

The Premier Should Not Also Be the Attorney General: *Roncarelli v Duplessis* Revisited as a Cautionary Tale in Legal Ethics and Professionalism

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ABSTRACT

From time to time, a Premier or Prime Minister appoints themselves as Attorney General. In this article, I argue that this dual portfolio is inherently and incurably problematic and should be avoided and indeed prohibited. I do so from the perspective of legal ethics and professionalism. The springboard for my analysis is the conduct of Quebec Premier and Attorney General Maurice Duplessis in the classic case of *Roncarelli v Duplessis*. While there may well be perceived benefits that tempt Premiers to serve in the dual role, any lawyer who does so unavoidably violates his or her professional obligations. For this reason, I argue that law societies or legislatures, or both, should introduce an explicit prohibition against this dual role.

Keywords: Legal Ethics; Attorney General; Premier; Cabinet; Maurice Duplessis

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“It is a truism of the law that anyone who is his own lawyer has a fool for a lawyer and a fool for a client.”¹

“Power corrupts, but absolute power is really neat.”²

I. INTRODUCTION

From time to time, a Premier or Prime Minister appoints himself as Attorney General.³ In this article, I argue that this dual portfolio is inherently and incurably problematic and should be avoided and indeed prohibited. I do so from the perspective of legal ethics and professionalism. While the special and unique role of the Attorney General as Chief Law Officer of the Crown is duly recognized in the Canadian case law and legal literature,⁴ this particular situation—of Attorneys General with dual portfolios and specifically this dual portfolio—has not yet been squarely addressed. Issues similar in kind, though lesser in severity, will occur any time the Attorney General holds a second portfolio. I focus on the Attorney General who is also Premier because the issues are clearest, and the problems most intractable, in this context.⁵

¹ *John Carten Personal Law Corp v British Columbia (Attorney General)* (1997), 153 DLR (4th) 460 at para 75, 40 BCLR (3d) 181, McEachern CJBC dissenting. See also *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 9: “It is said that anyone who represents himself or herself has a fool for a client.”

² George C Wilson, “Brass Hats Wait to Be Tapped,” *The Washington Post* (8 May 1986), 1986 WLNR 1884021, online: <www.washingtonpost.com/archive/politics/1986/05/08/brass-hats-wait-to-be-tapped/5247a405-31f5-4a17-a48b-0f191c4e04c1/> [perma.cc/FN2Z-E9HX], quoting John F Lehman, Jr.

³ I will refer to Premiers in this article, but the same considerations would apply to a Prime Minister who was also Minister of Justice and Attorney General, albeit subject to federalism considerations, assuming that person was a lawyer. See Andrew Flavelle Martin, “The Implications of Federalism for the Regulation of Federal Government Lawyers” (2020) 43:1 Dal LJ 363, especially at 383–86.

⁴ See e.g. *Ontario v Criminal Lawyers’ Association of Ontario*, 2013 SCC 43 at para 35.

⁵ The inherent challenges that arise in the Canadian context because the Attorney General is also the Minister of Justice have been examined elsewhere and I do not repeat that analysis here. See e.g. The Hon A Anne McLellan, “Review of the Roles of the Minister of Justice and Attorney General of Canada” (28 June 2019) at 23–24, online (pdf): <pm.gc.ca/en/news/backgrounders/2019/08/14/review-roles-minister-justice-

While it is now rare for a Premier to serve simultaneously as Attorney General, such a situation used to be more common – although it appears to have been uniquely Canadian.⁶ For example, three of the four post-Confederation premiers of Ontario did so.⁷ Paul Romney characterizes this phenomenon as a “logical consequenc[e] of the province’s political history and social structure.”⁸ More recently, during the constitutional negotiations of the early 1960s, the Premiers of New Brunswick and Alberta were also Attorneys General of their provinces.⁹

and-attorney-general-canada> [perma.cc/N77C-AMV6]; Adam Dodek, “The impossible position: Canada’s attorney-general cannot be our justice minister,” *The Globe and Mail* (22 February 2019) O1, 2019 WLNR 5866240, online: <www.theglobeandmail.com/opinion/article-the-impossible-position-canadas-attorney-general-cannot-be-our/> [perma.cc/Z6E6-GD2N]. Instead, my focus is on an Attorney General and Minister of Justice who is also the Premier.

⁶ See Paul Romney, *Mr Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature, 1791-1899* (Toronto: The Osgoode Society, 1986) at 159–60:

Often the party leaders were lawyers, and it became the practice for the leader of the government party in each section of the province [Canada West and Canada East] to take the office of attorney general for that section. In Upper Canada the tradition continued even after Confederation in 1867. Between 1841 and 1899 there were only about six years in which the leading government politician in Upper Canada and Ontario was not the attorney general. . . . Though these developments were unexampled in the history of England and its empire, they were logical consequences of the province’s political history and social structure.

See also *ibid* at 169.

⁷ Bruce W Hodgins, “Macdonald, John Sandfield” (1972), online: *Dictionary of Canadian Biography*, vol 10, <www.biographi.ca/en/bio/macdonald_john_sandfield_10E.html> [perma.cc/838Z-77DG]: “the provisional lieutenant governor of Ontario, Sir Henry William Stisted, asked Sandfield Macdonald to become the first premier of Ontario. His coalition government was sworn in on 15 and 20 July 1867; besides the premier, who became attorney general, the cabinet contained another Baldwinite, a coalition Grit, and two Conservatives.”; Paul Romney, “Mowat, Sir Oliver” (1994) *Dictionary of Canadian Biography*, vol 13, <www.biographi.ca/en/bio/mowat_oliver_13E.html> [perma.cc/AZV4-K6KW]: “On 25 Oct. 1872, at the urging of [Edward] Blake, George Brown, and Alexander Mackenzie, Mowat became premier and attorney general of Ontario.”; Arthur David G Burley, “Hardy, Arthur Sturgis”, *Dictionary of Canadian Biography*, vol 13, <www.biographi.ca/en/bio/hardy_arthur_sturgis_13E.html> [perma.cc/7ZT7-FFWZ]: “When [Oliver] Mowat retired in 1896, [Arthur Sturgis] Hardy as the senior minister became the new premier and attorney general, on 21 July.”

⁸ Romney, *supra* note 6 at 160.

⁹ See e.g. Barry L Strayer, *Canada’s Constitutional Revolution* (Edmonton: University of

The springboard for my analysis is *Roncarelli v Duplessis*,¹⁰ by far the best-known case concerning the legality of the actions of such a Premier and Attorney General. *Roncarelli* is uniquely useful in the context of legal ethics and professionalism, as in the context of public law,¹¹ because Premier and Attorney General Maurice Duplessis was brazen in his actions and shockingly transparent about his motivations and considerations. The kinds of issues I raise in my analysis have almost certainly arisen for other Premiers who were also Attorneys General but remained hidden from public view and notoriety. It is the transparency in *Roncarelli* that not only makes the relevant issues concrete but brings them into stark relief.

The basic facts of *Roncarelli v Duplessis* are straightforward. Quebec Premier and Attorney General Duplessis, in overt retaliation for *Roncarelli* providing bail for many Jehovah's Witnesses, ordered the Liquor Commission to revoke (or confirmed its decision to revoke) the liquor license for *Roncarelli's* restaurant.¹² *Roncarelli's* action against Duplessis personally for damages was eventually successful. (While the events in *Roncarelli* pre-dated the more recent trend in which the Attorney General's law enforcement responsibilities are spun off to a separate Minister of Public Safety or Solicitor General, and Duplessis' purported power to order the commission to revoke the license is likely one that would rest with the Solicitor General today, my focus is on the Attorney General's core function

Alberta Press, 2013) at 8. Surprisingly, Premier and Attorney General E.C. Manning of Alberta was not a lawyer, a point to which I will return below. See below note 98 and accompanying text.

¹⁰ *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2d) 689 [*Roncarelli* cited to SCR]. That Duplessis was both Attorney General and Premier is mentioned in passing in Grant Huscroft, "The Attorney General and Charter Challenges to Legislation: Advocate or Adjudicator?" (1995) 5 NJCL 125 at 132, n 29 (now Justice Huscroft of the Court of Appeal for Ontario).

