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### The Impact of the Honour of the Crown on the Ethical Obligations of Government Lawyers: A Duty of Honourable Dealing

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Andrew Flavelle Martin\*  
Candice Telfer\*\*

The Impact of the Honour of the Crown  
on the Ethical Obligations of  
Government Lawyers: A Duty of  
Honourable Dealing

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*The honour of the Crown is recognized as a Canadian constitutional principle that is essential to reconciliation between Indigenous and non-Indigenous Canadians. As part of the process of reconciliation, this article argues that the honour of the Crown imposes a special ethical obligation on government lawyers in specific circumstances, which we call the duty of honourable dealing. We situate this duty in the divided literature and case law about whether government lawyers have special ethical obligations and in the two dimensions in which the honour of the Crown applies: the Crown as an institution and the Crown as a collection of public servants in the performance of defined duties. This duty applies when government lawyers are engaging directly with Indigenous peoples and their representatives in negotiation contexts. It requires that engagement in negotiation processes be meaningful, with a candid exchange of positions and views that are carefully and respectfully considered.*

*L'honneur de la Couronne est reconnu comme un principe constitutionnel canadien essentiel à la réconciliation entre les Canadiens autochtones et non autochtones. Dans le cadre du processus de réconciliation, cet article soutient que l'honneur de la Couronne impose une obligation éthique spéciale aux avocats du gouvernement dans des circonstances particulières, ce que nous appelons le devoir d'agir honorablement. Nous situons cette obligation dans la littérature et la jurisprudence qui sont divisées sur la question de savoir si les avocats du gouvernement ont des obligations éthiques particulières et dans les deux dimensions dans lesquelles l'honneur de la Couronne s'applique : la Couronne en tant qu'institution et la Couronne en tant que groupe de fonctionnaires dans l'exécution de fonctions définies. Cette obligation s'applique lorsque les avocats du gouvernement travaillent directement avec les peuples autochtones et leurs représentants dans des contextes de négociation. Elle exige que l'engagement dans les processus de négociation soit significatif, avec un échange franc et sincère de positions et de points de vue qui sont soigneusement et respectueusement pris en compte.*

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\*\* Counsel, Indigenous Affairs Ontario Legal Services Branch, Government of Ontario. All views and opinions expressed in this article, as well as any errors, are the authors' own and should not be taken as those of the authors' employing institutions. Although we draw on our experience as government lawyers, we do not speak for current or past clients.

This research was presented at the Annual Meeting of the Canadian Association for Legal Ethics, Schulich School of Law, Dalhousie University, in October 2017. The authors thank attendees for their comments. We also thank all those who provided comments on a draft, particularly Kerry Wilkins, Richard Devlin, Alice Woolley, Asha Kaushal, Graham Reynolds and Toby Goldbach.

*Introduction*

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*Introduction*

This article examines the ethical obligations of government lawyers in relation to the honour of the Crown, the constitutional principle underlying the Crown’s relationship with Indigenous peoples.

Indigenous peoples<sup>1</sup> have a special constitutional status in Canada, as well as a long and troubled political history marred by racist, assimilationist and culturally devastating colonial policies. From the inclusion of explicit recognition and protection for Aboriginal rights under section 35 of the *Constitution Act, 1982*, through the development of case law and policy

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1. We generally use the term Indigenous, consistent with our understanding of the preferred terminology of Indigenous peoples as consistent with international norms (see *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR 61st Sess, Supp No 53, UN Doc A/61/53 (2007)), except when referring to section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*] and associated case law, where we use the term Aboriginal. Section 35 states in part:

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.  
(2) In this Act, “*aboriginal peoples of Canada*” includes the Indian, Inuit and Métis peoples of Canada. ...

Consequently, we occasionally use the terms Indigenous and Aboriginal interchangeably. No offence or statement of position is intended by this usage.

aimed at solidifying that recognition and protection, to the recent calls by the Truth and Reconciliation Commission to face our colonial past and move forward in a new and committed way, reconciliation has become the defining theme in Canada's law and politics as it relates to Indigenous peoples.<sup>2</sup> The Commission defined reconciliation as "about establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country."<sup>3</sup>

A robust and meaningful approach to the honour of the Crown is essential to advancing reconciliation. The Supreme Court of Canada stated: "The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1)."<sup>4</sup>

Many stakeholders across Canada are re-examining their approaches to Indigenous peoples as they work towards reconciliation. Prominent among these stakeholders are governments, at both the provincial and federal levels, and the legal profession.<sup>5</sup> At the intersection of governments and the legal profession are government lawyers. In particular, the lawyers who advise and represent governments in their dealings with Indigenous peoples are integral to the successful commitment to reconciliation.

We argue that in specific circumstances where government lawyers are engaging directly with Indigenous peoples and their representatives outside the litigation context, the honour of the Crown imposes an additional ethical obligation on government lawyers: a duty of honourable dealing.<sup>6</sup> While such a duty may suggest a moderation of the typical duty

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2. Truth and Reconciliation Commission of Canada: Calls to Action (Winnipeg: The Commission, 2015), online (pdf): <nctr.ca/assets/reports/Calls\_to\_Action\_English2.pdf> [perma.cc/HRA9-BTTA] [TRC Calls to Action]. See, e.g., *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1, [2005] 3 SCR 388 [*Mikisew Cree*]; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 32, 62, [2004] 3 SCR 511 [*Haida Nation*]; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 186, 153 DLR (4th) 193 [*Delgamuukw*].

3. Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: The Commission, 2015) at 6, online (pdf): <nctr.ca/assets/reports/Final%20Reports/Executive\_Summary\_English\_Web.pdf> [http://perma.cc/H5FJ-WR5H].

4. *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24, [2004] 3 SCR 550 [*Taku River Tlingit*].

5. See, e.g., TRC Calls to Action, *supra* note 2, Call to Action 27.

6. This possibility in the litigation context is raised, but not evaluated, in casebook scenarios and questions in Adam M Dodek, "Government Lawyers," in Alice Woolley et al, eds, *Lawyers' Ethics and Professional Regulation*, 3d ed (Toronto: LexisNexis Canada, 2017) 595 at 620 and 622 [Dodek, "Government Lawyers"]. At 620, Dodek asks whether it is ethical to argue a limitations defense against a claim by an Aboriginal band. At 622, Dodek asks how the views of several commentators on legal ethics for government lawyers "inform how government lawyers should deal with Indigenous persons in a legal context," and how the TRC report should "affect government lawyers' interaction with Indigenous peoples." At 622, Dodek asks whether the adversarial model of litigation "appl[ies]

of resolute or zealous advocacy, in our view it is better understood as zealous advocacy to a different purpose. In contexts where the honour of the Crown is at stake and government lawyers present as the “face” of the Crown, zealous advocacy must incorporate the unique duties owed by the Crown client to Indigenous peoples. Our argument is that government lawyers have a duty to advocate zealously, not just for the “best” deal for their client in the sense of the least costly or most advantageous from a technical perspective, but for the most appropriate and honourable deal that considers all relevant factors and is consistent with fulfilling their clients’ own legal obligations.

While we will use the established ethical duties of Crown prosecutors as a point of comparison for our analysis, we do not address the worthwhile question of whether the honour of the Crown imposes special or additional ethical obligations on Crown prosecutors, which is outside the scope of this article.

Our analysis proceeds in three parts. In Part I, we use the established ethical duties of Crown prosecutors as a point of comparison for our analysis. We then examine the divided literature and case law addressing whether government lawyers have special ethical obligations. In Part II, we discuss the honour of the Crown. We emphasize that this principle applies to the Crown in two different dimensions: the Crown as an institution and the Crown as a collection of public servants in the performance of defined duties. In Part III, we set out the implications of the honour of the Crown for the ethical obligations of government lawyers. We distinguish between the government lawyer as advisor and the government lawyer as the “face” of the Crown. The government lawyer as advisor has the same ethical obligations as all lawyers to provide competent and candid advice, and the honour of the Crown as a legal principle is a key component of such advice. In contrast, when the government lawyer is acting as the “face” of the Crown in the context of negotiation, we argue that she has a special ethical obligation of honourable dealing. To conclude, we argue that government lawyers should wholeheartedly embrace these ethical obligations.

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to government lawyers’ dealing with Indigenous litigants? Should it?” The name “duty of honourable dealing” is inspired by Brent Cotter’s “duty of fair dealing” in Brent Cotter, “Lawyers Representing Public Government and a ‘Duty of Fair Dealing,’” paper presented at the Alberta Law Conference of the Canadian Bar Association (March 2008), reprinted in *ibid* at 614-619 [Cotter, “Lawyers Representing Public Government”].

I. *Government lawyers might have special ethical obligations*

Before considering how the honour of the Crown impacts government lawyers' ethical obligations, we consider whether government lawyers as a class have special ethical obligations. Determining whether government lawyers have special ethical obligations requires a working definition of both ethical obligations and government lawyers.

By ethical obligations, we mean obligations the breach of which is sanctionable by a legal regulator. These obligations come from their status as lawyers and may also be referred to as “professional” or “regulatory” obligations. The non-exhaustive sources for these obligations are the rules of professional conduct and the discipline decisions of the respective law societies.<sup>7</sup> A law society may choose not to enforce some of these obligations, as some may be considered aspirational and some may not be disciplinary priorities. But it is the possibility and not the probability of law society discipline that is determinative. By “special” ethical obligations, we mean different ethical obligations than other lawyers. As we discuss below, special ethical obligations may be separated into two kinds: *additional* obligations, which are duties beyond those required of lawyers generally; or *higher* obligations, which are the same duties with a higher threshold of compliance.<sup>8</sup>

The term “government lawyer” may be used narrowly or broadly. Broadly, government lawyers are “those who are employed by or sub-contracted to work for federal, provincial, or local governments, related agencies, and public bodies.”<sup>9</sup> More narrowly, government lawyers are “lawyers working for the executive branch”<sup>10</sup> or who practice “on behalf of the executive branch of government at any of the three levels

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7. See Alice Woolley, *Understanding Lawyers' Ethics in Canada*, 2d ed (Toronto: LexisNexis, 2016) at paras 1.50-1.70 [Woolley, *Understanding*]. See also Deborah MacNair, “In the Service of the Crown: Are Ethical Obligations Different for Government Counsel?” (2006) 84:3 Can Bar Rev 501 at 519, who cautions against considering codes “the exclusive source for ethical obligations” [MacNair, “Service of the Crown”]. Note that law societies may have additional rules set out in by-laws. See, e.g., Law Society of Upper Canada, *Continuing Professional Development*, By-law 6.1 (1 January 2014), online: <Iso.ca/about-Iso/legislation-rules/by-laws> [perma.cc/R6AK-PYVP].

8. See, e.g., Michael H Morris & Sandra Nishikawa, “The Orphans of Legal Ethics: Why government lawyers are different—and how we protect and promote that difference in service of the rule of law and the public interest” (2013) 26 Can J Admin L & Prac 171 at 172, who appear to make this distinction, and Adam Dodek, “The ‘Unique Role’ of Government Lawyers in Canada” (2016) 49:1 Israel LR 23 at 28 [Dodek, “Unique Role”] who quotes them at 172 and appears to use the terms “separate” and “higher” as we use “additional” and “higher.”

9. Allan C Hutchinson, “‘In the Public Interest’: The Responsibilities and Rights of Government Lawyers” (2008) 46 Osgoode Hall LJ 105 at 112.

10. Adam M Dodek, “Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law” (2010) 33 Dal LJ 1 at 9 [Dodek, “Intersection”].

of government.”<sup>11</sup> Our focus in this article is in the narrow sense, i.e. lawyers who are employed by and represent the executive. We exclude non-practicing lawyers, as in lawyers employed by the government that do not practice law in the course of their duties.

