being provided because she knows what legal advice was previously provided. But in order to explain why she "knows" about that current advice, she has to disclose the previous advice. Indeed, even if she makes the bare assertion that she "knows" about the current advice, the alert listener can make a fair assumption that she is likely basing that knowledge on her knowledge of the previous advice.

How does the situation of the former Attorney General compare to a non-Attorney General former member of Cabinet? Consider for example legislator Y, who was the Minister of Finance while X was Attorney General and, like X, is now an opposition legislator after the intervening change in government. While Minister of Finance, Y alongside his then-Cabinet colleagues received advice from Attorney General X that there is a high likelihood that the floor-crossing prohibition is constitutional. Y, like X, can now make a credible guess that the current Cabinet is receiving the same advice about the floor-crossing prohibition. Y, unlike X, is not bound by the lawyer's duty of confidentiality from revealing that advice; but like X, he is bound by Cabinet confidence from revealing that advice.<sup>17</sup> For my purposes, I focus on the lawyer's duty of confidentiality.

While this situation may have a rare parallel in the private practice of law, it will be a fairly regular occurrence in the context of government. One can imagine a parallel situation in which Z, the chief legal officer of a company, leaves that company and then becomes a regular critic of the company itself, or perhaps even the chief legal officer of a rival company. (I recognize here that non-compete agreements may be common in these circumstances, which goes again to how unusual this situation would be in the private sector.) However, the situation of former Attorney General X and former Minister of Finance Y will occur much more frequently, given

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<sup>17</sup> See e.g. *The Freedom of Information and Protection of Privacy Act*, CCSM c F175, s 19.

that in the Canadian system an opposition party's caucus will often include former Cabinet ministers. Less frequent, but still presenting danger, is the situation of an Attorney General who is demoted or who is removed from caucus and forced to sit as an independent.<sup>18</sup>

### III. WAIVER

The lawyer's duty of confidentiality, like the broader duty of Cabinet confidence, can be waived by the client. While the current Attorney General may be able to waive confidentiality or Cabinet confidence on behalf of the government, the best and most definitive approach is for Cabinet, i.e. the Governor in Council or the Lieutenant Governor in Council, to make the waiver.<sup>19</sup>

A helpful parallel may be drawn to the conduct of former Attorney General Jody Wilson-Raybould during the fallout over the SNC Lavalin affair in the spring of 2019. Having been shuffled into another portfolio, she was at that time still in Cabinet but no longer the Attorney General. She was nonetheless adamant that she could not discuss her communications with representatives of the government while she was Attorney General, including the Prime Minister and the Clerk of the Privy Council, without a waiver of solicitor-client privilege and Cabinet confidence.<sup>20</sup> The eventual waiver also covered lawyer-client confidentiality: "Her Excellency the Governor General in Council, on the recommendation of the Prime Minister... waives, to the extent

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<sup>18</sup> For example, former Attorney General for Canada, Jody Wilson-Raybould. See e.g. Brian Platt, "Tuesday Night Massacre: Trudeau ejects Jody Wilson-Raybould, Jane Philpott from Liberal caucus" *The National Post* (2 April 2019), online <[nationalpost.com/news/politics/jody-wilson-raybould-says-shes-been-kicked-out-of-the-liberal-caucus](https://nationalpost.com/news/politics/jody-wilson-raybould-says-shes-been-kicked-out-of-the-liberal-caucus)> [<https://perma.cc/4VHX-XXDR>].

<sup>19</sup> See e.g. the waiver relating to former Attorney General for Canada, Jody Wilson-Raybould: PC 2019-0105 (25 February 2019), online: <[orders-in-council.canada.ca/attachment.php?attach=37424&lang=en](https://orders-in-council.canada.ca/attachment.php?attach=37424&lang=en)> [<https://perma.cc/L3Q8-2GBY>] [Wilson-Raybould waiver].