¹¹ And likewise in the tort of misfeasance in public office: Harry Wruck, "The Continuing Evolution of the Tort of Misfeasance in Public Office" (2008) 41:1 UBC L Rev 69 at 74:

This case was important in defining misfeasance in public office with some degree of specificity. It also demonstrated why the tort had fallen into disuse. In *Roncarelli*, Duplessis expressly admitted at trial that he was biased against Jehovah's Witnesses. In most cases it is extremely difficult to establish that a public official has acted with malice or for an improper purpose or in bad faith.

¹² *Roncarelli*, *supra* note 10 at 132–33. The direction and revocation occurred in late November and early December of 1946 (*ibid*).

to advise on the legality of such an action.) What makes the case unusual is that it was unnecessary to speculate about Duplessis' purpose and motivation in doing so, as he was remarkably frank.¹³

At the outset, I acknowledge that Premier Duplessis likely would have taken the same actions even if he had not also been Attorney General. He could have chosen a pliant or at least sympathetic Attorney General, or one that agreed that his actions were appropriate. He could have rejected the advice of the Attorney General—if he even sought that advice before acting—or even chosen a new Attorney General who would give him legal cover. As Cartier puts it, Duplessis' "concept of power was essentially based on the legitimacy of any action designed to preserve the culture and distinctiveness of the French-Canadian nation, using audacious means at times, often bordering on disdain for public institutions."¹⁴ Duplessis biographer Pierre Laporte was more dramatic: "Duplessis dominated his Ministers in every respect. . . . That one party member instead of another should hold a portfolio had little import. For Duplessis was the beginning and the end of everything. On certain questions that came under his authority he did not even consult them."¹⁵ In this context, a separate Attorney General would

¹³ *Ibid* at 133. See e.g. Lorne Sossin, "The Rule of Law and the Justiciability of Prerogative Powers: A Comment on *Black v. Chretien*" (2002) 47:2 McGill LJ 435 at 455 (now Justice Sossin of the Court of Appeal for Ontario): "It will be rare where evidence can be proffered that demonstrates decisionmakers acted in bad faith, or for ulterior or arbitrary motives. *Roncarelli*, where Premier Duplessis testified as to his ulterior motives, was surely exceptional in this regard."

¹⁴ Geneviève Cartier, "The Legacy of *Roncarelli v. Duplessis*: 1959-2009" (2010) 55:3 McGill LJ 375 at 389 [citation omitted] [Cartier, "Legacy"].

¹⁵ Pierre Laporte, *The True Face of Duplessis* (Montreal: Harvest House, 1960) at 67, originally published as Pierre Laporte, *Le vrai visage de Duplessis* (Montreal: Les Editions de l'Homme, 1960) at 65 («Monsieur Duplessis dominait complètement ses ministres. . . . Que tel député plutôt que tel autre soit titulaire d'un ministère, cela importait assez peu, car monsieur Duplessis était le commencement et la fin de tout. Sur certaines questions relevant de leur compétence il ne les consultait même pas.»). See similarly Leslie Roberts, *The Chief: A Political Biography of Maurice Duplessis* (Toronto: Irvin & Co, 1963) at 4-5:

Cabinet Ministers quickly learned to hold their tongues when confronted by decisions directly affecting their departments, on which they had not been consulted, or even informed about prior to public announcement from [Duplessis'] office. . . . He got away with it . . . partly because he surrounded himself with men who (with rare exceptions . . .) were more concerned with the spoils of office than with personal dignity.

presumably have little impact on Duplessis' decision-making. On the other hand, there is the romantic and idealistic possibility that a principled Attorney General would have advised against Duplessis' course of action or even resigned in protest.¹⁶

I also recognize that, from both a political science and an administrative law perspective, Duplessis' dual role *per se* represented a concentration of power in one individual. While that important issue is essential context for my analysis, my argument is that it is instead the concentration of functions in one person that is problematic from the perspective of legal ethics and professionalism. The same person is both legal advisor and ultimate decision-maker for the client.

This article is organized in four parts following this introduction. In Part II, I canvass the reasons in *Roncarelli* and the treatment of the case in the legal literature, primarily to demonstrate that the judges, subsequent commentators, and even Duplessis himself appeared to view his roles as Premier and Attorney General as fused. In Part III, I examine the professional and statutory duties of the Attorney General and demonstrate how being Premier confounds those duties. Then in Part IV I consider whether Duplessis' actions could and should have attracted professional discipline at the time, and whether similar actions might attract professional discipline today. In Part V, I illustrate other legal and practical consequences of being both Premier and Attorney General. I then reflect on the implications of my analysis in Part VI. I ultimately conclude that a lawyer cannot satisfy her professional obligations when acting as both Premier and Attorney General, and thus that such a dual role should be explicitly prohibited in legislation, the rules of professional conduct, or both.

Before continuing, I acknowledge that there may be obviously apparent benefits for the Premier to also be Attorney General. For example, a Premier

¹⁶ See Roberts, *supra* note 15 at 118: "after his early collisions with colleagues of character or strong conviction, he was at pains always to surround himself with pliant Ministers and to keep the instruments of power firmly in his own hands." See also Léon Dion, *Québec, 1945-2000*, vol 2: *Les intellectuels et le temps de Duplessis* (Québec: Presses de l'Université Laval, 1993) at 97: «À son double titre de premier ministre et de procureur général, Duplessis bafoue sans retenue les droits de la personne.» Consider here the recent failures of federal Minister of Justice and Attorney General Peter MacKay, as analyzed e.g. in Brent Cotter, "The Prime Minister v the Chief Justice of Canada: The Attorney General's Failure of Responsibility" (2015) 18 *Leg Ethics* 73 (now Senator Cotter).

may decide that the role of Attorney General is vital to fulfilling his policy agenda and absolute coordination between the two roles is desirable. A related potential benefit—at least to the Premier—and a rationale attributed to Duplessis by biographer Marguerite Paulin is to “consolidat[e] power.”¹⁷ Another reason applies if legal issues and interprovincial negotiations loom, as during times of constitutional negotiations.¹⁸ In such times, it may be strategically important for the Premier and Attorney General to indisputably speak with one voice. Another possibility, as when a Premier takes on any dual portfolio, is the desire to indicate to the public the importance of that other portfolio.¹⁹

These benefits, however, do not displace the harm: a Premier who is also Attorney General necessarily subordinates, indeed sacrifices, her professional obligations as a lawyer and thus violates the law of lawyering. This is not to say that the possibility of regulatory and disciplinary

¹⁷ Marguerite Paulin, *Maurice Duplessis: Powerbroker, Politician*, translated by Nora Alleyn (Montréal: XYZ Pub, 2005) at 168, 221, originally published in French as Marguerite Paulin, *Maurice Duplessis: le noblet, le petit roi* (Montréal: XYZ Pub, 2002) at 184 («Pour ce faire, Maurice Duplessis consolide son pouvoir: premier ministre du Québec, il assume avec poigne la fonction de procureur général en plus de diriger les relations intergouvernementales.» [English translation: “To do this, Maurice Duplessis consolidates his power: Premier of Quebec, he assumes with a heavy fist the function of Attorney General in addition to directing intergovernmental relations.”]) and at 236 («Le premier ministre Duplessis consolide son pouvoir en remplissant la fonction de procureur général et en dirigeant les relations intergouvernementales.» [English translation: “Premier Duplessis consolidates his power by fulfilling the function of Attorney General and directing intergovernmental relations.”])). As Paulin notes at 168 and 221, Duplessis also made himself minister for intergovernmental affairs. See also Dion, *supra* note 16 at 35: «Duplessis exerce lui-même le plus de pouvoirs possible. Quand il délègue, ce n’est que de façon conditionnelle. Premier ministre, il occupe en outre le poste de procureur général.» [English translation: “Duplessis himself exercises as much power as possible. When he delegates, it is only conditionally. As Premier, he also holds the post of Attorney General.”] See also William Kaplan, *The World War Two Ban on Jehovah’s Witnesses in Canada: A Study in the Development of Civil Rights* (SJD, Stanford University, 1998) at 412: “Duplessis ran the province in an authoritarian manner, but it was in his dual role as premier and attorney general that he stamped his pattern on the government.”