### 1. *Crown prosecutors as a starting point*

It is widely accepted that Crown prosecutors have special ethical duties. The classic and widely quoted articulation is from *Boucher v. The Queen*:

[T]he purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing.<sup>12</sup>

Equivalent language has been incorporated into the rules of professional conduct, so these duties are unquestionably ethical obligations. For example, the FLSC *Model Code of Professional Conduct* states that “When engaged as a prosecutor, the lawyer’s primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately.”<sup>13</sup> Similarly, Brent Olthuis refers to these as “duties of fairness,”<sup>14</sup> and Robert Frater emphasizes an “overriding commitment to fairness.”<sup>15</sup>

One explanation for this special ethical duty, which may be referred to as a “duty of impartiality,”<sup>16</sup> is that the Crown prosecutor has no client per se:

One singular feature which distinguishes Crown prosecutors from defence counsel and other members of the legal profession is that they do not have an identifiable client. This has been interpreted to mean that they have a shared duty both to the Court and to the public at large so that they can present any evidence that is available which may either

11. Dodek, “Unique Role,” *supra* note 8 at 25.

12. [1955] SCR 16 at 23-24, 110 CCC 263.

13. Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2009, last amended March 2017) r 5.1-3, commentary 1, online (pdf): <flsc.ca/wp-content/uploads/2018/03/Model-Code-as-amended-March-2017-Final.pdf> [perma.cc/MD8X-95SSD] [*FLSC Model Code*].

14. Brent Olthuis, “Prosecutorial Conduct,” in Adam M Dodek, ed, *Canadian Legal Practice: A Guide for the 21st Century* (Toronto: LexisNexis Canada, 2017) (looseleaf, release 50-5) Chapter 3 at para 3.225, 3-87.

15. Robert J Frater, *Prosecutorial Misconduct*, 2d ed (Toronto: Thomson Reuters, 2017) at 2.

16. *New Brunswick v Rothmans*, 2009 NBQB 198 at para 17, 352 NBR (2d) 226 [*Rothmans*], *aff’d* on other grounds 2010 NBCA 35, 357 NBR (2d) 160 [*Rothmans CA*].



exonerate or convict an accused.<sup>17</sup>

As Alice Woolley puts it, “the real ethical challenge of the prosecutor, ... is that she is asked to occupy the position of both the client and the lawyer.”<sup>18</sup>

This duty contrasts sharply with the lawyer’s general duty of “resolut[e]” or zealous advocacy.<sup>19</sup> Instead, it is sometimes described as a tempered or moderated advocacy. For example, David Layton and Michel Proulx use the phrase “controlled zeal” and state that “[t]he distinctive feature of the prosecutor’s role as advocate is zealousness tempered by the general duty to seek justice, not simply convictions.”<sup>20</sup>

## 2. *The case law is not determinative*

It is unclear whether government lawyers other than Crown prosecutors have special ethical obligations. The case law is sparse and somewhat contradictory. Superior courts in Ontario and New Brunswick have come to seemingly opposite conclusions and no appellate court has decided the issue.

Oddly, this case law arises not from appeals or judicial reviews of law society disciplinary decisions—in which courts would be ruling on law societies’ interpretations of the ethical obligations of lawyers—but instead in the course of deciding other legal questions.

In Ontario, the law is clear. The Divisional Court in *Everingham v. Ontario* held that “[a]ll lawyers in Ontario are subject to the same single high standard of professional conduct...[i]n respect of their liability under the Rules of Professional Conduct, ... Crown counsel stand on exactly the

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17. Deborah MacNair, “Crown Prosecutors and Conflict of Interest: A Canadian Perspective” (2002) 7 Can Crim L Rev 257 at 262. See also Woolley, *Understanding*, *supra* note 7 at paras 9.7 and 9.8 [note omitted]: “[W]hat the Crown wants in any particular case, and how ethically to achieve that outcome, is something that the prosecutor has to determine without the benefit of discussion with, or direction from, a client. The Crown prosecutor has responsibility for ethical choices that other lawyers do not have the authority to make. Courts and ethical rules address the prosecutor’s distinct ethical position in part by giving the prosecutor express and specific power and responsibility to make decisions that would ordinarily be made by clients, namely, when and whether to pursue a case.” See also *Rothmans*, *supra* note 16 at paras 17, 20: “[T]he duty of impartiality of a Crown prosecutor is closely related to the prosecutorial discretion vested in the Crown prosecutor.... The core elements of prosecutorial discretion... are, in my opinion, directly analogous to the decision-making powers that can only be exercised by a client in a civil case.”

18. Woolley, *Understanding*, *supra* note 7 at para 9.22.

19. *FLSC Model Code*, *supra* note 13, r 5.1-1: “When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect.”

20. David Layton & Hon Michel Proulx, *Ethics and Criminal Law*, 2d ed (Toronto: Irwin Law, 2015) at 587 (“controlled zeal”) and 621 (tempered zealousness). Woolley discusses the “controlled zeal” language at Woolley, *Understanding*, *supra* note 7 at para 9.13. See also *Rothmans*, *supra* note 16 at para 20: “Understandably, the Crown prosecutor cannot be permitted to act with excessive or untempered zeal in pursuing convictions.”

same footing as every member of the bar.”<sup>21</sup> The Court explicitly rejected the reasoning of the motion judge Borins J that government lawyers “have a higher obligation than lawyers generally” and that “there is a special responsibility on the part of government lawyers to be particularly sensitive to the rules of professional conduct.”<sup>22</sup>

In *Everingham*, a government lawyer was removed as counsel after he spoke directly with one of the (represented) applicants in the secure psychiatric facility where the applicant was detained. The motion judge held that the conversation breached the rule of professional conduct against contact with represented parties. It was in this context that the motion judge held that government lawyers have higher ethical obligations.<sup>23</sup> His reasoning was that since the government must act in the public interest and do so lawfully, a government lawyer “assumes a public trust” and “represents the public interest.”<sup>24</sup>

The Divisional Court acknowledged that the Attorney General has “special public obligations...in relation to the public interest in the legal profession and the conduct of government business according to law” and that Crown prosecutors have “unique obligations...in the conduct of public prosecutions.”<sup>25</sup> However, the Court held that these “public interest duties associated with their office” support judges’ higher expectations of “conduct and expertise” but not “a higher standard under the Rules of Professional Conduct.”<sup>26</sup> The Court thus recognized that government lawyers have special public interest duties, but that those duties are not ethical duties—which, as we explain below, is a common theme in the literature. The Divisional Court also noted, without elaborating, that “[i]t is not flattering to the lawyers of Ontario to say that most of them are held to a lower standard of professional conduct than government lawyers.”<sup>27</sup>

21. *Everingham v Ontario* (1992), 8 OR (3d) 121 at 125-126, 88 DLR (4th) 755 (Div Ct) [*Everingham* Div Ct], aff’d on other grounds (1991) 84 DLR (4th) 354, 3 CPC (3d) 87 (Ont Gen Div) [*Everingham* Gen Div cited to DLR]. *Everingham* Div Ct is widely quoted and discussed in the literature on special ethical obligations for government lawyers. See, e.g., Dodek, “Intersection,” *supra* note 10 at 15-17; Hutchinson, *supra* note 9 at 113; John Mark Keyes, “Professional Responsibilities of Legislative Counsel” (2011) 5 JPPL 11 at 14; Patrick J Monahan, “‘In the Public Interest’: Understanding the Special Role of the Government Lawyer” (2013) 63 SCLR (2d) 43 at 50-51; Malliha Wilson, Taia Wong & Kevin Hille, “Professionalism and the Public Interest” (2011) 38:1 Adv Q 1 at 10-12.

22. *Everingham* Gen Div, *supra* note 21 at 359-360.

23. *Ibid* at 357-360; for a similar summary of *Everingham* Gen Div, see Wilson, Wong & Hille, *supra* note 21 at 10.

24. *Everingham* Gen Div, *supra* note 21 at 360.

25. *Everingham* Div Ct, *supra* note 21 at 125-126, citing *Ministry of the Attorney General Act*, RSO 1990, c M.17 [*MAGA*] and *Law Society Act*, RSO 1990, c L.8. See esp. *MAGA*, s 5(b): “The Attorney General, ... (b) shall see that the administration of public affairs is in accordance with the law.”

26. *Everingham* Div Ct, *supra* note 21 at 125.

27. *Ibid* at 126.

The Court, holding that the lawyer did not breach the rule, nonetheless upheld the order based on the Court's "inherent jurisdiction...to deny the right of audience to counsel when the interests of justice so require."<sup>28</sup>

The broad language used by the Divisional Court in *Everingham* appears to preclude both higher and additional obligations. Under a narrow reading, however, *Everingham* holds only that government lawyers do not have *higher* ethical obligations than other lawyers, leaving open the possibility that government lawyers have *additional* ethical obligations. Such a narrow reading is supported by the subsequent decision of Code J in *1784049 Ontario Ltd v. Toronto (City)*, which appears to recognize an additional ethical obligation of government lawyers. In evaluating a claim of solicitor-client privilege in light of the crime-fraud exception, Code J held that the City Solicitor cannot "take an adversarial stance in litigation... if it means that City Council will continue to proceed in a manner that knowingly violates the law."<sup>29</sup> Justice Code relied on the positive obligation of the Attorney General to ensure that the government acts lawfully, which he extended to the City Solicitor at the municipal level via the rule of law.<sup>30</sup> However, it is not clear from the reasons of Code J whether this less-adversarial advocacy is an ethical obligation or solely a public interest obligation.<sup>31</sup> Indeed, Code J did not mention *Everingham*, which was binding on him.<sup>32</sup> This *additional* ethical duty of less-adversarial advocacy—if such a duty was indeed recognized in *Toronto*—is consistent with a narrow reading of *Everingham* that precludes only *higher* ethical obligations of government lawyers.

The law in New Brunswick is that government lawyers do have special ethical obligations, specifically additional ethical obligations, although the exact nature of those obligations remains unclear. In *New Brunswick v. Rothmans Inc*, Cyr J of the Court of Queen's Bench held that government lawyers have "public interest duties" as "the 'guardian of the public interest' at all times," and that these public interest duties

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28. *Ibid* at 126-127. The result supports a related point in the literature, to which we return below (see notes 74-76 and accompanying text), that the specific nature of the duties on government lawyers is not particularly meaningful. Even though the rule was not breached, the lawyer was nonetheless removed in the public interest, and the end result was the same.

29. *1784049 Ontario Ltd v Toronto (City)*, 2010 ONSC 1204, 101 OR (3d) 505 at para 39 [*Toronto*]. This decision by Code J is widely quoted and discussed in the literature on special ethical obligations for government lawyers, though not quite as often as *Everingham* Div Ct, *supra* note 21. See, e.g., Dodek, "Intersection," *supra* note 10 at 27; Wilson, Wong & Hille, *supra* note 21 at 13.

30. *Toronto*, *supra* note 29 at paras 38-39.

31. Indeed, Keyes, *supra* note 21 at 15-16 cites *Toronto* for the proposition that public interest duties are not ethical duties. While that characterization of *Toronto* is reasonable, so is the opposite characterization, i.e. that these duties are ethical duties.

32. It is not clear whether *Everingham* Div Ct was raised by counsel before Justice Code.

are “additional ethical duties.”<sup>33</sup> However, Cyr J did not specify what exactly these additional duties are and require, other than holding that they are lesser than and do not include the “duty of impartiality” of Crown prosecutors.<sup>34</sup> Moreover, his holdings about government lawyers’ ethical obligations are likely *obiter*. The relevant issue on the motions was whether the government’s outside counsel, retained on a contingency basis, had a “disqualifying conflict of interest between its public duties as counsel for the Attorney General and its substantial private financial interests under the [contingency agreement].”<sup>35</sup> Justice Cyr rejected this submission in part based on his conclusion that although government lawyers have “public interest” duties that are ethical duties, these duties do not apply to outside counsel.<sup>36</sup> The conclusion that government lawyers have ethical “public interest” duties is therefore not necessary for the holding. Instead, the *ratio* in the case can be more narrowly stated: even if government lawyers have “public interest” duties, and even if those are ethical duties, those duties do not apply to outside counsel. The reasoning in *Rothmans* is therefore persuasive at most.