<sup>20</sup> While my focus in this article is on the lawyer's duty of confidentiality, solicitor-client privilege applies to some of the same information and is stronger in law. The waiver of solicitor-client privilege is necessarily a waiver of the lawyer's duty of confidentiality.

they apply, solicitor-client privilege *and any other relevant duty of confidentiality to the Government of Canada*”.<sup>21</sup>

However, in the situation of former Attorney General X, there would appear to be no reason for the current government to waive X’s duty of confidentiality.

Could a cunning outgoing government, keen to use their knowledge to attack the incoming government, pre-emptively waive lawyer-client confidentiality and Cabinet confidence for themselves? While this would be highly controversial, it faces no clear legal impediment and, like many other political measures, would only have political repercussions (if any).

#### IV. PARLIAMENTARY PRIVILEGE AND THE ROLE OF THE SPEAKER

The major asterisk to the preceding discussion is parliamentary privilege. Legislator X, the former Attorney General, is forbidden by lawyer-client confidentiality and Cabinet confidence from revealing the legal advice from her time in office or using it to her benefit or the client’s detriment. Nonetheless, she cannot face any regulatory or legal consequences for revealing this advice inside the legislature.<sup>22</sup> She may face consequences within the legislature – and indeed, in a majority government situation, as an opposition legislator will be quite vulnerable to the imposition of such consequences.

While one might hope that the Speaker has a role to play in preventing, or at least in chastising, members from breaching such duties in the legislature, there is little indication of such a role. The main grounds on which the Speaker will intervene are incivility or

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<sup>21</sup> Wilson-Raybould waiver, *supra* note 19 [emphasis added].

<sup>22</sup> Andrew Flavelle Martin, “The Immunity of the Attorney General to Law Society Discipline” (2016) 94:2 Can Bar Rev 413 at 429-430 [Martin, “Attorney General Discipline”].



unparliamentary language and the *sub judice* convention.<sup>23</sup> Moreover, the Standing Orders of the House of Commons, for example, do not mention lawyers' duties of confidentiality or solicitor-client privilege.<sup>24</sup>

One could argue that the lawyer's duty of confidentiality is an undue constraint on legislators' fundamental responsibility to question the government – that is, that the breach of this duty is desirable and necessary to properly fulfill the opposition's function of holding the government accountable. In a somewhat parallel example, Adam Dodek has argued that parliamentary privilege outweighs solicitor-client privilege in terms of access to documents: “At its core, parliamentary privilege is about protecting the essential functions of Parliament to allow it to fulfil its roles as a house of debate and the organ of government charged with holding the executive to account.”<sup>25</sup> This characterization matches that adopted by the Supreme Court of Canada in *House of Commons v Vaid*, which is that parliamentary privilege protects the ability of legislators to discharge their proper functions: “Parliamentary privilege in the Canadian context is the sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, without which they could not discharge their functions”.<sup>26</sup> For opposition legislators in particular, “holding the executive to account” is the central function.

Imagine a variant situation, in which former Attorney General X concludes, based on the advice she received while Attorney General, that

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<sup>23</sup> Marc Bosc & André Gagnon, *House of Commons Procedure and Practice*, 3d ed (Ottawa: House of Commons, 2017), Chapter 7, “The Speaker and Other Presiding Officers of the House”, online: <[https://www.ourcommons.ca/About/ProcedureAndPractice3rdEdition/ch\\_07\\_1-e.html#7-1-3](https://www.ourcommons.ca/About/ProcedureAndPractice3rdEdition/ch_07_1-e.html#7-1-3)> [<https://perma.cc/43NY-VQZK>]. See also Chapter 13, “Rules of Order and Decorum”, online: <[www.ourcommons.ca/About/ProcedureAndPractice3rdEdition/ch\\_13\\_3-e.html](http://www.ourcommons.ca/About/ProcedureAndPractice3rdEdition/ch_13_3-e.html)> [<https://perma.cc/YC3G-5MUL>].

<sup>24</sup> House of Commons, *Standing Orders of the House of Commons* (29 November 2018), online: <[www.ourcommons.ca/About/StandingOrders/SOPDF.pdf](http://www.ourcommons.ca/About/StandingOrders/SOPDF.pdf)> [<https://perma.cc/J8YX-4XYH>].