¹⁸ See above note 9 and accompanying text.

¹⁹ As I will discuss below, there is a legitimate concern that both portfolios cannot be adequately fulfilled. Indeed, it is quite possible if not likely that the “other” portfolio becomes neglected, an afterthought, or an empty gesture. See below note 55 and accompanying text.

consequences is the overriding reason, or even a main reason, that a lawyer should comply with her professional obligations. Neither is the ability of a lawyer to return to practice after concluding her life in politics. If nothing else, one might hope that the choice to knowingly violate the law could have political ramifications. I nonetheless maintain the idealistic hope that membership in a profession brings with it, at least sometimes, a commitment to meet the obligations that go along with that membership, in letter if not in spirit.²⁰

Indeed, it is for this reason—this temptation—that this cautionary tale remains relevant and necessary today even though no Premier has succumbed to this particular temptation for decades. Disuse, whether because of deliberate forbearance or because of chance, does nothing to prevent it from happening tomorrow. For the next Premier who asks why she should not make herself Attorney General, and is not persuaded merely because the practice has been abandoned in recent years, this article provides a substantive and principled answer, even if not a definitive one.

One final note is necessary before I begin my analysis. It can be dangerous, if not unfair, to judge lawyers—or others—in hindsight by present standards. My twin goal in this article is to demonstrate why the dual role of Premier and Attorney General was necessarily and incurably problematic at the time of the events in *Roncarelli* and why it remains so today. While the standards of the legal profession are more explicit and detailed now than they were then, at a fundamental level they are largely the same at their core. I will identify, where appropriate, not only the modern rules of professional conduct, as set out in the *Model Code* of the Federation of Law Societies of Canada and the *Quebec Code of Professional Conduct of Lawyers*,²¹ but also the rules applicable at the time of the events giving rise to the litigation in *Roncarelli*, as set out in the 1939 by-laws of the *Barreau de Québec*.²² (While

²⁰ See e.g. 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 37 [Martin, “Political Practices”].

²¹ Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2009, last amended 2019), online: *Federation of Law Societies of Canada* <www.flsc.ca> [perma.cc/N52S-TLDK] [FLSC Model Code]; *Code of Professional Conduct of Lawyers*, CQLR c B-1, r 3.1 [Quebec Code].

²² *Barreau de la Province de Québec, Lois et règlements (en vigueur le 1 Septembre 1939)* (Montréal: Thérien Frères Limitée, 1939) [1939 règlements], made pursuant to *Loi du Barreau*, RSQ 1925, c 210, s 8. While the 1939 by-laws were published in French only,

limited, the behaviours prohibited by these by-laws are explicitly not exhaustive.²³) I will also refer to relevant canons from the 1920 *Canons of Legal Ethics* of the Canadian Bar Association.²⁴ One major exception, however—a matter that was not regulated at the time of the events in *Roncarelli*—is competence. As Amy Salyzyn explains, until the 1970s it was unclear if competence was a basis for lawyer discipline.²⁵ Thus, my conclusions on Duplessis' competence should be read in this historical context.

II. *RONCARELLI V DUPLESSIS*: DUPLESSIS AS BOTH PREMIER AND ATTORNEY GENERAL

The reasons in *Roncarelli*, including references to Duplessis' own public statements, reveal that Duplessis himself blurred or fused the two roles of Premier and Attorney General, as well as the sets of powers accompanying those two roles. In his testimony, Duplessis sometimes stated that he was acting in his role as Prime Minister and Attorney General, while at other times stating that he was acting in his role as Attorney General. For example, he said both that «je considère que c'est mon devoir comme Procureur

I will provide translations where appropriate from the bilingual 1955 by-laws: Barreau de la Province de Québec, *Lois et règlements annotés | Statute and By-Laws Annotated* (Montréal: Le Barreau, 1955) [1955 règlements], made pursuant to *Loi du Barreau*, 2-3 Eliz II, ch 59, s 22.

²³ 1939 règlements, *supra* note 22 at 83, by-law 54 [emphasis added]: «Sont dérogatoires à l'honneur et à l'exercice de la profession, entre autre actes, les suivants.»

²⁴ Canadian Bar Association, “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] [CBA Canons], 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], reprinted in Alice Woolley et al, eds, *Lawyers' Ethics and Professional Regulation*, 3rd ed (Toronto: LexisNexis Canada, 2017) at 100–04. I note that the CBA Canons had no legal force in themselves, and that the original Discipline by-laws of the Barreau pre-dated the CBA Canons by approximately three years. See *Loi organique et règlements du Barreau de la province de Québec (Adoptés le 25 octobre 1917)* (Montreal: Eug Goblensky & Co, 1917) at 66, by-law 62 [on file with author].

²⁵ Amy Salyzyn, “From Colleague to Cop to Coach: Contemporary Regulation of Lawyer Competence” (2017) 95:2 Can Bar Rev 489 at 496.

Général et comme Premier Ministre en conscience dans l'exercice de mes fonctions officielles et pour remplir le mandat que le peuple m'avait confié et qu'il m'a renouvelé avec une immense majorité» and that he had given the order «moi-même, à titre de Procureur Général.»²⁶ Some of the judges also appeared to fuse the roles. For example, Rand J wrote that “it appears that the action taken by the . . . general manager and sole member of the [Liquor] Commission was dictated by Mr. Duplessis as Attorney-General and Prime Minister of the province.”²⁷ In contrast, Taschereau J in dissent held that «c'est le Procureur Général, agissant dans l'exercice de ses fonctions, qui a été requis de donner ses directives à une branche gouvernementale dont il est l'aviseur.»²⁸

The Supreme Court of Canada, in referring back to *Roncarelli*, sometimes recognizes Duplessis' dual role. For example, in the foundational case of *Nelles v Ontario*, McIntyre J noted that “Duplessis in the *Roncarelli* case purported to act not only as the Premier of Quebec but also as the Attorney General.”²⁹ In other cases, the Court refers only to his role as Attorney General – perhaps revealingly, as did LeBel J for the Court in *McCulloch Finney c Barreau (Québec)*.³⁰

The plentiful and rich literature on *Roncarelli* tends to blur or at least de-emphasize Duplessis' dual roles as Premier and Attorney General. For example, in his 1974 discussion of judicial review, Peter Hogg refers to Duplessis as merely the Premier and does not mention that he was also the Attorney General.³¹ One of the few commentators who specifically and explicitly acknowledges the ways in which that dual role was problematic is

²⁶ *Roncarelli*, *supra* note 10 at 134, 135 [English translation: “I consider that it is my duty as both the Premier and as the Attorney General in conscientiously carrying out my official functions and to fulfill the mandate given to me by the people, and which they renewed with a large majority.”; “myself, by virtue of my role as Attorney General.”].

²⁷ *Ibid* at 133.

²⁸ *Ibid* at 130 [English translation: “It is the Attorney General, carrying out his official functions, who is empowered to give directions to a branch of the government with respect to which he is an advisor.”].

²⁹ *Nelles v Ontario*, [1989] 2 SCR 170 at 210, 60 DLR (4th) 609.

³⁰ *McCulloch Finney c Barreau (Québec)*, 2004 SCC 36 at para 39 [Finney].

³¹ PW Hogg, “Judicial Review: How Much Do We Need?” (1974) 20:2 McGill LJ 157 at 165. See similarly Geneviève Cartier, “Administrative Discretion and the Spirit of Legality: From Theory to Practice” (2009) 24:3 Can JL & Soc'y 313 at 315–17.

Mary Liston.³² Liston does so, albeit in passing, in the midst of an analysis of arbitrariness in the administrative law context:

[T]he effects of his [Duplessis'] arbitrary actions were further exacerbated by the overlapping sources of power stemming from his two executive functions: the political role of prime minister and the advisory legal role of Attorney General. This blending of functions recalls Montesquieu's most famous institutional remedy for the risks of arbitrariness: to separate and distribute power among several institutions and corresponding persons so that no institution or official possesses an effective monopoly or stranglehold.³³

Liston also appears to be alone in explicitly noting that Duplessis' actions and the consequences of those actions were "a disturbing result from a man trained as a lawyer."³⁴

III. INHERENT PROBLEMS FOR THE PROFESSIONAL AND STATUTORY DUTIES OF THE ATTORNEY GENERAL

In this Part, I explain the specific problems posed by the dual role of Attorney General and Premier for the professional duties of all lawyers and the statutory duty unique to the Attorney General. As I will demonstrate, the core problem is that the Attorney General must candidly advise herself as Premier, which advice may well include dissuading herself from an unlawful course of action. She must also distinguish her actions and decisions in both roles—not only to others but even in her own mind—and possibly even resign as Attorney General because of her own decisions as Premier. She must also resist the temptation to prioritize her own personal and political interests as Premier, and the instructions she as Premier gives herself as Attorney General, over her duties to the Crown as the client.

To understand why the same person should not be both Attorney General and Premier, one must recognize that the Attorney General shares the professional duties of all lawyers but is also burdened with a unique duty imposed by statute.

Like all lawyers, the Attorney General owes the client a duty of loyalty, which includes component duties of candour, commitment, confidentiality,

³² Mary Liston, "Witnessing Arbitrariness: *Roncarelli v. Duplessis* Fifty Years On" (2010) 55 McGill LJ 689.

³³ *Ibid* at 696.

³⁴ *Ibid* at 695.

and avoidance of conflicts,³⁵ as well as a duty of competence.³⁶ Recall that, under the rules of professional conduct, a lawyer in public office is purportedly held to the same standards as a lawyer in private practice.³⁷

Alone among lawyers, the Attorney General has a positive duty to see that his client—the government—acts lawfully.³⁸ This statutory duty is far from a recent creation. Not only did this duty exist at the time of the events in *Roncarelli*;³⁹ counsel for Duplessis indeed relied on this provision, among others, to characterize his actions as being “justifiable as having been done in good faith in the exercise of his official function as Attorney-General and Prime Minister.”⁴⁰ At the same time, the related concept of the Attorney General as “Guardian of the Rule of Law”⁴¹ is a more recently articulated and recognized one to which arguably Duplessis should not be retroactively held.

An Attorney General who is also Premier will necessarily and unavoidably have difficulties fulfilling these professional duties and this statutory duty because she is one person performing both roles simultaneously. The six key professional duties are candour, independence from the client, protection of the interests of the organizational client,

³⁵ See e.g. *R v Neil*, 2002 SCC 70 at para 19. See also e.g. *FLSC Model Code*, *supra* note 21, rr 3.2–2 (candour), 3.4–1 (conflicts), 3.4–1 commentary 5 (commitment, etc.). See also *Quebec Code*, *supra* note 21, ss 20 (confidentiality), 37 (candour), 71 (conflicts). See also *CBA Canons*, *supra* note 24, 3.1 (candour), 3.2 (conflicts).

³⁶ *FLSC Model Code*, *supra* note 21, r 3.1–2; *Quebec Code*, *supra* note 21, ss 20, 21. But see above note 25 and accompanying text.

³⁷ *FLSC Model Code*, *supra* note 21, r 7.4–1. I say purportedly because the interpretation and application of this rule has been uneven. See Martin, “Political Practices”, *supra* note 20 at 11–16. See also *Quebec Code*, *supra* note 21, s 78, specifically on conflicts of interest for lawyers in public office.

³⁸ See e.g. *Act respecting the Ministère de la Justice*, CQLR c M-19, s 3: “The Minister . . . sees that the administration of public affairs is in accordance with the law.”

³⁹ *An Act Respecting the Department of the Attorney General*, RSQ 1941, c 46, s 4: “The duties of the Attorney-General are the following: . . . To see that the administration of public affairs is in accordance with the law”. Note that unlike the 1941 version of this statute, the modern version separates the duties of the Attorney General from those of the Minister of Justice and assigns this duty to the latter; CQLR c M-19, *supra* note 38, s 33.

⁴⁰ *Roncarelli*, *supra* note 10 at 153.

⁴¹ See e.g. Kent Roach, “Not Just the Government’s Lawyer: The Attorney General as Defender of the Rule of Law” (2006) 31:2 *Queen’s LJ* 598.

maintenance of the distinction between the lawyer role and the non-lawyer role, withdrawal, and competence. In the specific context of an Attorney General who is also Premier, many of these duties and the barriers to fulfilling them are closely intertwined.

Among the professional duties of all lawyers, that most in peril when the Premier is her own Attorney General would seem to be candour – closely connected with the unique statutory duty to see that public affairs are conducted lawfully. Can a Premier truly be candid with herself that her proposed course of action is unlawful? Indeed, the rules of professional conduct emphasize that candour may require “firmness” that “will not please the client”:

Occasionally, a lawyer must be firm with a client. Firmness, without rudeness, is not a violation of the rule. In communicating with the client, the lawyer may disagree with the client’s perspective, or may have concerns about the client’s position on a matter, and may give advice that will not please the client. This may legitimately require firm and animated discussion with the client.⁴²

It seems unlikely that an Attorney General as lawyer can be adequately firm and displeasing in “animated discussion” with herself as Premier as required by this rule.⁴³ For example, if nothing else, can the Attorney General adequately caution herself as Premier against making politically expedient but legally problematic public statements?⁴⁴ It seems unlikely.

A second professional duty that is imperilled is the duty to maintain independence from the client. It is worth emphasizing that an Attorney General and Premier may be particularly tempted to fulfill and even exceed her professional duties to the client at the expense of her duties to the administration of justice. The rules of professional conduct explicitly recognize that a lawyer who concurrently serves in a non-legal role must carefully protect her “integrity” and “independence.”⁴⁵ Can an Attorney

⁴² *FLSC Model Code*, *supra* note 21, r 3.2-2, commentary 3.

⁴³ *Ibid*, r 3.2-2, commentary 3.

⁴⁴ See e.g. Bernard Saint-Aubin, *Duplessis et son époque* (Montréal: La Presse, 1979) at 251: «il tombe sous le sens que sans les déclarations publiques de Duplessis, il n’aurait jamais été condamné à verser des dommages intérêts. Sur le plan juridique, il a commis une erreur grave. Par contre, sur le plan politique, il en a tiré des avantages immenses.» [English translation: “It seems logical that without Duplessis’s public statements, he would never have been ordered to pay damages. Legally, he made a serious mistake. On the other hand, on the political level, he derived immense advantages from it.”]

⁴⁵ *FLSC Model Code*, *supra* note 21, r 7.3-1. This rule also mentions “competence.”

General avoid being the mouthpiece of the client when she shares with the Premier a single mouth?⁴⁶ Again, that seems unlikely – if not impossible. Indeed, the danger of client capture for in-house or government lawyers seems strongest here – in a similar way as if the CEO of an organization was also its chief legal counsel. Recall, however, that such a corporate officer is fundamentally different from a Premier who is Attorney General given that the corporate officer lacks the Attorney General’s unique positive duty to ensure lawfulness. It seems unlikely that the Premier can meaningfully restrain herself from that course of action.

Similarly, a third professional duty that is necessarily problematic is the duty to act in the best interests of the organizational client, i.e. the Crown. Recall that where a lawyer represents an organizational client, she must act in the best interests of the organization and not the person from whom she takes instructions.⁴⁷ A Premier acting as Attorney General may be tempted to favour her own personal and political interests—both her personal political prospects and her vision for the province—over the legal interests of the government. Indeed, there is potential for a conflict of interest for a lawyer who holds both roles simultaneously.⁴⁸ While I recognize that lawyers

⁴⁶ See e.g. *Goodman v Rossi* (1994), 21 OR (3d) 112 at 132, 120 DLR (4th) 557 (Div Ct), rev’d on other grounds (1995), 24 OR (3d) 359, 125 DLR (4th) 613 (CA):

More and more we read and hear about the practice of law becoming the business of law; the diminution of the nobility of the profession; the surfacing of a new breed of lawyers who have cast aside the attributes of independence and responsibility to become little more than mouthpieces for their clients.

See more recently, albeit in the criminal context, *R v Samra* (1998), 41 OR (3d) 434 at 446, 129 CCC (3d) 144 (CA): “There is an erroneous premise underlying the appellant’s submissions in this case – that defence counsel is but a mouthpiece for his client.”

⁴⁷ *FLSC Model Code*, *supra* note 21, r 3.2-3: “Although 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 commentary 1.