The limited case law that exists exhibits a fundamental divide. *Rothmans* recognizes that government lawyers have public interest obligations, and those public interest obligations constitute special ethical obligations. In contrast, the reasons of the Divisional Court in *Everingham* recognize those same public interest obligations but conclude that they do not constitute special ethical obligations. Indeed, the Court stated quite explicitly that government lawyers do not have special ethical obligations, although it is unclear whether the holding precludes all special ethical obligations or only higher ones.

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33. *Rothmans*, *supra* note 16 at paras 22, 33. Like *Toronto*, *Rothmans* is quoted and discussed in the literature on special ethical obligations for government lawyers, although not as often as *Everingham* Div Ct, see, e.g., Dodek, “Intersection,” *supra* note 10 at 17 and Wilson, Wong & Hille, *supra* note 21 at 12-13. While the decision of the motion judge was appealed to the New Brunswick Court of Appeal, leave to appeal was denied on this issue: [2009] NBJ No 292, No 293 (CA) (QL). Leave to appeal to the SCC on these denials was refused: [2009] SCCA No 518, No 519 (QL). The Court of Appeal noted these denials in *Rothmans* CA, *supra* note 16 at paras 7-10. Justice Cyr did not mention *Everingham*, and it is unclear whether it was raised by counsel before him.

34. *Rothmans*, *supra* note 16 at para 32. For a similar description of *Rothmans*, see Wilson, Wong & Hille, *supra* note 21 at 12. Justice Cyr did rely on and adopt much of Lorne Sossin’s expert report: Expert Report of Professor Lorne Sossin in *Rothmans*, court file No F/C/88/08. As we explain further below, Sossin does articulate these duties – and while Cyr J did not adopt these parts of the report, they may have informed his reasoning.

35. *Rothmans*, *supra* note 16 at para 4.

36. *Ibid* at paras 33, 65. We note, although not central to our analysis in this article, that this holding promotes a problematic outsourcing of legal services to avoid ethical obligations.

3. *The literature is divided*

A similar divide exists in the literature. On one side, Adam Dodek, Brent Cotter, and Lorne Sossin argue that government lawyers have special ethical “public interest” duties as government agents or delegates of the Attorney General—although they disagree as to what exactly those special ethical obligations are. On the other side, Deborah MacNair and others acknowledge those same public interest duties but argue, for a wide range of reasons, that these duties are not special ethical obligations.

Dodek, Cotter, and Sossin agree that government lawyers’ special ethical obligations are rooted in their status as government agents or delegates of the Attorney General, although they differ in how they articulate those special ethical obligations. Dodek argues that government lawyers have special ethical obligations “as custodians of the rule of law.”<sup>37</sup> These obligations arise “because they exercise public power” both as public servants and as delegates of the Attorney General,<sup>38</sup> so they share and fulfill her positive obligation to “see that the administration of public affairs is in accordance with the law.”<sup>39</sup> Dodek suggests that specifics may include an obligation to “provide objective and independent advice” and to “not exploit loopholes in the law in sanctioning government action or rely on technicalities in litigation.”<sup>40</sup> He also suggests that this duty includes a moderation of zealous advocacy in at least some public law litigation, although the specifics are unclear.<sup>41</sup> Dodek also identifies “a special responsibility to protect the independence of the judiciary” and the independence of the bar.<sup>42</sup>

Similarly, Cotter argues that the special ethical obligations of government lawyers are “‘public interest’ responsibilities” rooted in the government’s public interest duties.<sup>43</sup> He characterizes the special ethical

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37. Dodek, “Intersection,” *supra* note 10 at 8, 25. See also Dodek, “Unique Role,” *supra* note 8 at 27.

38. Dodek, “Intersection,” *supra* note 10 at 18-22 (quotation is from 18). See also Dodek, “Unique Role,” *supra* note 8 at 28.

39. *MAGA*, *supra* note 25, s 5(b), as quoted in and discussed in Dodek, “Intersection,” *supra* note 10 at 20. See also, as quoted by Dodek, “Intersection,” *ibid* at 20 note 75, *Department of Justice Act*, RSC 1985, c J-2, s 4(a) [*DJA*]: “see that the administration of public affairs is in accordance with the law.” See also Dodek, “Unique Role,” *supra* note 8 at 32, 33, 38, 41.

40. Dodek, “Intersection,” *supra* note 10 at 29, quoting John C Tait, “The Public Service Lawyer, Service to the Client and the Rule of Law” (1997) 23 *Commonwealth L Bull* 542 at 543-544, and 30. We do not separately consider Tait but only because he is unclear as to whether this special obligation of government lawyers is an ethical obligation.

41. Dodek, “Unique Role,” *supra* note 8 at 35-37.

42. Dodek, “Intersection,” *supra* note 10 at 30-31 (quote from 30).

43. Cotter, “Lawyers Representing Public Government,” *supra* note 6 at 614-615. Cotter at 615 criticizes a duty to the “public interest” as “vacuous...and potentially dangerous.” As we discuss below, a fair criticism of Cotter is that he too readily transfers the duty of the client into the duty of the

obligation as a “duty of fair dealing” owed “to the community of interest in opposition to the government.”<sup>44</sup> This duty includes “admitting what should reasonably be admitted, conceding what should reasonably be conceded, accommodating what should reasonably be accommodated.”<sup>45</sup> Cotter describes his “duty of fair dealing” as “a moderation of zealous advocacy” and explicitly analogizes this “duty of fair dealing” to the special duties of Crown prosecutors.<sup>46</sup>

Sossin also argues that government lawyers have special ethical duties: “a duty to act in the public interest, to ensure that their activities do not give rise to a perception of personal benefit, and to act independent of partisan or political preferences.”<sup>47</sup> Like Dodek, Sossin identifies “the government lawyer’s duty to uphold the rule of law.”<sup>48</sup> Sossin anchors these duties in “clear academic and judicial authority for the view that all government lawyers do owe specific ethical and professional obligations by virtue of the status of government lawyers as public servants, and by virtue of the Attorney General’s obligation to act in the public interest.”<sup>49</sup> Unlike Cotter, Sossin contrasts the special ethical obligations of government lawyers with those of Crown prosecutors, although he places both groups on a single spectrum.<sup>50</sup>

In contrast to Dodek, Cotter, and Sossin, others—almost all of whom are government lawyers—argue that there are no special ethical obligations on government lawyers. While they largely recognize “public interest” duties, these commentators argue that such duties do not constitute ethical duties.<sup>51</sup> Patrick Monahan argues that government lawyers have a

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lawyer. See below note 71 and accompanying text.

44. *Ibid* at 615. See also W Brent Cotter, QC, “The Legal Accountability of Governments and Politicians: A Reflection upon Their Roles and Responsibilities” (2007) 2 JPPL 63, where Cotter emphasizes this duty as one of a government to its citizens. Dodek, “Intersection,” *supra* note 10 at 29 says of Cotter, “Lawyers Representing Public Government”: “I agree conceptually with Cotter’s approach, but ultimately I feel that it is too difficult to translate into practical guiding principles for government lawyers, the courts and the public.” See also Gavin MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Toronto: Carswell, 2018) (looseleaf, release 2018-1) Ch 21 at 21.3, 21-3, who identifies a similar rationale for a higher duty in some American cases: “The rationale for imposing this higher duty on government lawyers is that all citizens are entitled to fairness in dealing with their government, and that public confidence in governmental fairness would be eroded if government lawyers were to deploy questionable negotiation strategies or tactics intended to harass, delay or obstruct.”

45. Cotter, “Lawyers Representing Public Government,” *supra* note 6 at 618.

46. *Ibid* at 617-619, quotation from 619.

47. Sossin, *supra* note 34 at para 33.

48. *Ibid* at para 30.

49. *Ibid* at para 29 [emphasis omitted].

50. *Ibid* at paras 22-28.

51. This is how Dodek characterizes the opposing literature, and that characterization seems fair. See Dodek, “Intersection,” *supra* note 10 at 17: “While acknowledging the public interest obligations

“public interest role,” which comes from the Attorney General’s positive obligation and includes a “responsibility to uphold and advance the rule of law” and an “overarching responsibility...to advance the public interest.”<sup>52</sup> Similarly, Michael H Morris and Sandra Nishikawa recognize a public interest duty situated within the responsibilities of public servants and the positive obligation of the Attorney General;<sup>53</sup> Allan Hutchinson argues that government lawyers “have a much greater obligation to consider the public interest in their decisions and dealings with others” than other lawyers;<sup>54</sup> John Mark Keyes recognizes “an obligation to consider the public interest”;<sup>55</sup> Malliha Wilson, Taia Wong, and Kevin Hille acknowledge that “government lawyers are guided by public interest imperatives”;<sup>56</sup> and Deborah MacNair argues that “the ‘public interest’ informs [government lawyers’] duties, mission and vision”<sup>57</sup> and that “there is a broader, ill-defined notion of acting in the public interest in the case of the public sector lawyer.”<sup>58</sup>

These “public interest” duties may be quite specific. For example, Monahan identifies “[t]he obligation to act in an independent and impartial manner, independently of partisan political considerations,” which includes an “adherence to principled consistency.”<sup>59</sup> Similarly, MacNair contemplates “a duty to use government litigation and other resources efficiently and to avoid waste of public funds; a duty to ensure that their representation before the courts is fair and accurate; a duty to avoid letting personal values and biases override the public policy choices of client officials and the Crown; a duty to respect the public interest role in their work where it is appropriate to do so.”<sup>60</sup>

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of government lawyers, government lawyers Deborah MacNair and John Mark Keyes conclude that these obligations do not translate into higher ethical duties.” [Citations to MacNair, “Service of the Crown,” *supra* note 7 and Keyes, *supra* note 21 omitted]. See more recently Dodek, “Unique Role,” *supra* note 8 at 28: “Government lawyers who have written on the subject argue compellingly that as agents of the Attorney General they have ‘special duties’, but they strongly resist the notion that those special public law duties translate into higher ethical duties.” [Citations to Wilson, Wong & Hille, *supra* note 21, Morris & Nishikawa, *supra* note 8, and Monahan, *supra* note 21 omitted.] Hutchinson, *supra* note 9, though not a government lawyer, fits loosely with this group. He recognizes public interest obligations and does not characterize them as special ethical obligations, but neither does he explicitly rule out special ethical obligations.

52. *Supra* note 21 at 43, 45, 54.

53. *Supra* note 8 at 174-178

54. *Supra* note 9 at 114.

55. *Supra* note 21 at 15.

56. *Supra* note 21 at 9.

57. MacNair, “Service of the Crown,” *supra* note 7 at 507.

58. Deborah MacNair, “The Role of the Federal Public Sector Lawyer: From Polyester to Silk” (2001) 50 UNBLJ 125 at 129 [MacNair, “Federal Public Sector Lawyer”].

59. *Supra* note 21 at 45-46, quoting and discussing Tait, *supra* note 40 at 543-544.

60. MacNair, “Service of the Crown,” *supra* note 7 at 528.

For at least four reasons, these authors argue that these “public interest” duties are not ethical duties.<sup>61</sup> First, the public interest is “amorphous” and “dynamic”:<sup>62</sup>

because there are so many competing notions of what comprises the public interest and how it should apply in particular situations, it is a notoriously difficult and contested task to designate what ends are in the public interest and what means—which must also be consistent with the public interest—are best pursued to realize those ends.<sup>63</sup>

Second, it is for lawyers’ superiors, including political masters, and not lawyers themselves to determine the public interest.<sup>64</sup> One example of this is the decision whether or not a possible defence is inappropriate because it is a technicality.<sup>65</sup> Similarly, it is for the Attorney General herself to exercise her positive obligation to ensure lawfulness in government and to protect the public interest, while government lawyers merely “empowe[r]” her to do so.<sup>66</sup> Third, zealous advocacy is itself in the public interest because it provides the best outcomes.<sup>67</sup> Fourth, the public interest duties of government lawyers are inward-looking or internal, such as the “responsibility to advocate for, and defend, values of legality and the rule of law within government”<sup>68</sup> and “to exercise critical powers of persuasion and education in respect of their public sector clients.”<sup>69</sup>

There are two other important arguments about apparent sources of special ethical obligations on government lawyers. First, any special legal or other obligations on the client do not necessarily translate into

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61. See most explicitly *ibid* at 516, 528; Keyes, *supra* note 21 at 15-16; Wilson, Wong & Hille, *supra* note 21 at 14; and less explicitly, Monahan, *supra* note 21 at 49-52 and Morris & Nishikawa, *supra* note 8 at 172.

62. Wilson, Wong & Hille, *supra* note 21 at 17. See also MacNair, “Service of the Crown,” *supra* note 7 at 516: “the amorphous nature of public interest obligations for all public officials.”

63. Hutchinson, *supra* note 9 at 115-116; Keyes, *supra* note 21 at 25: “what is in the public interest is often difficult to define, if not a matter of some controversy.”

64. See, e.g., Hutchinson, *supra* note 9 at 117, 119-122. “[W]hile acting in the public interest, they must ultimately defer to the views of their superiors as to what ends and means are in the public interest.” (*ibid* at 124); Keyes, *supra* note 21 at 20; Monahan, *supra* note 21 at 52; Wilson, Wong & Hille, *supra* note 21 at 15-16; Morris & Nishikawa, *supra* note 8 at 175-176, citing Tait, *supra* note 40 at 547-548.

65. Monahan, *supra* note 21 at 52.

66. Wilson, Wong & Hille, *supra* note 21 at 15-16.

67. See, e.g., Wilson, Wong & Hille, *supra* note 21 at 17; Hutchinson, *supra* note 9 at 119, 124.

68. Monahan, *supra* note 21 at 55.

69. Morris & Nishikawa, *supra* note 8 at 175. Note that Dodek also supports such as inward-looking role: “Government lawyers are involved in protecting the rule of law from the inside.” (Dodek, “Intersection,” *supra* note 10 at 23.) However, he does not seem to see such an inward-looking role as being inconsistent with special ethical obligations. See also Hutchinson, *supra* note 9 at 120-121: “government lawyers have a significant contribution to make in debates within government about how to determine what the public interest demands.”



special ethical obligations on the lawyer. As MacNair puts it, “[i]t is easy to confuse the ethical obligations of government counsel with the legal obligations of clients.”<sup>70</sup> In this respect, a fair criticism of Cotter is that he too readily transfers the duties of government to government lawyers. A second argument, echoing the reasons of the Divisional Court in *Everingham*, is that higher expectations of government lawyers do not create higher ethical duties.<sup>71</sup>

Finally, there are arguments about how special ethical obligations of government lawyers are derived. An argument against special ethical obligations on government lawyers as a class is that the roles and practice contexts of government lawyers are too diverse for a uniform set of special ethical obligations.<sup>72</sup> A related argument is that government lawyers are not analogous to Crown prosecutors, therefore the special ethical obligations of Crown prosecutors should not be readily extended to other government lawyers.<sup>73</sup>

#### 4. *Drawing lessons from this debate*

As discussed, there is disagreement in the caselaw and literature over whether government lawyers have special ethical obligations. In Ontario, *Everingham* says that they do not; in New Brunswick, *Rothmans* says they do. Many commentators argue that government lawyers’ public interest duties, governments’ legal obligations, and higher expectations by the public or judges do not create special ethical obligations for government lawyers.

Given that government lawyers face higher expectations and have public interest duties, and that governments have special legal obligations, does it matter whether government lawyers have special ethical obligations? Morris and Nishikawa argue that because “the Courts, other lawyers, and the public at large expect government lawyers to act differently, ...the question whether they *should* be subject to higher ethical duties [is]

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70. MacNair, “Service of the Crown,” *supra* note 7 at 530 [citation omitted].

71. See, e.g., *ibid* at 517; MacNair, “Federal Public Sector Lawyer,” *supra* note 58 at 145 and 165; Morris & Nishikawa, *supra* note 8 at 172. See also Keyes, *supra* note 21 at 13: “it is not that the standard is higher, but rather that the nature of government as a client produces quite different expectations.”

72. Wilson, Wong & Hille, *supra* note 21 at 14-15. See also Sossin, *supra* note 34 at para 22, who puts government lawyers on a spectrum, with Crown prosecutors being at one end.

73. See, e.g., MacNair, “Service of the Crown,” *supra* note 7 at 513 [citations omitted]: “The work of Crown prosecutors is driven by public interest imperatives. Historically, the public interest role has been hived out from others as deserving of special attention and it stands apart historically. Unfortunately, it can also be used as a stereotype and applied to other government counsel unreservedly without any further analysis.”

somewhat academic.”<sup>74</sup> Dodek notes that “there are a whole host of areas where a higher duty is expected of government lawyers.”<sup>75</sup> Dodek as well as Morris and Nishikawa identify Aboriginal law and the honour of the Crown as one such context of higher expectations.<sup>76</sup> Finally, recall that the Divisional Court in *Everingham* did not disqualify the government lawyer for violating a higher ethical obligation to uphold the rules of professional conduct, but instead used its inherent jurisdiction to disqualify him in the interests of justice.

On the contrary, we argue that the source and nature of any duties—and the distinction between special ethical obligations and other kinds of obligations—matter. The source and nature of a duty determines to whom the duty is owed, who can complain of a breach, who adjudicates that complaint and grants a remedy, and what remedy can be granted. A court may grant the same remedy for the violation of different kinds of duties—for example, to disqualify counsel or enter a stay of proceedings because of a breach of duties of the lawyer or legal duties of the government itself. A court may also award damages for a range of reasons. Outside of the litigation context, however, the consequences for a breach of public interest duties or higher expectations are unclear. They would seem at most to be employment consequences, which the government as employer may be hesitant to impose if the government as client benefitted from the breach.<sup>77</sup> The breach of ethical obligations, however, is a matter for the law society and can result in professional consequences. The Supreme Court in *Krieger v. Law Society of Alberta* held that law societies must have some jurisdiction over Crown prosecutors, partly because only law societies have the power to impose disciplinary penalties.<sup>78</sup> Similar considerations apply to other breaches by government lawyers. For these reasons, special ethical obligations matter.

The disagreement in the case law and literature over whether government lawyers as a class have special ethical obligations is problematic. Resolving that broader debate is beyond the scope of this article, but we apply lessons drawn from the debate in this article. We acknowledge cautions from the literature: against a generalized duty

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74. *Supra* note 8 at 172 [emphasis in original], discussed in Dodek, “Unique Role,” *supra* note 8 at 28.

75. Dodek, “Intersection,” *supra* note 10 at 25-26. Dodek seems to use this point to argue that special ethical obligations are not a great leap from the status quo—but it seems to also support the idea that special ethical obligations are not necessary in that they would not change the status quo.

76. *Ibid*; Morris & Nishikawa, *supra* note 8 at 174.

77. See, e.g., Dodek, “Intersection,” *supra* note 10 at 12: “The Crown is unlikely to complain to the law society about the conduct of a government lawyer.”

78. 2002 SCC 65 at para 58, [2002] 3 SCR 372.

to a generalized public interest that applies to government lawyers as a homogenous class, against transplanting the duties of the government as client to the government lawyer, and against unsupported comparisons to Crown prosecutors. But we also see space in the case law for additional ethical obligations on government lawyers in particular circumstances. Against this backdrop we argue that government lawyers working in the area of Indigenous relations, particularly in the context of negotiation, have a special ethical obligation derived from the legal principle of the honour of the Crown.

## II. *The honour of the Crown*

The Supreme Court of Canada has defined the “honour of the Crown” simply (and somewhat tautologically) as the principle that the Crown must conduct itself with honour in its dealings with Aboriginal peoples.<sup>79</sup> As a more practical working definition, the Court has said that the honour of the Crown prohibits the Crown from any appearance of “sharp dealing” with Aboriginal peoples.<sup>80</sup> Drawing on the case law, we define “sharp dealing” as engaging without an intention to keep promises, or otherwise coercing or unilaterally imposing outcomes.<sup>81</sup>

The Supreme Court has confirmed that when the Crown is interacting with Aboriginal peoples, the “honour of the Crown is always at stake.”<sup>82</sup> The impetus for the honour of the Crown principle is rooted in colonization,<sup>83</sup>

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79. *Manitoba Métis Federation v Canada*, 2013 SCC 14 at para 65, [2013] 1 SCR 623 [*Manitoba Métis Federation*].

80. This modern approach to defining the honour of the Crown was first clearly articulated in the post-1982 Supreme Court jurisprudence in *R v Sparrow*, [1990] 1 SCR 1075 at 1107, 70 DLR (4th) 385 [*Sparrow*], drawing on decisions of the Ontario Court of Appeal: *R v Agawa* (1988), 65 OR (2d) 505, 53 DLR (4th) 101 and *R v Taylor and Williams* (1981), 34 OR (2d) 360, 62 CCC (2d) 227 [*Taylor and Williams*]. See also *Sparrow* at 1114; *R v Badger*, [1996] 1 SCR 771 at para 41, 133 DLR (4th) 324 [*Badger*]; *R v Marshall*, [1999] 3 SCR 456 at paras 49-51, 177 DLR (4th) 513 [*Marshall No. 1*]; *Haida Nation*, *supra* note 2 at paras 16, 19. However, it should be noted that the honour of the Crown has long been identified as a key principle in assessing the Crown’s relationship with Indigenous peoples; see in particular Justice Gwynne’s dissenting opinion in *Province of Ontario v Dominion of Canada and Province of Quebec In re Indian Claims* (1895), 25 SCR 434 at 511-512 [*Ontario v Canada*]; also *Province of Ontario v Dominion of Canada* (1909), 42 SCR 1 at 103-104, Idington J.

81. See *Badger*, *supra* note 80, at para 41; reinforced in *Haida Nation*, *supra* note 2, at para 42. The notion of “sharp dealing” as exhibited by coercive Crown approaches is supported by the reference to *United States v Alcea Band of Tillamooks* (1946), 329 US 40 and (1951), 341 US 48 in *Calder v Attorney General of British Columbia*, [1973] SCR 313, 34 DLR (3d) 145 and the reference to *R v George*, [1966] SCR 267, 55 DLR (2d) 386 in *Marshall No. 1*, *supra* note 80 at para 51.

82. See, e.g., *Badger*, *supra* note 80 at para 41; *Haida Nation*, *supra* note 2 at para 16. In *Manitoba Métis Federation*, *supra* note 79 at para 68, the Supreme Court referred to para 41 of *Badger*, but notably seems to have narrowed the application of the honour of the Crown to dealings (“interactions”) where reconciliation is a goal.