<sup>25</sup> Adam Dodek, “Second Opinion: Parliament Trumps Solicitor-Client Privilege” *Law Times* (28 June 2010), online: <[www.lawtimesnews.com/archive/second-opinion-parliament-trumps-solicitor-client-privilege/260142](http://www.lawtimesnews.com/archive/second-opinion-parliament-trumps-solicitor-client-privilege/260142)> [<https://perma.cc/AAE4-DES9>].

<sup>26</sup> *Canada (House of Commons) v Vaid*, 2005 SCC 30 at para 29.

the current government is misrepresenting the legal advice it has received. Arguably, by purporting to disclose that advice (albeit falsely), the government has implicitly and necessarily waived solicitor-client privilege over that advice and released its lawyers from their duties of confidentiality in relation to that advice. However, whether or not waiver applies, it appears to be in the public interest that legislator X expose that misrepresentation. Does that credit to the public interest outweigh the harm to the public interest of legislator X breaching her duty of confidentiality? Given the strength of parliamentary privilege, I recognize that some might argue that the uncomfortable legal answer appears to be yes.

## V. IMPLICATIONS: THE FORMER ATTORNEY GENERAL AS JUSTICE CRITIC

My analysis suggests that a former Attorney General, while appearing uniquely suited to be Justice critic, will be significantly restricted in that role and should indeed perhaps avoid it entirely.

The former Attorney General as justice critic may face a conflict of interest. The *FLSC Model Code* defines a conflict of interest as “the existence of a substantial risk that a lawyer’s loyalty to or representation of a client would be materially and adversely affected by the lawyer’s own interest or the lawyer’s duties to another client, a former client, or a third person.”<sup>27</sup> The commentary elaborates that “[t]he risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation.”<sup>28</sup>

The nature of that conflict depends on whether her party, or her caucus, or her opposition leader, is properly considered a client for whom former Attorney General X is practicing law. (This will depend to some extent on the ability and skill of the former Attorney General to provide legal advice without the support of departmental lawyers.) If so, she is in a conflict between the interests of the former client and the interests of the current client. The current client’s interest is to use confidential advice to

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<sup>27</sup> *FLSC Model Code*, *supra* note 9, r 1.1-1. The *Manitoba Code*, *supra* note 9, r 1.1-1, is identical.

<sup>28</sup> *FLSC Model Code*, *supra* note 9, r 3.4-1, commentary 2. The *Manitoba Code*, *supra* note 9, r 3.4-1, commentary 2, is identical.

criticize the government; the former client's interest, indeed right, is for that information to remain confidential. If she is not practicing law, while there is not a conflict as defined in the *Code*, the lawyer's personal and political interest is in using that confidential information for the benefit of herself and her party in opposition, while her professional obligation is to refrain from doing so – and thus the former Attorney General is at risk of breaching the rule on confidentiality. In the face of this clash, the former Attorney General must not breach her obligation of confidentiality though she may be sorely tempted to do so.

A lawyer is free to act against a former client if the matters are unrelated and the lawyer does not have “relevant confidential information arising from the representation of the former client that may prejudice that client”.<sup>29</sup> It would appear that many matters on which a Justice critic and former Attorney General would work and comment would be related to matters for which that former Attorney General had been responsible while in office, or matters in which the former Attorney General has relevant confidential information.

Moreover, a former Attorney General does not avoid this risk entirely by refusing the formal role of Justice critic. Her caucus colleagues, who may not be lawyers and may not understand the rules around confidentiality, will likely still want to use her confidential information for their own purposes. In addition to resisting this pressure, the former Attorney General should educate her colleagues about the importance of lawyers' professional obligations to the protection of the public interest.

## VI. IMPLICATIONS: WHY THIS MATTERS

At the end of the day, does any of this matter? The answer depends on the precise nature of the question. As a political matter, it would be seem to be only the most controversial legal advice the revelation of which would prompt serious political consequences.