⁴⁸ *Ibid*, r 7.3-1, commentary 1: “A lawyer must not carry on, manage or be involved in any outside interest in such a way that makes it difficult to distinguish in which capacity the lawyer is acting in a particular transaction, or that would give rise to a conflict of interest or duty to a client.” See also commentary 2: “When acting or dealing in respect of a transaction involving an outside interest, the lawyer should be mindful of potential conflicts and the applicable standards referred to in the conflicts rule and disclose any

can act despite a conflict of interest if the client gives “express,” “informed,” and “voluntary” consent,⁴⁹ given the Premier’s unfettered (and undisplaced) prerogative discretion to choose her cabinet, including the Attorney General,⁵⁰ it seems unrealistic that the Premier would seek such consent or that Cabinet would deny it if sought.

A related fourth concern is whether such a person can maintain the distinction between the two roles. The rules of professional conduct also caution that “a lawyer must not carry on, manage or be involved in any outside interest in such a way that makes it difficult to distinguish in which capacity the lawyer is acting in a particular transaction.”⁵¹ Where the Premier is Attorney General, it may not be clear—for example, to members of his Cabinet or to bureaucrats—in which capacity she is instructing them. Are her statements policy advice (or direction), or legal advice? Ministers and others might reasonably assume that her instructions are both orders from the Premier and an assurance from the Attorney General that such orders are lawful. As I will return to below, aside from any regulatory consequences for the lawyer, uncertainty over which role is being exercised can jeopardize the client’s interests via the applicability of the legal protection of solicitor-client privilege.⁵²

A related fifth professional duty is the duty to withdraw. A Premier and Attorney General is at heightened risk of violating the lawyer’s duty to withdraw when “a client persists in instructing the lawyer to act contrary to professional ethics.”⁵³ The risks would be either that the Attorney General

personal interest.”

⁴⁹ *Ibid*, r 3.4-2(a). The conditions in r 3.4-2(b) allowing implied consent would not apply, even though the client is a government.

⁵⁰ See e.g. *Askin v Law Society of British Columbia*, 2013 BCCA 233 at para 31, aff’d 2012 BCSC 895 at paras 29-30, leave to appeal to SCC refused, 35463 (7 November 2013).

⁵¹ *FLSC Model Code*, *supra* note 21, r 7.3-1, commentary 1. See also *Quebec Code*, *supra* note 21, s 11(2): “When a lawyer engages in activities which do not relate to the profession of lawyer, in particular in connection with a job, a function, an office or the operation of an enterprise: . . . he must avoid creating or allowing any ambiguity to persist as to the capacity in which he is acting.”

⁵² See below note 90 and accompanying text.

⁵³ *FLSC Model Code*, *supra* note 21, r 3.7-7. See also *Quebec Code*, *supra* note 21, s 49(2): “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.”

would not recognize that she was instructing herself to violate her professional obligations, or that she would be unwilling to act on that recognition. Theoretically a Premier who was also Attorney General could resign as Attorney General while remaining Premier – but that incredible scenario would unavoidably generate speculation about the reason for resignation and cast doubt on her actions and decisions as Premier.

As a more practical matter, the roles of Premier and of Attorney General are demanding ones. It is legitimate to question whether one person can adequately fulfill both roles simultaneously, and more specifically maintaining her competence as a lawyer. Indeed, while this may first appear to be a practical issue instead of an ethical issue, it is the substantial risk of diminished competence that is the inflection point at which the practical issue transforms into an ethical issue. On one level this is an issue of whether two major portfolios can be adequately managed by one person – and though increased delegation may appear to make the dual role manageable, there are limits to which a lawyer can delegate her professional functions and responsibilities.⁵⁴ More particularly, an Attorney General who is also Premier may not be able to remain competent as a lawyer, and provide competent and adequate service to the client, given the other demands on her time. The rules of professional conduct caution against such dual roles: “A lawyer who engages in another profession, business or occupation concurrently with the practice of law must not allow such outside interest to jeopardize the lawyer’s professional integrity, independence or competence.”⁵⁵ To the extent that such a Premier and Attorney General purports to fulfill her responsibilities as chief law officer of the Crown through delegation, such success is illusory and is in reality an abdication of her role.⁵⁶ The more any lawyer delegates, and the less time they dedicate to their practice personally, the more risk they incur. This is not to suggest that some Attorneys General who are not Premiers do not

⁵⁴ Recall *FLSC Model Code*, *supra* note 21, r 6.1-1: “A lawyer has complete professional responsibility for all business entrusted to him or her.”

⁵⁵ *FLSC Model Code*, *supra* note 21, r 7.3-1. See also *Quebec Code*, *supra* note 21, s 11(1): “When a lawyer engages in activities which do not relate to the profession of lawyer, in particular in connection with a job, a function, an office or the operation of an enterprise: . . . he must ensure that those activities do not compromise his compliance with this code.”

⁵⁶ See below notes 92 to 93 and accompanying text.

also function as figureheads or rubber stamps – merely that the likelihood of this happening increases exponentially when that Attorney General is also Premier, just as the risks increase and the likelihood of avoiding negative outcomes decreases.

For these reasons, a Premier who appoints herself Attorney General is at a special risk of contravening not only her professional duties as a lawyer but also her unique statutory duty as Attorney General.

I turn next to the potential role of discipline given that several of these rules may have been violated on the facts of *Roncarelli*. In particular, I use the facts to demonstrate that where a Premier who is Attorney General acts in a way that is clearly unlawful, she will either be committing professional misconduct (by violating her duties of competence or of candour in her capacity as Attorney General) or conduct unbecoming (by acting contrary to the legal advice given by herself as Attorney General to herself as Premier).

IV. THE DISCIPLINE QUESTION

Here I consider the appropriate role of the Barreau as regulator in the *Roncarelli* saga. While discipline is only one function of law societies, and disciplinary proceedings are only one regulatory tool to fulfill their mandate, I focus on whether Duplessis could and should be disciplined – both under the law at the time and under the law today. I emphasize before doing so that discipline is not the exhaustive purpose of the rules of professional conduct. Lawyers should fulfill their duties and comply with the rules in letter and in spirit,⁵⁷ and not solely in order to avoid investigation and discipline from the regulator. While the rules of professional conduct themselves acknowledge that some of their imperatives are “aspirational,”⁵⁸ that acknowledgement is not an excuse for non-compliance. The rules engaged where a Premier is also Attorney General are anything but aspirational.

⁵⁷ See e.g. *FLSC Model Code*, *supra* note 21, r 3.1-1, definition of “competent lawyer”: “(g) complying in letter and spirit with all rules pertaining to the appropriate professional conduct of lawyers.”

⁵⁸ *Ibid*, preface at 6: “Some sections of the Code are of more general application, and some sections, in addition to providing ethical guidance, may be read as aspirational.”

I recognize at the outset that given Duplessis' political power, it seems impossible that the Barreau would have seriously considered pursuing disciplinary action against him. (I am aware of no indication that Roncarelli made, or considered making, a complaint to the Barreau.) If the situation were to occur today, I hope and expect the result might be different. But disregarding the "would" question, I will focus instead on the "could" and "should" questions.

The first "could" question is whether Duplessis' actions were in violation of his professional duties as a lawyer, constituting either professional misconduct or conduct unbecoming. I first consider professional misconduct, which requires "a marked departure from the conduct expected of lawyers."⁵⁹ Duplessis could potentially have violated any of the rules I discussed in the previous part, and I will not repeat them all here. However, given how he publicly appeared to fuse his roles and powers as Premier and Attorney General,⁶⁰ the rules about outside interests and conflicts of interest would appear to be particularly relevant on the facts. Although the duty of candour seems most relevant in the general situation of a Premier who is also Attorney General, on the specific facts of *Roncarelli* the duty of competence seems equally relevant – with the caveat above that competence may not have been an appropriate inquiry for the Barreau at the time.⁶¹ To the extent that *Roncarelli* arguably changed the state of the law or established new law on arbitrariness and discretion, it would seem unwise and unfair to allege that Duplessis, insofar as he advised himself or the Commissioner that the revocation was lawful, failed to fulfill his duty of competence.

However, there are strong indications that Duplessis, as a lawyer, knew or should have known that the proposed course of action was unlawful. Rand J made this assertion:

The office of Attorney-General traditionally and by statute carries duties that relate to advising the Executive, including here, administrative bodies, enforcing the public law and directing the administration of justice. In any decision of the statutory body in this case, he [Duplessis] had no part to play beyond giving advice on legal questions arising. In that role his action should have been limited to advice

⁵⁹ *Strother v Law Society of British Columbia*, 2018 BCCA 481 at para 64 [citations omitted].

⁶⁰ See above note 26 and accompanying text.

⁶¹ See above note 25 and accompanying text.

on the validity of a revocation for such a reason or purpose and what that advice should have been does not seem to me to admit of any doubt.⁶²

Similarly, Abbott J held that:

I have no doubt ... that respondent knew and was bound to know as Attorney-General that neither as Premier of the province nor as Attorney-General was he authorized in law to interfere with the administration of the Quebec Liquor Commission or to give an order or an authorization to any officer of that body to exercise a discretionary authority entrusted to such officer by the statute.⁶³

And while Martland J did not explicitly hold that Duplessis should have known that his actions were unlawful, he noted that Duplessis' purported power to intervene was "a very dangerous proposition and one which is completely alien to the legal concepts applicable to the administration of public office in Quebec, as well as in the other provinces of Canada" – which suggests that a competent lawyer would and should have known.⁶⁴

The literature is equally emphatic in this respect. Duplessis biographer Leslie Roberts, writing in 1960 concerning Duplessis' prosecutions of Jehovah's Witnesses, observed that "he must have been fully aware that the ultimate judgment was bound to go against him. He was too good a lawyer, as were the Law Officers of the Crown who surrounded him in the Attorney-General's office, not to have known."⁶⁵ Likewise, legal historian William Kaplan echoes Roberts, at least in regard to the appeals, writing that "Duplessis was a good enough lawyer to know that he would lose this legal battle in the end."⁶⁶ Though admittedly in hindsight, Mark Aranson more recently writes that "even a cub lawyer should" have known Duplessis' conduct was unlawful.⁶⁷ On the other hand, the decision of the Supreme Court of Canada was not unanimous.

Assuming that *Roncarelli* was correctly decided⁶⁸—and more importantly, that the Barreau would accept that it was correctly decided or at least the

⁶² *Roncarelli*, *supra* note 10 at 142 [emphasis added].

⁶³ *Ibid* at 185 [emphasis added].

⁶⁴ *Ibid* at 155 [emphasis added].

⁶⁵ Roberts, *supra* note 15 at 126.

⁶⁶ Kaplan, *supra* note 17 at 444, citing Roberts, *supra* note 15 at 126–27.

⁶⁷ Mark Aranson, "Some Australian Reflections on *Roncarelli v. Duplessis*" (2010) 55 McGill LJ 615 at 637–38 (quotation is from 637).

⁶⁸ In contrast, Roderick MacDonald has argued that the decision of the Supreme Court of Canada could and might have been different: Roderick A MacDonald, "Was

nature of Duplessis' conduct was *res judicata*, and would inquire into competence—these assertions are ones that a disciplinary panel would no doubt examine closely and weigh heavily in its own determinations on professional misconduct. However, to the extent that these assertions are exaggerated or unfounded, Duplessis or a lawyer in a similar position would have a credible argument that there was no misconduct. Indeed, recall that Duplessis claimed that it was his duty to take the actions he did.⁶⁹

One would expect, and a court on judicial review would demand, that the Barreau would consider qualified expert evidence about whether Duplessis truly should have known that the course of conduct was unlawful. If he should not have known, there would be no misconduct.

Assuming that Duplessis knew or should have known that the conduct was unlawful, it would seem that he as Attorney General necessarily violated either his duty of competence or of candour. If he believed the course of action was lawful, the violation would be of competence. In contrast, if he believed that the course of action was unlawful, the potential violation becomes candour. However, he could conceivably argue that as Attorney General he instructed himself as Premier that the course of action would be unlawful, and as Premier decided to follow that course despite that advice. (Indeed, a prudent and clever lawyer in such a situation might even diarize this formalistic distinction by authoring two memos – one memo from herself as Attorney General to herself as Premier advising that the proposed course of action was unlawful, and another memo from herself as Premier to herself as Attorney General indicating that she was proceeding despite that legal advice.) Such a claim could, however, merely transform his actions from potential professional misconduct into potential conduct unbecoming.

Aside from disciplinary liability for professional misconduct in his practicing role as Attorney General, Duplessis potentially attracted disciplinary liability for conduct unbecoming in his role as Premier. As Gavin MacKenzie puts it, conduct unbecoming is conduct that “tend[s] to bring discredit upon the legal profession or the administration of justice.”⁷⁰

Duplessis Right?” (2010) 55 McGill LJ 401.

⁶⁹ See above note 26 and accompanying text.

⁷⁰ Gavin MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Toronto: Thomson Reuters Canada, 1993) (loose-leaf updated 2021, release 1) at Ch 26, 26.8. While MacKenzie refers here to “lawyers’ personal or private conduct,” there is clear

For a lawyer in public office, even in a non-practicing role such as Premier, to disregard advice that his proposed actions would be unlawful—especially when he as Attorney General has provided that advice to himself as Premier—risks discrediting the legal profession. Indeed, serious unlawful acts by any lawyer, even outside practice, would appear to do so. For example, while “most conduct unbecoming complaints involve convictions for criminal offences,” and “historically, only convictions for criminal offences involving moral turpitude were considered to bring discredit upon the profession,”⁷¹ there can be a finding of conduct unbecoming even where the lawyer was acquitted of criminal charges related to the same conduct.⁷² Thus, the actions of Duplessis as Premier in *Roncarelli* would almost certainly qualify as conduct unbecoming.

Biographer Conrad Black nonetheless asserts that Duplessis was cognizant of his professional obligations, at least to the administration of justice: “Duplessis himself was very disappointed at the verdict but responded as a loyal member of the bar to the judgement of the Supreme Court. . . . [he] had responded unrancorously to the final judgment.”⁷³ Thus, insofar as Black’s characterization is correct—despite, for example, Cartier’s

precedent that conduct lawyers in public office, outside the practice of law, can constitute conduct unbecoming. See *Nova Scotia Barristers’ Society v Morgan*, 2010 NSBS 1 [Morgan]:

Mr. Morgan made the comments which are the subject of this Complaint in his capacity as Mayor of Cape Breton Regional Municipality and at no time did he state or was he retained to act as a lawyer for and on behalf of the Municipality in the case giving rise to Mr. Justice Murphy’s decision. Therefore Mr. Morgan made the comments described in the Complaint in his “personal or private capacity” . . . rather than in a “lawyer’s professional capacity.”

See also e.g. *Law Society of Upper Canada v Jackson*, 2017 ONLSTH 64 at para 17 [Jackson]: “Conduct unbecoming a barrister or solicitor is conduct, including in a lawyer’s personal or private capacity, that tends to bring discredit upon the legal profession.”

⁷¹ MacKenzie, *supra* note 70 at Ch 26, 26.8.

⁷² See e.g. *Jackson*, *supra* note 70 at paras 15–17.

⁷³ Conrad Black, *Duplessis* (Toronto: McClelland & Stewart, 1977) at 389–90. This mention of Duplessis as a lawyer is largely omitted in Black’s subsequent revised version: Conrad Black, *Render Unto Caesar: The Life and Legacy of Maurice Duplessis*, rev ed (Toronto: Key Porter, 1998) at 286–87. See also *CBA Canons*, *supra* note 24, 2.1: “He should maintain towards the Judges of the Courts a courteous and respectful attitude and insist on similar conduct on the part of his client.”

characterization that Duplessis “disdai[ned] . . . public institutions”⁷⁴—and would be shared by the Barreau, Duplessis would not face additional disciplinary liability for his public reaction to the Court’s decision.⁷⁵

Insofar as “good faith is not a defence to a charge of conduct unbecoming,”⁷⁶ whether Duplessis was truly acting in good faith as he claimed would instead be a relevant factor for the determination of any disciplinary penalty imposed for professional misconduct or conduct unbecoming.⁷⁷ As Rand J noted, Duplessis “felt that action [the license revocation] to be his duty, something which his conscience demanded of him.”⁷⁸ Recall also Duplessis’ testimony: «je considère que c’est mon devoir comme Procureur Général et comme Premier Ministre en conscience dans

⁷⁴ Cartier, “Legacy”, *supra* note 14 at 389 [citation omitted]; See also above note 14 and accompanying text.

⁷⁵ *FLSC Model Code*, *supra* note 21, r 5.6-1: “A lawyer must encourage public respect for and try to improve the administration of justice.” See also *CBA Canons*, *supra* note 24, 2.1: “He should maintain towards the Judges of the Courts a courteous and respectful attitude.” See also 1939 *règlements*, *supra* note 22 at 83, by-law 54: «Sont dérogatoires à l’honneur et à l’exercice de la profession, entre autre actes, les suivants: . . . 6. Manquer, dans sa conduite ou par ses paroles, au respect dû aux tribunaux et au Barreau.» [English translation: “The following are derogations from the honor and exercise of the profession, among other acts: . . . 6. Fail, in his conduct or in his words, with respect due to the courts and to the Bar.”] See also 1955 *règlements*, *supra* note 22 at 68, by-law 66: “33. Shows lack of proper respect for the Court or Bar by word, deed or appearance.” Contrast for example *Morgan*, *supra* note 70, as discussed e.g. in Martin, “Political Practices”, *supra* note 20 at 11-12, where Cape Breton mayor and Nova Scotia lawyer John Morgan reacted to an adverse court decision by publicly accusing his province’s entire bench of political bias.

⁷⁶ *Hesje v Law Society of Saskatchewan*, 2015 SKCA 2 at paras 93-94 (quotation is from para 93), applying *Law Society of Saskatchewan v Merchant*, 2009 SKCA 33, leave to appeal to SCC refused, 33156 (23 July 2009). Contrast *Law Society of Upper Canada v Carey*, 2017 ONLSTH 25 at para 63, *aff’d* 2018 ONLSTA 4: good faith can be a defence to a charge of professional misconduct.

⁷⁷ For the factors going to penalty, see e.g. *Faminoff v The Law Society of British Columbia*, 2017 BCCA 373 at para 36. For absence of bad faith as a mitigating factor, see e.g. *Law Society of Upper Canada v Edward Emil Patrick Iglar*, 2004 ONLSAP 7 at para 55; *Law Society of Upper Canada v Richard Keith Watson*, 2008 ONLSHP 59 at para 15.

⁷⁸ *Roncarelli*, *supra* note 10 at 133 [English translation: “I consider that it is my duty as both the Premier and as the Attorney General in conscientiously carrying out my official functions and to fulfill the mandate given to me by the people, and which they renewed with a large majority.”].

l'exercice de mes fonctions officielles et pour remplir le mandat que le peuple m'avait confié et qu'il m'a renouvelé avec une immense majorité.»⁷⁹ Justice Rand nevertheless characterized the conduct as “malicious.”⁸⁰ (Aronson argues that “the Attorney General’s malice consisted only of honest yet egregious ingredients. . . . hubris or stupidity.”⁸¹) Similarly, in the 2004 case of *Finney*, LeBel J for the Supreme Court of Canada referred to Duplessis’s conduct as Attorney General as “a classic example” of “intentional fault.”⁸² While *Finney* was about the civil liability of the Barreau and was not a disciplinary matter, this characterization nonetheless suggests that—at least if the facts of *Roncarelli* were to occur now—a disciplinary panel would likely reject any claim of good faith as a mitigating factor.

The necessary second “could” question, however, is whether the Barreau had at the time, or would have today, jurisdiction over Duplessis. Not long after the *Roncarelli* saga, the Quebec Court of Appeal in 1967 held in *Barreau c Wagner* that the Attorney General cannot be disciplined for conduct in the exercise of his duties of office.⁸³ While I have argued elsewhere that this holding may have been incorrect at the time and should no longer be considered good law,⁸⁴ one would assume there is a decent chance that the same law would have been applied to Duplessis. The question would then become whether Duplessis’ actions were beyond the scope of his duties, which was the position of the majority in *Roncarelli*,⁸⁵ which would vitiate the immunity recognized in *Wagner*.

That brings me to the “should” question: should the Barreau have disciplined Duplessis? The starting point for answering this question is that,

⁷⁹ *Ibid* at 134.

⁸⁰ *Ibid* at 141.

⁸¹ Aronson, *supra* note 67 at 637. See also *ibid* at 634: “His illegality may have been neither intentional nor subjectively reckless, but the illegality was both so obvious and so outrageous that it was inexcusable in a prime minister and Attorney General.”

⁸² *Finney*, *supra* note 30 at para 39.

⁸³ *Barreau (Montréal) c Wagner* (1967), [1968] BR 235 at 235, 1967 CarswellQue 253 (CA) [*Wagner*], discussed in Andrew Flavelle Martin, “The Immunity of the Attorney General to Law Society Discipline” (2016) 94:2 Can Bar Rev 413 at 422–24.

⁸⁴ *Ibid* at 422–24.

⁸⁵ See *Roncarelli*, *supra* note 10 at 141, Rand J: “To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred.”

as Gavin MacKenzie puts it, “[t]he purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.”⁸⁶ I recognize that the regulation of extraprofessional conduct is largely considered, at least in the literature, to be a distraction from the core protective functions of a law society.⁸⁷ However, to characterize Duplessis’ conduct as extraprofessional would require disaggregating his role and actions as Premier from those as Attorney General, which, as described above, both Duplessis and Rand J seemed to fuse.⁸⁸ Regardless, the consequences of Duplessis’ actions were so severe, the denunciation of the majority of the Supreme Court of Canada so emphatic, and the resultant media attention and public awareness so widespread (at least in Quebec),⁸⁹ that it is difficult to see how an ideal and effective legal regulator could disregard the matter.

V. OTHER LEGAL AND PRACTICAL CONSEQUENCES

The choice to serve as both Premier and Attorney General has other important legal and practical consequences that are worth emphasizing.

An important legal consequence for the client of the dual role is that communications may lose the protection of solicitor-client privilege if it is unclear whether they were made in the role as Premier or the role as Attorney General.⁹⁰ This impact is less important as a practical matter

⁸⁶ MacKenzie, *supra* note 70 at Ch 26, 26.1.

⁸⁷ See e.g. Andrew Flavelle Martin, “The Limits of Professional Regulation in Canada: Law Societies and Non-Practising Lawyers” (2016) 19:1 Legal Ethics 169 at 172, quoting Adam Dodek.

⁸⁸ See above notes 26 to 27 and accompanying text.

⁸⁹ See Eric M Adams, “Building a Law of Human Rights: *Roncarelli v. Duplessis* in Canadian Constitutional Culture” (2010) 55 McGill LJ 437 at 451–53.

⁹⁰ See e.g. Adam M Dodek, *Solicitor-Client Privilege* (Toronto: LexisNexis Canada, 2014) at para 4.114: “There are many lawyers who serve in elected and appointed positions. With the exceptions of Attorneys General, they are clearly not acting in their capacity as professional legal advisers and communications with them will not be privileged.” See also *FLSC Model Code*, *supra* note 21, r 7.3–1, commentary 1: “A lawyer must not carry on, manage or be involved in any outside interest in such a way that makes it difficult to distinguish in which capacity the lawyer is acting in a particular transaction.”

insofar as many such communications would qualify as protected cabinet confidences.⁹¹

An important practical consequence involves the Deputy Attorney General. The Deputy plays an important role that is nonetheless largely overlooked in the legal literature.⁹² It seems likely that, where a Premier nominally appoints herself as Attorney General, she would be more reliant on the Deputy Attorney General—and via the Deputy, the government lawyers of the bureaucracy—than she otherwise would be. Indeed, it may be that in such a situation, the Deputy Attorney General essentially fulfills the role normally played by a separate Attorney General, though without sitting in the Cabinet – an acting Attorney General in all but title, political power, and democratic legitimacy. Moreover, where the roles of Premier and Attorney General are held by the same person, there would remain two separate bureaucratic departments advising that person, one (Cabinet Office or Privy Council Office) in her capacity as Premier and one (Justice or Attorney General) in her capacity as Attorney General. As always, a Minister is entitled to decline to follow the advice of the bureaucracy, but the advice will still be provided.

Nonetheless, even where the Deputy Attorney General is the Attorney General in all but title, an Attorney General in name only still holds herself out as practicing law and thus her conduct is doubtlessly within the appropriate jurisdiction of the law society. Put another way, it will be no defence against law society discipline for the Attorney General to claim that she had delegated all her functions to the Deputy Attorney General and in so doing delegated professional responsibility as well.⁹³

An additional complication when the same person is both Premier and Attorney General is the virtual negation of the ability for the Attorney General to use resignation as a principled means of disassociating himself

⁹¹ See e.g. Yan Campagnolo, *Le secret ministériel: théorie et pratique* (Quebec: Presses de l'Université Laval, 2020); Yan Campagnolo, "Cabinet Secrecy in Canada" (2019) 12:3 JPPL 583; Yan Campagnolo, "Rethinking Cabinet Secrecy" (2020) 13:3 JPPL 497.

⁹² But see e.g. Deborah MacNair, "The Role of the Federal Public Sector Lawyer: From Polyester to Silk" (2001) 50 UNBLJ 125 at 133–37, and more recently Elizabeth Sanderson, *Government Lawyering: Duties and Ethical Challenges of Government Lawyers* (Toronto: LexisNexis Canada, 2018) at 211–26 (Chapter 5).

⁹³ Recall *FLSC Model Code*, *supra* note 21, r 6.1–1: "A lawyer has complete professional responsibility for all business entrusted to him or her."

from unconstitutional or otherwise unlawful actions by the Premier.⁹⁴ By convention, such resignation is obligatory when the Premier or Cabinet interferes with a criminal prosecution and arguably obligatory when the Premier chooses to disregard advice that a course of action would be unconstitutional.⁹⁵ Theoretically, an oddly principled lawyer could resign as Attorney General to disassociate herself as a lawyer from her own decision as Premier and a politician – but that scenario seems so unlikely as to be imaginary, as well as being meaningless. As discussed above,⁹⁶ a Premier’s decision to resign as Attorney General but continue as Premier would unavoidably generate speculation about the reason for resignation and cast doubt on her actions and decisions as Premier.

Indeed, a Premier who is also Attorney General could circumvent, if not render meaningless, the constitutional principle identified in *Krieger v Law Society (Alberta)*—“that the Attorneys General of this country must act independently of partisan concerns when exercising their delegated sovereign authority to initiate, continue or terminate prosecutions”⁹⁷—by claiming that her interventions in matters of prosecutorial decision-making were in her capacity as Attorney General and not her capacity as Premier.

These practical and legal problems would be compounded if the Premier and Attorney General was not a lawyer. While it is unusual and problematic for the Premier to be her own Attorney General, Duplessis was not unique in that respect. Also problematic, though also not unique, is an Attorney General who is not a lawyer. What appears unique, however, was the situation of E.C. Manning, a non-lawyer Premier who appointed himself Attorney General.⁹⁸ Manning appears to have avoided the infamy of Duplessis, but that might have been more luck than anything else – or perhaps he closely followed the legal advice of his Deputy Attorney General.

One can imagine a situation in which the Premier is the only lawyer in his party’s caucus. In such a situation, would it be less problematic for the Premier to serve as Attorney General or for the Premier to appoint a non-

⁹⁴ See e.g. Andrew Flavelle Martin, “The Attorney General as Lawyer (?): Confidentiality upon Resignation from Cabinet” (2015) 38:1 Dal LJ 147 at 152–54.

⁹⁵ *Ibid.*

⁹⁶ See above note 53 and corresponding text.

⁹⁷ *Krieger v Law Society (Alberta)*, [2002] 3 SCR 372 at para 3, 168 CCC (3d) 97.

⁹⁸ See e.g. Strayer, *supra* note 9 at 8; Brian Brennan, *The Good Steward: The Ernest C. Manning Story* (Calgary: Fifth House 2008) at 125–26.

lawyer as Attorney General? In my view, the non-lawyer Attorney General is preferable. As I have argued above, an Attorney General who is Premier cannot meet his professional obligations as a lawyer. The non-lawyer Attorney General has no such professional obligations. Many other problems accompany the non-lawyer Attorney General, but different solutions are available for those problems – albeit solutions beyond the scope of this article.⁹⁹ With respect to Manning, there is simply no situation in which it is appropriate, or least problematic, for a non-lawyer Premier to also serve as Attorney General.

VI. REFLECTIONS AND CONCLUSION

In this article, I have demonstrated the legal ethics problems that can arise, or existing problems that can be exacerbated, when a Premier also serves as Attorney General. These problems are strikingly illustrated in the actions of Maurice Duplessis of Quebec as detailed in *Roncarelli*. Did Duplessis competently and candidly advise himself on the scope of his powers as Premier and the lawfulness of his proposed course of action? Did he adequately prioritize the interests of the government over his personal and political interests as Premier? While the answers to these questions are unknowable, it seems unlikely. Even if he did so, if only in his own mind, it seems clear that he may have violated his statutory duty as Attorney General to see that public affairs were conducted lawfully. Moreover, there was no realistic possibility that Duplessis as Attorney General could disassociate himself from Duplessis as Premier, through resignation or otherwise.

While there was no realistic prospect of regulatory proceedings against Duplessis at the time, similar facts would hopefully lead to investigation and discipline if they took place today. Indeed, the brazenness of Duplessis' conduct and the warranted public attention that ensued would arguably require public and visible action by the corresponding law society as regulator to maintain public confidence in the legal profession and the administration of justice and to protect the public interest.

From an idealistic perspective, lawyers who serve as both Premier and Attorney General at the same time have presumably done so because they

⁹⁹ See Andrew Flavelle Martin, "The Non-Lawyer Attorney General: Problems and Solutions" (2021) 72 UNB LJ 257.

did not appreciate that the dual role violated their professional obligations, and increased awareness of the inherent problem will discourage lawyers from doing the same in the future. (I harbour no illusion that such considerations would have affected Duplessis' decision-making.) At the same time, and perhaps more realistically, a Premier could appoint herself Attorney General nonetheless, making a rational decision that the likelihood of professional or political consequences were outweighed by the benefits – in essence, from the Premier's perspective, calling the law society's bluff.¹⁰⁰ It is the public interest that is harmed, if not the personal or political or professional interests of the lawyer in question, when the government's chief law officer cannot meet her professional obligations. The harm is all the worse when that lawyer puts herself in that impossible position knowingly and deliberately.

Legislators and law societies should thus consider a specific prohibition against this dual portfolio, either in legislation or in the rules of professional conduct or both, although such a prohibition would not be necessary to discipline a lawyer who serves in this role. The prerogative power of the Premier to select the Cabinet could certainly be displaced by legislation.¹⁰¹

My conclusion is that it is simply impossible for a lawyer to adequately fulfill her professional obligations while serving as both Premier and Attorney General. Even in the absence of a specific prohibition, any lawyer tempted to take on such a dual role should be acutely aware of the challenges and ramifications that choice poses for her professional obligations as a lawyer. The mere fact that professional discipline would be unlikely does not change this reality. A non-lawyer should avoid this situation all the more.

Similar issues, though less severe, will arise for an Attorney General who is not the Premier but who also holds an additional portfolio – but the calculus will be different in such a situation. While it may be more challenging for such a dual Minister to meet her professional obligations as a lawyer, it will not be impossible as it is for a Premier who is also Attorney General. In particular, such an Attorney General could recuse herself from

¹⁰⁰ I acknowledge here the disillusioning possibility that the violation of the rules of professional conduct, and all the more so the imposition of discipline for doing so, may be seen as a political badge of honour. But the unavoidable harm remains very real regardless of whether it is overlooked or unappreciated.

¹⁰¹ See above note 50 and accompanying text.

legal advice to her own Ministry. Indeed, it is helpful to set out a spectrum running from no additional portfolio at one end to the role of Premier at the other. For smaller additional portfolios, the issues could be quite manageable if indeed that recusal was genuine. The larger and more complex the additional portfolio, the more problematic such recusal would become, until—at the additional portfolio of Premier—it would become untenable and amount to resignation as Attorney General.