83. See *Haida Nation*, *supra* note 2 at paras 17 and 32; *Taku River Tlingit*, *supra* note 4 at para 24; *Manitoba Métis Federation*, *supra* note 79 at para 66.

and this was acknowledged by the Crown itself as early as 1763 in King George III's Royal Proclamation, "in which the British Crown pledged its honour to the protection of Aboriginal peoples from exploitation by non-Aboriginal peoples."<sup>84</sup> The Supreme Court has imbued the principle with a grand goal in this context: "the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty."<sup>85</sup>

The honour the Crown has come to be enshrined as a constitutional principle through its specific association in the modern case law with the protection of Aboriginal and treaty rights accorded by section 35 of the *Constitution Act, 1982*.<sup>86</sup> As a constitutional principle whose goal is reconciliation, it works to constrain federal and provincial governments in exercising their legislative powers and to guide them in interpreting and applying the section 35 Aboriginal rights protections. It also leads to interpretive restraints: courts will assume the Crown intends to fulfill its promises to Aboriginal peoples and will hold the Crown to interpretations of treaty, statutory and constitutional documents that protect and fulfill those promises.<sup>87</sup>

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84. *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 42, [2010] 3 SCR 103 [*Beckman*]. The *Royal Proclamation of 1763*, issued under the prerogative power of the King, addressed matters related to Great Britain's acquisition of New France under the terms of the Treaty of Paris, 1763. The Proclamation established that treaty-making with Indigenous nations was the sole purview of the Crown and that direct purchase of "Indian lands" by settlers would no longer be permitted. (Peter W Hogg, *Constitutional Law of Canada*, 5th ed supp (Toronto: Thomson Reuters Canada, 2017), vol 1 (loose-leaf revision 2017-1), ch 2 at 2.3(b), 2-8; ch 28 at 28.1(a), 28-2; ch 28 at 28.1(c), 28-6.) The Royal Proclamation is given constitutional status through s 25 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, *supra* note 1:

25 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763...

85. *Manitoba Métis Federation*, *supra* note 79 at paras 9, 66, 71. See also *Haida Nation*, *supra* note 2 at paras 17 and 20; *Delgamuukw*, *supra* note 2 at paras 186 and 204. Jamie D Dickson, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (Saskatoon: Purich Publishing, 2015) provides a good overview of the history and development of the honour of the Crown principle in the second chapter; 24 ff.

86. See *Beckman*, *supra* note 84 in particular at para 97: Deschamps J dissenting, but not on this point, refers to the four constitutional principles identified in the *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 [*Secession Reference*] and notes that these principles are interwoven with basic compacts, including the compact "between the non-Aboriginal population and Aboriginal peoples with respect to Aboriginal rights and treaties with Aboriginal peoples." She then notes that this compact "actually incorporated a fifth principle underlying our Constitution: the honour of the Crown." See also *Beckman* at para 42; *Manitoba Métis Federation*, *supra* note 79 at paras 69-70.

87. See *Badger*, *supra* note 80 at para 47; *R v Van der Peet*, [1996] 2 SCR 507 at para 24, 137 DLR (4th) 289 [*Van der Peet*]; *Beckman*, *supra* note 84 at para 12; *Manitoba Métis Federation*, *supra* note 79 at para 70; *Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2016 SKCA 124 at para 41, 485 Sask R 162 [*Peter Ballantyne Cree*].

The honour of the Crown is, as the Supreme Court states, “not a mere incantation,”<sup>88</sup> but rather “applies independently of the expressed or implied intention of the parties.”<sup>89</sup> In other words, the honour of the Crown is about substance, not form, and it finds expression in imposing concrete, practical obligations on the Crown.<sup>90</sup> While the honour of the Crown is not in itself enforceable as a legal cause of action, the breach of these practical obligations may lead to liability on the part of the Crown.<sup>91</sup> We characterize the honour of the Crown principle as operationalizing in two ways that can lead to liability: 1) it gives rise to specific legal duties, of which the Crown can be found in breach; and 2) it gives rise to directives about how the Crown must approach the interpretation of documents, and how the Crown and Crown agents must conduct themselves in engagements with Indigenous peoples.<sup>92</sup> We address these obligations throughout the following sections.

The honour of the Crown principle has also long been tied to the fiduciary concept in the jurisprudence.<sup>93</sup> More recent case law and

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88. *Haida Nation*, *supra* note 2 at para 16.

89. *Beckman*, *supra* note 84 at paras 38, 61.

90. *Manitoba Métis Federation*, *supra* note 79 at para 68; *Badger*, *supra* note 80 at para 41. Thomas Isaac makes a similar point when he states, “Reconciliation flows from the constitutionally protected rights of Métis protected by section 35 and is inextricably tied to the honour of the Crown, and must be grounded in practical actions”: Thomas Isaac, *A Matter of National and Constitutional Import: Report of the Minister’s Special Representative on Reconciliation with Métis: Section 35 Métis Rights and the Manitoba Métis Federation Decision* (Ottawa: Indigenous and Northern Affairs Canada, 2016) at 3 [emphasis added], online (pdf): <publications.gc.ca/collections/collection\_2016/aanc-inac/R5-123-2016-eng.pdf> [perma.cc/657F-9YGJ]. See also *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 at para 41, [2017] 1 SCR 1069 [*Clyde River*]: “Engagement of the honour of the Crown does not predispose a certain outcome, but promotes reconciliation by imposing obligations on the manner and approach of government” (with references to *Haida Nation*, *supra* note 2 at paras 49 and 63).

91. *Manitoba Métis Federation*, *supra* note 79 at paras 70-71; *Peter Ballantyne Cree*, *supra* note 87 at para 41.

92. In this way, our approach is similar to that of Dickson, *supra* note 85, who referred to enforceable “off-shoots” of the honour of the Crown. However, Dickson was concerned with greater specificity in describing his off-shoots (the duty to consult, the duty of diligent implementation, and fiduciary duty obligations; see 10-11, 25, 115-118), and did not address what we describe as the interpretive- and conduct-related directives. Dickson’s detailed and careful approach was advanced in support of his argument that the honour of the Crown should replace fiduciary obligations in determining Crown liability regarding the Crown’s relationships with Indigenous peoples, and in our view this is not inconsistent with our different formulation of the enforceable “off-shoots” of the honour of the Crown.

93. See *Sparrow*, *supra* note 80 at 1109, for example, which ties together the discussion of the Crown’s role as fiduciary vis-à-vis Indigenous peoples in *Guerin v The Queen*, [1984] 2 SCR 335, 13 DLR (4th) 321 with the discussion of the honour of the Crown in *Taylor and Williams*, *supra* note 80: “In our opinion, *Guerin*, together with *R. v. Taylor and Williams*...ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.”

commentary has problematized the relationship between the honour of the Crown principle and the view of the Crown as a fiduciary vis-à-vis Indigenous peoples, not least because of criticisms that this approach is colonial and paternalistic.<sup>94</sup> This discussion is beyond the scope of this article, except to note that while according to the current case law the honour of the Crown may give rise to fiduciary duties, we are looking at the honour of the Crown principle as an independent source of duties and liabilities on the Crown.<sup>95</sup>

These duties and liabilities are given practical expression through the actions and decisions of two distinct dimensions of the Crown: the Crown as institution and the Crown as a collection of individual Crown servants in the performance of defined duties.

We have borrowed the notion of “dimensions” in part from the *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, in which Lamer CJ for the majority of the Supreme Court—building on the earlier decision in *Valente*—drew a conceptual distinction between the two dimensions of the judiciary to which judicial independence attaches.<sup>96</sup> The Chief Justice identified three core characteristics of judicial independence, and noted that the dimensions “indicate which entity—the individual judge or the court or tribunal to which he or she belongs—is protected by a particular core characteristic.”<sup>97</sup> We argue that the honour of the Crown applies, though in different ways, on both the individual and the institutional levels.

### 1. *The institutional dimension*

By “Crown as institution,” we are referring to the Crown in its capacity as a singular (whether at the federal or provincial level) policy- or decision-making entity. We include individuals in the political realm such as ministers of the Crown and appointed statutory decision-makers as part

94. See Justice Deschamps’ dissenting opinion in *Beckman*, *supra* note 84 at para 105; *Peter Ballantyne Cree*, *supra* note 87 at para 83, adopting Dickson’s arguments in *Dickson*, *supra* note 85. Dickson took the view that the honour of the Crown principle should replace fiduciary concepts that have been imported, in his view non-conventionally, into the Aboriginal jurisprudence as the notion of basing Crown liability on a fiduciary concept is outdated and redundant; see 17, 45.

95. See *Haida Nation*, *supra* note 2 at para 18.

96. *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 SCR 3 at paras 118-122, 150 DLR (4th) 577 [*PEI Judges Reference*]; *Valente v The Queen*, [1985] 2 SCR 673, 24 DLR (4th) 161.

97. *PEI Judges Reference*, *supra* note 96 at para 119 [emphasis added]. In the Aboriginal law context, this idea of “dimensions” is analogous to the distinction that E Ria Tzimas, in her paper examining reconciliation and the purpose of consultation, draws between Justice Binnie’s decision in *Beckman*, which she argues locates consultation at the individual level, and Justice Deschamps’ decision, which locates consultation at the collective level: E Ria Tzimas, “To What End the Dialogue?” (2011) 54 SCLR (2d) 493 at 526.

of the Crown as institution.<sup>98</sup> The Crown as institution is subject to both specific legal duties and interpretive and conduct-related directives, as imposed by the honour of the Crown, in a manner different from how those obligations are imposed on individual Crown servants.

Where a decision by the Crown as institution may adversely impact asserted or proven section 35 rights, the honour of the Crown imposes the legal duty to consult and accommodate where appropriate (as a shorthand, the “duty to consult”).<sup>99</sup> The Supreme Court’s decision in *Haida Nation* generally looked at the implications of the honour of the Crown on the Crown as an institution, in the context of fulfilling the duty to consult. In *Haida Nation*, the Court found that when the Crown is acting as a decision-maker where decisions may impact asserted or proven section 35 rights, it must “act with good faith to provide meaningful consultation appropriate to the circumstances” having regard to “the procedural safeguards of natural justice demanded by administrative law.”<sup>100</sup>

The Crown as institution is also subject to interpretive and conduct-related directives, albeit on a higher and more generalized level than individual Crown servants. For example, the Supreme Court has been very clear that the honour of the Crown mandates that “treaties, s. 35(1), and other statutory and constitutional provisions protecting the interests of aboriginal peoples, must be given a generous and liberal interpretation” by the Crown.<sup>101</sup> Individual Crown servants, particularly lawyers, have a role in providing advice related to these directives. However, as we discuss below, public positions on the interpretation of legal documents, including in litigation contexts, are positions of the Crown as institution.

## 2. *The individual dimension*

In *Manitoba Métis Federation*, the Supreme Court explicitly addressed the honour of the Crown in relation to actions of “servants of the Crown,” attaching the principle to the individual dimension of the honour of the

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98. For example, in *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resources Operations)*, 2017 SCC 54, [2017] 2 SCR 386, the Supreme Court addresses an appeal of a judicial review of a decision of the British Columbia Minister of Forests, Lands and Natural Resources Operations on the basis, *inter alia*, that he erred in concluding that the Crown’s duty to consult and accommodate had been met. While the appeal addresses this decision as a decision of this individual—the Minister—in our conception this represents a decision of the Crown as institution.

99. *Haida Nation*, *supra* note 2 at para 35; *Manitoba Métis Federation*, *supra* note 79 at paras 73, 76.

100. *Supra* note 2 at para 41.

101. *Van der Peet*, *supra* note 87 at para 24. We also note that in *Marshall No. 1*, *supra* note 80, the Supreme Court set out as a presumption that the Crown will act honourably in its approach to treaty-making; see para 52 *per* Binnie J and para 78 *per* McLachlin J (as she then was, dissenting but not on this point).

Crown.<sup>102</sup> However, the individual dimension may be evident in the prior case law.<sup>103</sup>

In *Haida Nation*, the Supreme Court referred to the honour of the Crown as “a core precept that finds its application in concrete practices.”<sup>104</sup> The Court has also been clear that treaty-making and implementation generally are governed by the honour of the Crown, particularly through the requirements—and concrete practices?—of good faith negotiation and avoidance of sharp dealing.<sup>105</sup> The word “dealing” suggests interactions at a level much more direct and individual than that of high-level and broad policy-making. Dealing, including sharp dealing, suggests practices informed by the strategic choices and relational responses of individual actors, particularly if we define sharp dealing, as above, in terms of intentions and inducing outcomes. When the Court stated “[i]n all its dealings with Aboriginal peoples...the Crown must act honourably,” at its highest it encompasses everything down to the day-to-day interactions of Crown servants carrying out the business of the Crown.<sup>106</sup>

The term “Crown servants” is broad and the definitional limits of who may be a Crown servant can be contested. In this article, we are generally referring to members of the public service tasked with implementing the government’s legislative and policy agenda.<sup>107</sup> In the context of the

102. *Supra* note 79 at paras 65, 80.

103. As a very early reference, we note that in Justice Gwynne’s dissenting opinion in *Ontario v Canada*, *supra* note 80 he stated at 511-512: “the British sovereigns, ever since the acquisition of Canada, have been pleased to adopt the rule or practice of entering into agreements with the Indian nations or tribes...the terms and conditions expressed in those instruments as to be performed by or on behalf of the Crown, have always been regarded as involving a trust graciously assumed by the Crown to the fulfilment of which with the Indians the faith and honour of the Crown is pledged, and which trust has always been most faithfully fulfilled as a treaty obligation of the Crown.” The reference to “on behalf of the Crown” may be read to implicitly implicate individual Crown servants in implementing treaty promises as well as institutional components of the Crown like ministries or agencies.

104. *Supra* note 2 at para 16 [emphasis added].

105. *Ibid* at para 19; reaffirmed in *Mikisew Cree*, *supra* note 2 at para 33 and *Manitoba Métis Federation*, *supra* note 79 at para 73.

106. *Haida Nation*, *supra* note 2 at para 17 [emphasis added].

107. See Kerry Wilkins, “Reasoning with the Elephant: The Crown, Its Counsel and Aboriginal Law in Canada” (2016) 13 *Indigenous LJ* 27 at 33-34. Wilkins draws a distinction between the public service, with its “assigned tasks ... to produce and preserve good government and to do everything possible consistent with that imperative, and with the law, to assist the government in power to achieve effectively its legislative and policy agenda” and political staff who are vulnerable to political change. We note that lawyers for administrative bodies may be Crown servants where it is clear that, as a function of the legislative authority provided to such a body, it exists to exercise executive powers (see *Clyde River*, *supra* note 90). For our purposes, we also do not consider the implications of this analysis on outside counsel retained by the Crown, though we acknowledge that is a topic worthy of exploration. We note that it may appear from our analysis, and from the decision in *Rothmans*, that approaches that promote the outsourcing of ethical obligations by Crown clients are problematic.



Crown's relationship with Indigenous peoples, Crown servants play a particularly important role in providing, as Wilkins notes, "a thorough understanding of the relevant legal, practical or operational risks and complexities" associated with political agendas and promises, and in implementing policy and other initiatives.<sup>108</sup>

In *Manitoba Métis Federation*, the Supreme Court issued a declaration "[t]hat the federal Crown failed to implement the land grant provision set out in s. 31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown."<sup>109</sup> This holding has been characterized as creating a new cause of action—breach of the honour of the Crown.<sup>110</sup> However, this is not how the Court operationalized the principle. The Chief Justice and Karakatsanis J for the majority framed the breach as that of the fulfillment of a constitutional promise that engages the honour of the Crown or is based on the honour of the Crown.<sup>111</sup> Alternatively, as Justice Rothstein described it in his dissenting opinion, "a breach of the duty of diligent fulfillment of solemn obligations."<sup>112</sup> This aligns with the first of the two ways we have suggested that the honour of the Crown operationalizes: giving rise to specific legal duties—in this case, the duty of diligent implementation—of which the Crown can be found in breach.

Importantly, the majority in *Manitoba Métis Federation* grounded its finding that the Crown breached this duty in the actions of individual Crown servants charged with implementing the constitutional promise in question, which was to provide land to the children of Métis heads of household as promised under s. 31 of the *Manitoba Act, 1870*. The majority referred to a "series of errors and delays" that interfered with meeting the promise.<sup>113</sup> The majority acknowledged the unrealistic requirement of perfection in all acts related to the implementation of a constitutional promise, and they set the threshold for a breach at "a persistent pattern of errors and indifference."<sup>114</sup> The focus on "all acts" and "pattern of errors" implicates the actions and decisions of individual Crown servants. For example, the Court called out mistakes and inattention in identifying scrip beneficiaries and then in issuing scrip—a process undertaken by Crown servants as part of fulfilling the government's agenda of the day.<sup>115</sup> The Court accepted

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108. See *supra* note 107 at 35-36.

109. *Supra* note 79 at para 154 [emphasis added].

110. See, e.g., Hogg, *supra* note 84, vol 1, ch 28 at 28.8(k), 28-62.

111. See *Manitoba Métis Federation*, *supra* note 79 at para 9.

112. *Ibid* at para 223.

113. *Ibid* at para 32.

114. *Ibid* at para 82.

115. *Ibid* at paras 104, 123. The Canadian government had promised to provide lots of land to Métis children under s. 31 of the *Manitoba Act, 1870*, but the implementation of this promise was beset with

findings of the trial judge that “although they did not act in bad faith, the government servants may have been negligent in administering the s. 31 grant,”<sup>116</sup> and that for the most part “there was no bad faith or misconduct on the part of the Crown employees.”<sup>117</sup> Nevertheless, the Court pointed out that “diligence requires more than simply the absence of bad faith.”<sup>118</sup> Although the liability for the breach ultimately attaches to the Crown as institution, the Court relied on a pattern of lack of diligence by individual actors to find that the duty of fulfilling this particular promise had been breached.

This contextual and fact-based approach of looking for a pattern of conduct is consistent with the idea that the honour of the Crown is about substance and not form. The Supreme Court has been clear that there is no *pro forma* honour of the Crown threshold or duty—“[t]he honour of the Crown gives rise to different duties in different circumstances.”<sup>119</sup> It follows that in the context of individual Crown servants, the honour of the Crown may be viewed as more of a code of conduct guiding interactions and approaches rather than an amorphous and decontextualized label to apply to such interactions writ large.<sup>120</sup>

When the individual Crown servants are government lawyers, we argue that in certain circumstances the honour of the Crown imposes an additional ethical obligation to the obligations that already apply to lawyers.

### III. *Ethical obligations of government lawyers in Indigenous matters*

The honour of the Crown applies to the Attorney General and government lawyers as her delegates. Government lawyers are undoubtedly Crown servants, as we have broadly defined the term above. Government lawyers carry out the duties of the Attorney General.<sup>121</sup> As the chief law officer of the Crown, the Attorney General provides legal advice, litigation, and other legal services for the government and oversees government

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challenges and delays. At a certain point, the government decided that for those eligible that had not yet received land, it would instead provide scrip—\$240 redeemable coupons for land (*ibid* at paras 32-38).

116. *Ibid* at para 96 [emphasis added].

117. *Ibid* at paras 96, 109 [emphasis added].

118. *Ibid* at para 109.

119. *Haida Nation*, *supra* note 2 at para 18; see also *Beckman*, *supra* note 84 at para 43.

120. Deschamps J in *Beckman*, *supra* note 84 (dissenting but not on this point) stated that “the honour of the Crown is more of a normative legal concept than a description of the Crown’s actual conduct”; para 108. As discussed above, Deschamps J took a specifically institutionally-focused approach in that case; see Tzimas, *supra* note 97.

121. See, e.g., Dodek, “Intersection,” *supra* note 10 at 18-19.

legislation and the legislative process.<sup>122</sup> However, as discussed above,<sup>123</sup> she also has a positive duty to “see that the administration of public affairs is in accordance with the law.”<sup>124</sup>

The implications of the honour of the Crown for the ethical obligations of government lawyers differ depending on the role those lawyers are playing. On the level of the individual lawyers working under the Attorney General, as Wilkins describes:

Facing inward, government lawyers give legal advice and provide drafting services (contracts, treaties, bills, regulations and other legal instruments) to their clients...Facing outward, they support and participate in the Crown’s negotiations with others (the other order of Crown government, municipalities, Aboriginal communities and/or other private parties) and represent the Crown in litigation.<sup>125</sup>

Similar to Wilkins’ inward/outward divide, we distinguish between the inward-facing advisory context and the outward-facing litigation and negotiation contexts.

### 1. *Lawyer as advisor*

In the advisory context, the government lawyer must give advice that incorporates the honour of the Crown, but in doing so she has the same ethical obligations as all other lawyers.

The case law has long hinted that the honour of the Crown may have specific implications for lawyers supporting the Crown’s relationships with Indigenous peoples by explicitly tying the honour of the Crown to the interpretation and analysis of legal documents. In *Badger*, the Supreme Court directed that “[i]nterpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown.”<sup>126</sup> While the Court in *Badger* used as its starting point principles of treaty interpretation, it then applied these principles in the context of interpreting a constitutional document.<sup>127</sup> In *Sparrow*, the Court specifically noted the obligation on

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122. See, e.g., *MAGA*, *supra* note 25, s 5. See also *Attorney General Act*, RSBC 1996, c 22, s 2 [*AGA*]; *DJA*, *supra* note 39, ss 4-5.

123. See note 39.

124. *MAGA*, *supra* note 25, s 5(b); *AGA*, *supra* note 122, s 2(b); *DJA*, *supra* note 39, s 4(a); Kent Roach, “Not Just the Government’s Lawyer: The Attorney General as Defender of the Rule of Law” (2006) 31:2 *Queen’s LJ* 598 at 602; Dodek, “Intersection,” *supra* note 10 at 20-21.

125. *Supra* note 107 at 37 [footnotes omitted].

126. *Supra* note 80 at para 41. See also *Haida Nation*, *supra* note 2 at para 19; *Manitoba Métis Federation*, *supra* note 79 at para 75; *Beckman*, *supra* note 84 at para 12.

127. The *Alberta Natural Resources Transfer Agreement, 1930*, being Schedule 2 to the *Constitution Act, 1930*, 20-21 *George V c 26 (UK)* [reprinted in RSC 1985, App II, No 26].

Parliament and the legislatures to scrutinize the impacts of proposed legislation and regulations on section 35 rights, ensuring that legislative objectives are attained in ways that uphold the honour of the Crown.<sup>128</sup> Government lawyers have a critical role in fulfilling this obligation—what is treaty, statutory and constitutional interpretation and scrutiny if not the work of lawyers?

In supporting the business of the Crown, however, lawyers do more than just interpret documents. Government lawyers also provide advice on specific determinations and decisions, and on policy development and implementation. In all matters concerning the Crown's relationships with Indigenous peoples, ensuring that government decision-making complies with the law is of paramount importance.<sup>129</sup> Discretionary Crown decisions must be made within constitutional limits, including the honour of the Crown principle,<sup>130</sup> and the advice of lawyers can be critical in ensuring these limits are respected. Crown clients may also reasonably ask lawyers for advice more generally focused on ensuring consistency with the honour of the Crown in approaches to reconciliation-focused mandates, decision-making or policy development.

Constitutional principles tend to be more normative in nature than subject to clear legal tests.<sup>131</sup> As a result, they can be less amenable to traditional risk-based legal advice than other bases for liability. Crown counsel may need to be nimbler (or perhaps, if not too heretical, more creative) than in other contexts in framing and providing legal advice regarding the honour of the Crown.

The Supreme Court in *Haida Nation*, referring to reconciliation and honourable approaches to be taken by the Crown in the context of the duty to consult, advised against taking a “legalistic” approach and demanding “the distant goal of proof.”<sup>132</sup> Similarly, in providing legal advice informed by the honour of the Crown, lawyers may need to let themselves be guided more on the level of principle than technical, legalistic arguments. In addition to a traditional legal risk assessment, it may be appropriate—and indeed complementary—to address the more normative, principle-based question: is this course of conduct consistent with the honour of the Crown and the reconciliation mandate demanded by the courts in Canada?

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128. *Supra* note 80 at 1110.

129. See Wilkins, *supra* note 107 generally at 33-36.

130. See Beckman, *supra* note 84 at paras 45, 57.

131. Consider, for example, the Supreme Court's discussion of democracy in the *Secession Reference*, *supra* note 86, which is described as a “fundamental value” (*ibid* at para 61) and “a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated” (*ibid* at para 62).

132. *Supra* note 2 at para 33.

Or perhaps more practically: will this course of conduct raise the spectre of sharp dealing, or will it assist in, or be consistent with, reconciling Aboriginal and non-Aboriginal interests?

Traditional legal risk assessments are still necessary. As discussed, the honour of the Crown also gives rise to obligations, the breach of which can be actionable and lead to liability. This was most clearly exemplified in *Manitoba Métis Federation*, which provides a more traditional legal framework to assess Crown conduct (i.e. the duty of diligent implementation).<sup>133</sup> In this way, the honour of the Crown requires government lawyers to provide rigorous legal advice, including risk assessments, regarding breaches of obligations and the attendant potential for liability. Such considerations are a necessary part of giving complete and diligent legal advice to Crown clients.

Solicitor-client privilege precludes public scrutiny of much of the work of lawyers. There is no public access to the advice provided to Crown clients that could be used to hold government lawyers to account in providing honour of the Crown advice. There is also no way to determine, unless expressly disclosed, whether Crown clients are acting on the advice of lawyers.<sup>134</sup>

There is some debate on whether legal advice provided to the Crown should be made public. Dodek has argued that governments should claim privilege less often, and indeed “proactively disclose legal advice in specific matters,”<sup>135</sup> to promote accountability of government lawyers and to “strengthen the democratic conversation between government and the citizenry.”<sup>136</sup> Hutchinson makes a similar argument that privilege should not apply by emphasizing that “the basic democratic commitment to openness and transparency as a vital prerequisite for accountability suggests that

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133. While the declaration in that case was not paired with any binding orders, the force of the condemnation by the Supreme Court has nevertheless had significant implications for the federal Crown and provided the impetus to begin addressing the historical broken promise. For example, in response to the decision in *Manitoba Métis Federation*, the federal Minister of (then) Indigenous and Northern Affairs Canada appointed lawyer Thomas Isaac as the Minister’s Special Representative on Reconciliation with Métis, leading to Isaac’s report, *A Matter of National and Constitutional Import* (Isaac, *supra* note 90). This then in part led to the federal government and the Manitoba Métis Federation signing a “Framework Agreement on Reconciliation” in 2017 that includes among its purposes “to arrive at a shared solution that advances reconciliation between the Parties consistent with the purpose of section 35 of the *Constitution Act, 1982* and the Supreme Court of Canada’s decision in *Manitoba Métis Federation Inc. v. Canada (AG)*” (s. 1.1.2); online: <[www.rcaanc-cirnac.gc.ca/eng/1502395273330/1539711712698](http://www.rcaanc-cirnac.gc.ca/eng/1502395273330/1539711712698)> [perma.cc/N7ZP-UHQ8].

134. As Wilkins, *supra* note 107 notes at 41: “The advice or recommendation a government counsel is giving her client internally may be quite different from the positioning she is instructed to articulate externally: a fact that confidentiality constraints preclude her from disclosing publicly.”

135. Dodek, “Intersection,” *supra* note 10 at 45-47 (quote from 45).

136. *Ibid* at 47.

there is very little role for confidentiality in the affairs of government.”<sup>137</sup> (We also note the Truth and Reconciliation Commission recommended that the federal government “develop a policy of transparency by publishing legal opinions it develops and upon which it acts or intends to act, in regard to the scope and extent of Aboriginal and Treaty rights.”<sup>138</sup>) These arguments have been sharply criticized by other commentators, who argue that privilege is necessary for frankness between government lawyers and the government as client, without which the quality of legal advice sought and provided will be diminished.<sup>139</sup>

We note that privilege promotes an unvarnished and fully-canvassed exchange of opinions and ideas within government which is critical to ensuring that public policy is developed and implemented in as robust and defensible a manner as possible. As Monahan puts it, the effect of reducing privilege “would be to make it significantly more difficult and challenging to protect the rule of law within government.”<sup>140</sup> The legal protection of solicitor-client privilege is very strong and the few exceptions to privilege are applied narrowly.<sup>141</sup> We expect that solicitor-client privilege will continue to be claimed by, and apply to, governments—and rightly so.

Regardless of the dictates of privilege, government lawyers, like all other lawyers, have a duty to provide competent and candid advice to the client.<sup>142</sup> Any advice that does not incorporate the legal principle of the honour of the Crown, where that principle is relevant, is incomplete. However, we argue that Crown clients—even more than typical clients—likewise have an obligation to ensure they are getting the most complete legal advice possible to inform their decisions. This includes insisting, where applicable, that the advice requested from government lawyers

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137. *Supra* note 9 at 126

138. TRC Calls to Action, *supra* note 2, Call to Action 51.

139. See, e.g., Monahan, *supra* note 21 at 52-54; Morris & Nishikawa, *supra* note 8 at 178-180.

140. *Supra* note 21 at 54. See also Morris & Nishikawa, *supra* note 8 at 179: “there can be serious negative unintended consequences that threaten to undermine the Rule of law and the public interest.”

141. For a thorough discussion of the exceptions, see Adam M Dodek, *Solicitor-Client Privilege* (Toronto: LexisNexis Canada, 2014) at paras 8.1-8.165.

142. *FLSC Model Code*, *supra* note 13, r 3.2-2, commentary [2]: “A lawyer’s duty to a client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer’s own experience and expertise. The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.” See also r 3.2-2: “When advising a client, a lawyer must be honest and candid.” See also rr 3.1-1, 3.1-2 on competence. For a more extensive analysis of the duties of the lawyer as advisor, see Alice Woolley, “The Lawyer as Advisor and the Practice of the Rule of Law” (2014) 47:2 UBC L Rev 743. Woolley at 746 states that “the lawyer as advisor must provide an objectively reasonable assessment of the law and its application to the client’s situation, while shaping that assessment and its application to assist the client to achieve his or her goals.”

includes honour of the Crown considerations. As the Supreme Court stated in *Haida Nation*: “The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake.”<sup>143</sup> This question should be an integral part of the requests for legal advice put to government lawyers, where applicable.

In the role of government lawyer as advisor, the honour of the Crown does not impose a special ethical obligation. While the government as client has particular legal obligations under the honour of the Crown, the lawyer’s obligations are unchanged. The lawyer’s standard obligation to provide competent and candid advice applies, and competent advice must be informed by the legal principle of the honour of the Crown, when necessary.

## 2. *Lawyer as the “face” of the Crown*

There are also public dimensions to the work of government lawyers when lawyers engage directly with non-clients. Sometimes government lawyers engage on the strict instruction of their clients and other times under broad directions to pursue and fulfill their clients’ objectives. In some contexts, particularly where government lawyers have greater discretion in how they engage with Indigenous parties, we argue that the honour of the Crown imposes an additional ethical obligation of honourable dealing.

Litigation is the most obvious example of a context in which government lawyers act as the public face of the Crown. Litigation is conducted on the instruction of clients, and the positions and arguments made in the course of litigation are generally those of the client, for whom counsel speaks.<sup>144</sup> As Wilkins notes:

The government client frequently accepts the lawyers’ recommendations, especially if they have been brokered carefully in advance with counsel for the client departments or ministries. But there is no guarantee that it will do so, and when it does not, the task (and professional obligation) of the government lawyer is to act in accordance with the instructions she has received, regardless of her professional opinion or personal preference (that, or find another client), unless the instructions would require doing something that is flat-out illegal.<sup>145</sup>

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143. *Supra* note 2 at para 45.

144. See Wilkins, *supra* note 107 at 37. Wilkins highlights what he characterizes as even stricter requirements on government lawyers to act pursuant to approved instructions or mandates than their colleagues in private practice: “In matters of any real import, it will almost always be necessary to obtain the approval, or at least the acquiescence, of senior officials in the justice department or ministry and of all the government departments or ministries whose interests the litigation is perceived to affect.”

145. *Ibid* at 38.

Nevertheless, there are any number of in-the-moment decisions and choices that arise in the course of litigation—in the immediacy of the courtroom, or in settlement conference, or during the exchange of information and documentation—that do not rise to the level of requiring client instruction and which require lawyers to act honourably and respectfully. However, this approach to conduct is already an integral part of lawyers’ professional responsibilities and we argue there are not any additional or higher ethical obligations as a result of the honour of the Crown principle. In particular, lawyers have an overarching duty to “be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.”<sup>146</sup> More specifically, lawyers “must avoid sharp practice and must not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other lawyers not going to the merits or involving the sacrifice of a client’s rights.”<sup>147</sup>

On the other hand, there can be significant strategic choices related to the conduct of litigation that are not in-the-moment or routine, where clients may defer to litigation counsel. These include decisions like the choice of witnesses; approaches to cross-examination; and the focus, tone and organization of written and oral submissions. In some circumstances, such decisions may be appropriately at counsels’ discretion, in which case the discussion that follows may apply to some extent in litigation contexts. However, we are cautious not to collapse the distinction between situations where discretion on the part of counsel is necessary and appropriate and situations where the Crown client fails to properly instruct or supervise the conduct of litigation. It is our view that the honour of the Crown does not generally impose *additional* ethical obligations on government lawyers in the conduct of litigation, but the honour of the Crown may impose additional duties or obligations on the *Crown clients* in providing instructions to government lawyers.<sup>148</sup> A full exploration of the ethical obligations of Crown clients in the conduct of litigation is beyond the scope of this article.

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146. *FLSC Model Code*, *supra* note 13, r 7.2-1.

147. *Ibid*, r 7.2-2.

148. For example, in *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot’in Nation*] the Supreme Court suggested that in certain cases taking an overly technical approach to pleadings will be inconsistent with reconciliation (*ibid* at para 23). While the Court did not explicitly frame this as an honour of the Crown issue, we suggest that there is a nexus between overly technical litigation strategies that either ignore or obscure the underlying substantive issues at play in a claim and serve only to cause delay, and the “sharp dealing” that runs afoul of the honour of the Crown. While lawyers may provide the advice to employ technical strategies (engaging the considerations we have flagged above), the decisions about how to conduct litigation and the positions and arguments relied on remain those of the Crown clients.



The additional ethical obligation, in our view, applies in contexts where government lawyers are interacting with Indigenous people and their representatives directly and have discretion in determining how those engagements unfold. For simplicity, we focus on what we refer to as “negotiation.” However, these interactions do not always resemble traditional notions of negotiation, but rather may include a range of engagements from very informal, exploratory and *ad hoc* (e.g. setting out relationship principles or policy engagement) to very formal, moderated and subject to set parameters and rules of conduct (e.g. claim settlement negotiations).<sup>149</sup> In such contexts, lawyers may function as negotiators themselves, or as advisors to negotiators. We are not distinguishing between these functions but rather focusing on the potentially significant degree of discretion government lawyers may have. This broad notion of negotiation has become a critical aspect of the Crown’s relationships with Indigenous peoples and fulfilling Indigenous-specific mandates and objectives. It is the preferred approach to a wide spectrum of matters, including modern land claim agreements, harvesting arrangements, sector-specific relationship building, and the provision of social and economic programming.

The courts have signalled consistently that negotiation is the preferred approach to advancing reconciliation, in part because litigation processes expend resources and perpetuate distrust.<sup>150</sup> Nevertheless, the nature of negotiation is implicitly legalistic. It often involves lawyers, is conducted under carefully crafted agreements or protocols, and is undertaken with the aim of concluding detailed settlements or coming to agreements with regard to the recognition and exercise of section 35 rights. Indigenous parties are increasingly represented in these types of engagements with the Crown by sophisticated, experienced legal counsel. In this context, the onus increasingly falls on government lawyers to act as key members of negotiating teams rather than just as background advisors to Crown clients as they would otherwise.

We identify the key difference between litigation and negotiation as the degree of discretion accorded the government lawyer in developing and advancing positions. In the adversarial litigation context, lawyers

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149. We do acknowledge that the more formal the negotiations, the stricter the mandates will be and latitude in how settlement agreements are reached may be reduced. See Wilkins, *supra* note 107 at 37. However, our argument for the purposes of this article is that the term “negotiations” can cover a broad range of engagements, many of which do not involve formal mandates, changes to which require approval of senior officials. Additionally, we argue that unlike the litigation settlement context to which Wilkins is primarily referring, in non-litigation-based negotiations—even where there is a formal mandate in place—approvals may be required for changes to the outcomes, but determining how the mandated outcomes are achieved remains more in the control of the negotiators.

150. See *Haida Nation*, *supra* note 2 at para 25; *Delgamuukw*, *supra* note 2 at para 186.

speak on behalf of their clients by advancing pre-approved positions. In other words, the parties advancing the positions are the clients, speaking through their lawyers. The outcome is defined by these positions since the court either accepts or rejects the positions taken by the parties on the law and/or facts.

In the negotiation context, the “outcome” is defined by the negotiation, policy or program mandates—the objectives or goals of each party to the particular interaction—and may be broad and fluid. The clients determine the mandates or goals, but the negotiators, including government lawyers—while it may vary from context to context—often have broad discretion in achieving those mandates.<sup>151</sup> When overly technical approaches are taken in litigation, it is on the instruction of the client. When overly technical approaches are taken in negotiation, it is more often the choice of the people sitting at the table.

As an approach to conduct, the honour of the Crown may inform what the Supreme Court in *Haida Nation* characterized as “honourable negotiation.”<sup>152</sup> While that case dealt specifically with the duty to consult, we adopt this term to apply to the practical notion of people sitting at a negotiation table. When at a negotiation table, a government lawyer may be presented with a position or argument that challenges her and/or her client’s view of the Crown’s legal obligations in the given circumstances. She has the choice of vigorously and vociferously challenging the Indigenous negotiating partner’s view, or listening respectfully, transparently flagging her hesitancy, and committing to consider and provide her client with advice in order to prepare an informed response. Even where the position posed is ultimately inconsistent with the Crown’s negotiation mandate, it will only be in rare (if any) circumstances where no consideration can reasonably be given, or that the position cannot be aired respectfully in the hopes of stimulating alternative, productive discussion.

Lawyers trained in the common law tradition generally have a strong litigious and adversarial instinct, in addition to a desire to protect the interests of their clients, which they have committed to serve. The duty of zealous advocacy—albeit within some limits—is, in many ways, a defining imperative of the profession.<sup>153</sup> However, we argue that what

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151. Possible mandates include set compensation ranges with associated releases or other consideration, particular policy outcomes or service provision, and agreements on future conduct.

152. *Supra* note 2 at para 20.

153. See, e.g., *FLSC Model Code*, *supra* note 13, r 5.1-1, and commentary [1]. See also, e.g., *R v Felderhof* (2003), 68 OR (3d) 481 at para 84, 180 CCC (3d) 498 (CA), Rosenberg JA, albeit in the context of criminal defence: “Zealous advocacy on behalf of a client, to advance the client’s case and protect that client’s rights, is a cornerstone of our adversary system”—quoted with approval in *Groia v The Law Society of Upper Canada*, 2016 ONCA 471 at para 129, 131 OR (3d) 1, for the

generally represents appropriate zealous advocacy in the context of negotiating a complex commercial arrangement, undertaking engagements on regulatory reform, or settling civil litigation in matters not related to claims by Indigenous people, must be reconsidered in contexts where the honour of the Crown is engaged. In these circumstances, government lawyers need to consider what zealous advocacy means in light of their role as Crown servants. They are bound by the individual dimension of the honour of the Crown principle, while also required to fulfill their professional obligations to act in the best interests of their Crown clients.

### 3. *The duty of honourable dealing*

We argue that when government lawyers act as the face of the Crown in negotiations with Indigenous peoples, they have an additional ethical obligation, which we characterize as a duty of honourable dealing.<sup>154</sup> The duty of honourable dealing requires that government lawyers infuse their approaches to dealing with Indigenous parties with the honour of the Crown principle.

This duty does not imply acceding to all arguments raised by Indigenous representatives. Government lawyers still have professional duties to advise their clients to the best of their abilities, which includes diligent determinations of whether arguments raised across the table are supportable in law, legal risks, and the range of potential outcomes for any decision or course of action. As part of the responsible and diligent provision of legal advice, government lawyers should explore the boundaries of where agreement is not legally required. In this way, the duty of honourable dealing that we propose is not quite a moderation of zealous advocacy, as discussed above. Rather, we argue that the duty of zealous advocacy continues to apply, but it is zealous advocacy towards a different goal. The Crown client itself is subject to the honour of the Crown principle. Consequently, zealously advocating for the Crown client requires acknowledging Indigenous peoples not just as the parties on the

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proposition that “The courts have unreservedly acknowledged that zealous advocacy is fundamental to the advocate’s role.” But see *ibid* at para 132: “The duty of zealous advocacy must be jealously protected and broadly construed. But it is not absolute and must not be abused. Nor do the Conduct Rules assign it paramountcy.”

154. This name is inspired by Brent Cotter’s “duty of fair dealing”: Cotter, “Lawyers Representing Public Government,” *supra* note 6. Elizabeth Sanderson comes to a similarly framed conclusion from a different analysis. See Elizabeth Sanderson, *Government Lawyering: Duties and Ethical Challenges of Government Lawyers* (Toronto: LexisNexis Canada, 2018) at 201-203 (quote is from 203): “the honour of the Crown is a public law imperative on government lawyers additional to their professional duty of civility. At a minimum, it requires government lawyers to remain attuned to the imperative of honourable conduct, acting *honourably* at all times when dealing with Indigenous claimants.” [Emphasis in original].

other side of the table, but as constitutionally recognized peoples to whom the Crown client owes special obligations.

A cue can be taken from the duty to consult case law in which the courts have been clear that there is no duty to agree;<sup>155</sup> rather the process of consultation must be meaningful.<sup>156</sup> Similarly, consistent with the honour of the Crown principle, negotiation processes must be meaningful, with a candid exchange of positions and views that are all carefully and respectfully considered. In practical terms, the question to guide how government lawyers conduct themselves in negotiation may simply be: is this engagement process truly “meaningful,” or is the spectre of sharp dealing a real risk?

In this respect, our “duty of honourable dealing” has some tonal similarities to Cotter’s “duty of fair dealing.” Just as Cotter roots his duty in the obligations a government owes to its citizens, “including the ones with whom it is in conflict,” our duty is rooted in the honour of the Crown, a legal duty owed to Indigenous peoples.<sup>157</sup> Similarly, Cotter notes that his duty “does not mean that governments must accede to any allegation made by a claimant, or acquiesce in the face of every challenge to its policies.”<sup>158</sup> Our duty, however, is grounded in a specific legal principle that applies not only to the Crown as an institution but also to the conduct of individual Crown servants, including lawyers.

The duty of honourable dealing, like the special ethical obligations of Crown prosecutors, is fundamentally rooted in the level of discretion afforded counsel in negotiations with Indigenous groups. We acknowledge the concern in the literature over unsupported comparisons to Crown prosecutors, and we make this comparison in a deliberate and specific way. For government lawyers, it may be useful to think of discretion as sitting on a spectrum. At one end, with near absolute discretion, are Crown prosecutors and at the other, with minimal discretion, are civil litigators. In between, with substantial discretion, are government lawyers in Indigenous negotiation contexts. Unlike Crown prosecutors, the government lawyer in the Indigenous context does have a client. However, as discussed, at times the government lawyer has a great deal of leeway in moderating her conduct and shaping how the Crown client’s overall goals are met. Whereas

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155. Except where Aboriginal title is proven, in which case the title holding Aboriginal group’s consent is required for any Crown use of the title lands, otherwise the Crown will have to justify any infringement in accordance with the strict justification test set out in the case law; *Tsilhqot’in Nation*, *supra* note 148 at paras 2, 76, 88, 90-92.

156. See *Haida Nation*, *supra* note 2 at para 42; *Clyde River*, *supra* note 90 at para 23.

157. Cotter, “Lawyers Representing Public Government,” *supra* note 6 at 116.

158. *Ibid.*

the absolute discretion of Crown prosecutors brings with it the strongest ethical obligations, the substantial discretion of these government lawyers brings ethical obligations that are not as strong but are similar in kind.

Like Crown prosecutors, there is not a duty to seek a “win” in the typical sense. In other words, the desired result is not necessarily a “victory” over the other party. Instead, like the Crown prosecutor, the government lawyer in the Indigenous context has a duty “to see that justice is done” insofar as the honour of the Crown is aimed at reconciliation and against sharp dealing.

### *Conclusion*

In this article, we have argued that the honour of the Crown imposes an additional ethical obligation on government lawyers working on Indigenous matters in limited circumstances. For the government lawyer as advisor, the honour of the Crown does not impose special ethical obligations. Instead, the honour of the Crown forms an important and required component of that advice. However, for the government lawyer acting as the “face” of the Crown in negotiation contexts, which we have defined broadly, the honour of the Crown imposes an additional ethical obligation that we call a duty of honourable dealing. This obligation has some similarities to the special obligations of Crown prosecutors in that it is partly based on the level of discretion granted to government lawyers in the negotiation context.

What are the implications for government lawyers? While the honour of the Crown imposes an additional ethical obligation in some circumstances, that obligation is not inconsistent with the interests of the client or the role of the lawyer. Indeed, this duty of honourable dealing is consistent with the lawyer’s standard commitment to zealous advocacy, while furthering the goal of reconciliation. Reconciliation is undeniably in the public interest and is therefore a legitimate goal of the government to be weighed alongside other goals. In the same way that all lawyers work to further the goals of the client, government lawyers work to help the government client reach this goal. For these reasons, government lawyers should enthusiastically embrace this additional ethical obligation.

All lawyers have a part to play in the project of reconciliation, as the TRC Calls to Action make clear. Cultural competency training, for example, is relevant for all lawyers, regardless of their clients or practice areas.<sup>159</sup> But the honour of the Crown has particular ramifications for government lawyers who advise and represent governments in their

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159. TRC Calls to Action, *supra* note 2, Call to Action 27.

dealings with Indigenous peoples. Fulfilling the obligation of honourable dealing is a serious but surmountable challenge. Both governments as employers and law societies as regulators have a role to play in building capacity and supporting government lawyers in this respect, particularly through continuing professional development. Indeed, given the mobility of lawyers within government and the dynamic nature of government practice, all government lawyers should be trained to recognize when the duty of honourable dealing will arise and how to proceed when it does. Governments should prioritize developing expertise in this area, most likely among those branches that deal most directly and most often with Indigenous affairs, that can be shared across government when needed.