But from a legal ethics perspective, the breach – even if the practical implications are minimal, which I argue they are not – is a fundamental one that strikes at the heart of public confidence in the legal profession. Indeed, confidentiality is one of the most important duties of the lawyer

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<sup>29</sup> *FLSC Model Code*, *supra* note 9, r 3.4-10(c). The *Manitoba Code*, *supra* note 9, r 3.4-10(c) is identical.

for maintaining that public confidence in the profession. As the Supreme Court of Canada has emphasized, confidentiality is integral to the lawyer-client relationship: “Experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality “as close to absolute as possible””.<sup>30</sup> Put simply, “[i]f lawyers do not maintain client confidentiality, the public’s trust in our profession will soon become eroded and irreparably harmed.”<sup>31</sup>

Thus, even if former Attorney General X by revealing the legal advice he received while Attorney General advances some fundamental public purpose, such as legitimately holding the current government to account, the damage to the public interest would outweigh that benefit.

How would such a breach of confidentiality change the behaviour of the government and its lawyers? Central here is the fact that the Crown is a continuing entity. Departmental lawyers would be less likely to give frank and candid legal advice to the Attorney General if they thought that she might use that advice against the government in the future. In turn, the Attorney General, to the extent that she was reliant on those departmental lawyers to generate legal advice to Cabinet, would be less able to perform her functions competently. The departmental lawyers would be at risk of breaching their obligations of candour to the client,<sup>32</sup> and both the departmental lawyers and the Attorney General would be at risk of breaching their duties of competence.<sup>33</sup>

Less important as a matter of law and legal ethics, but arguably as important to the functioning of the apolitical civil service and the long-term interests of the Crown, former Attorney General X has broken trust with her former departmental lawyers by using their advice to criticize or embarrass the government.

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<sup>30</sup> *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 9, quoting from *R v McClure*, 2001 SCC 14 at para 35.

<sup>31</sup> *Law Society of Alberta v Robidoux*, 2014 ABLS 5 at para 26, [2014] LSDD No 117.

<sup>32</sup> *FLSC Model Code*, *supra* note 9, r 3.2-2: “When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.” See also *Manitoba Code*, *supra* note 9, r 3.1-2, which is identical.

<sup>33</sup> *FLSC Model Code*, *supra* note 9, r 3.1-2. See also *Manitoba Code*, *supra* note 9, r 3.1-2, which is identical.

While legal ethics should not be reduced to discipline alone, in light of the brazenness and consequences of the actions of former Attorney General X, a relevant question becomes whether former Attorney General X should be disciplined by the law society. As has been explained elsewhere,<sup>34</sup> there are few restrictions on the law society's regulatory and disciplinary jurisdiction over the Attorney General. Assuming that former Attorney General X remains a lawyer, there is no reason that this jurisdiction would be any different for a former Attorney General than for a current Attorney General. Other than parliamentary privilege, which I discussed above, there would be no barrier to discipline of former Attorney General X. Indeed, even in Ontario, where there the Attorney General enjoys statutory immunity against law society discipline, that immunity is limited to "anything done by him or her while exercising the functions of such office",<sup>35</sup> and thus would not apply to a breach of confidentiality after X ceased to be Attorney General. Thus, if former Attorney General X were to repeat the breach outside the legislature and thus beyond parliamentary privilege, the law society would have disciplinary jurisdiction.

I would argue that the need for denunciation and deterrence of this kind of breach favours law society action. Such action protects the public interest, as law societies are charged to do<sup>36</sup> – not only the public interest in public confidence in the legal profession, but the public interest in the competent and efficient functioning of government. I would also argue that the law society should take such a breach of lawyer-client confidentiality more seriously than most governments would appear to take a breach of cabinet confidence.

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<sup>34</sup> Martin, "Attorney General Discipline", *supra* note 22.

<sup>35</sup> *Law Society Act*, RSO 1990, c L.8, s 13(3), as discussed in Martin, "Attorney General Discipline", *supra* note 22 at 431-32.

<sup>36</sup> See e.g. *Legal Profession Act*, CCSM c L107, s 3(1): "The purpose of the society is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence."