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Legal Ethics and the Political Activity of Government Lawyers

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THE ABILITY TO ENGAGE in political activity is an essential feature of a democratic society. However, the ability of government lawyers to do so is unclear. While most governments have passed legislation identifying permissible political activity of their employees, it is unclear how the professional obligations of lawyers apply in this context and how these professional obligations interact with this legislation. This article answers these questions. The duty of loyalty to the client requires most government lawyers to refrain from all political activity at the same level of government. The special professional obligations of Crown prosecutors require these lawyers to refrain from all political activity. The duty to encourage respect for the administration of justice requires counsel for courts and tribunals to refrain from political activity to the same extent required of judges and members of these courts and tribunals. *Charter* considerations will reduce these restrictions only somewhat. However, legislation on the political activity of government employees should be interpreted as a waiver of the duty of loyalty that allows most government lawyers to engage in political activity as permitted by that legislation. The article concludes by making recommendations for legislatures and law societies to address this uncertainty.

LA POSSIBILITÉ DE PARTICIPER à des activités politiques est une composante essentielle d'une société démocratique. Cependant, une incertitude entoure la capacité des juristes du gouvernement de mener de telles activités. Bien que les gouvernements aient pour la plupart adopté des lois qui prévoient les activités politiques autorisées pour leurs employés, on ne sait pas précisément de quelle manière les obligations professionnelles des juristes s'appliquent dans ce contexte et comment ces obligations interagissent avec cette législation. Dans cet article, on répond à ces questions. L'obligation de loyauté envers le client impose à la plupart des juristes du gouvernement de renoncer à toute activité politique au même niveau de gouvernement. Les obligations professionnelles particulières qui incombent aux procureurs de la Couronne exigent de ces avocats qu'ils et elles s'abstiennent d'entreprendre toute activité politique. L'obligation de favoriser le respect pour l'administration de la justice exige des avocats qui plaident devant les tribunaux judiciaires et administratifs de s'abstenir de toute activité politique à l'instar de ce qui est exigé des juges et membres de ces tribunaux judiciaires et administratifs. Les considérations relatives à la *Charte* ne diminueront la portée de ces restrictions que jusqu'à un certain point. La législation concernant les activités politiques des employés du gouvernement devrait être interprétée comme une dispense de l'obligation de

loyauté, permettant ainsi à la plupart des juristes du gouvernement de mener des activités politiques conformément aux préceptes de ladite législation. L'article conclut en formulant des recommandations à l'intention des assemblées législatives et des barreaux afin de dissiper ces incertitudes.

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INTRODUCTION

Justice Abella, writing for the Supreme Court of Canada in *Doré v Barreau du Québec* in the context of civility, argued that the professional obligations of lawyers do not, and should not, render them "verbal eunuchs."[1] She noted that lawyers "not only have a right to speak their minds freely, they arguably have a duty to do so."[2] However, it remains to be seen whether these professional obligations render some lawyers—specifically, government lawyers—political eunuchs, despite their constitutional and statutory rights to political activity.

Consider this scenario. Lawyer X is an employee of the provincial government. She frequently represents that government before the Court of Appeal and the Supreme Court. These appeals often involve controversial issues, on which the opposition parties hammer the government. Lawyer X is also a lifelong member of provincial Party Y. She routinely canvasses for candidates in elections and by-elections, and always makes the maximum donations allowed by law. Does this political activity contravene her professional obligations as a lawyer? Does it matter if Party Y is the governing party or an opposition party? Or a federal party instead of a provincial party? What if Lawyer X appears only in routine negligence cases, or does

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1 2012 SCC 12 at para 68, [2012] 1 SCR 395 [*Doré*].

2 *Ibid.*

only solicitor work advising the government on commercial transactions? The answers to these important questions are currently unclear.

The ability to engage in political activity is an essential feature of a democratic society. The rights to vote, to support a candidate or party, and to run in an election are protected under the *Canadian Charter of Rights and Freedoms* (*Charter*) and are, for the most part, relatively uncontroversial.[3] While government employees do face some legislated constraints on political activity in order to protect public confidence in an apolitical bureaucracy, these constraints are fairly minimal and generally well understood.[4]

However, government lawyers are a subset of government employees who face substantial uncertainty around permissible political activity. Government lawyers are both government employees and lawyers and thus are subject both to the legal regimes regulating government employees and to those regulating lawyers. As Adam Dodek puts it, "[g]overnment lawyers are not simply lawyers working in the public sector. Nor are they simply public servants who happen to be lawyers. They are both lawyers and public servants at the same time."[5] Political activity is one context in

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss 2(b), 3 [*Charter*]. But see currently e.g. *Frank v Canada* (*Attorney General*), 2015 ONCA 536, 126 OR (3d) 321, leave to appeal to SCC granted, 36645 (14 April 2016) (whether expats can be excluded from voting in federal elections); see also e.g. *Sauvé v Canada* (*Chief Electoral Officer*), 2002 SCC 68, [2002] 3 SCR 519 [*Sauvé*] (whether penitentiary inmates can be excluded).

4 But see *Taman v Canada* (*Attorney General*), 2017 FCA 1, [2017] 3 FCR 520 [*Taman* FCA], rev'g 2015 FC 1155, [2016] 2 FCR 297 [*Taman* Fed Ct] (the applicant in *Taman*, a prosecutor for the federal government, successfully challenged a decision denying her a leave of absence to seek a nomination for a federal election). The legal literature on the political activity of government employees is mostly dated and from the early years of the *Charter*. See Leslie Brown & Michael MacMillan, "Democratic Rights and the Civil Service: Political Neutrality versus the Charter" (1989) 9 Windsor YB Access Just 183. See also Ontario Law Reform Commission, *Report on Political Activity, Public Comment and Disclosure by Crown Employees* (Toronto: Ministry of the Attorney General, 1986), online: Osgoode Digital Commons <digitalcommons.osgoode.yorku.ca/library_olrc/126> [*OLRC Report*]. More recently on political activity, see Gavin Murphy & Shane Zurbrigg, "Canadian Governor in Council Appointees and Political Activities: Has Something Fallen between the Cracks?" (2015) 9 JPPL 333.

5 Adam M Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law" (2010) 33:1 Dal LJ 1 at 6 [Dodek, "Intersection"]. See also Deborah MacNair, "Legislative Drafters: A Discussion of Ethical Standards from a Canadian Perspective" (2003) 24:2 Stat L Rev 125 at 130 [MacNair, "Legislative Drafters"]; John Mark Keyes, "Professional Responsibilities of Legislative Counsel" (2011) 5 JPPL 11 at 13; Deborah MacNair, "The Role of the Federal Public Sector Lawyer: From Polyester to Silk" (2001) 50 UNBLJ 125 at 141–42 [MacNair, "The Federal Public Sector Lawyer"].

which the interaction of these multiple regimes is not clear—a context which is unaddressed in the case law[6] and literature.[7]

Government lawyers must comply not only with legislation on government employees but also with the professional obligations that apply to lawyers under legislation on the legal profession. The uncertainty exists

6 There are no reported court decisions, and no available reported discipline decisions, on the political activity of government lawyers. By available reported discipline decisions, I mean those included on CanLII or in the Law Society Discipline Decisions database on Lexis Advance Quicklaw.

7 The existing literature focuses primarily on how whistleblowing interacts with confidentiality and privilege, as well as on conflicts of interest. Dodek writes that this duality "creates unique tensions, problems and responsibilities for government lawyers," and discusses whistleblowing as an example (Dodek, "Intersection", *supra* note 5 at 6–8). See also MacNair, "Legislative Drafters", *supra* note 5 at 130 ("[t]here is often a fine line between the responsibilities of a legislative drafter as a public servant and as a legal professional…. This may create some confusion as to whether their obligations as public servants…override their professional obligations as lawyers"). MacNair considers conflicts of interest and confidentiality and privilege (MacNair, "Legislative Drafters" at 140–54). 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 528 ["MacNair, "Service of the Crown"] (discussing confidentiality as an example); MacNair, "The Federal Public Sector Lawyer", *supra* note 5 at 142, 154–64 (discussing conflicts of interest, confidentiality, and privilege as examples); Keyes, *supra* note 5 at 13 (discussing conflicts of interest (at 27–32) and confidentiality (at 32–42) as examples). Some of this literature acknowledges political activity, but only in passing. While MacNair suggests that legislative drafters "ha[ve] a duty to be non-partisan" and "a distinct, independent role similar to Crown prosecutors," she is unclear as to whether the non-partisan duty is only as a government employee or also as a lawyer, and how this non-partisanship relates to the prosecutor-like role (MacNair, "Legislative Drafters", *supra* note 5 at 131). She also notes the restraints on political activity of government employees, but she does not address how the professional obligations of lawyers apply to political activity. She addresses the professional obligations of Crown prosecutors, but not how those obligations apply to political activity or interact with political activity legislation (MacNair, "The Federal Public Sector Lawyer", *supra* note 5 at 142, 148). Similarly, Keyes notes "legislative restrictions on the political activities of public servants" and states that "[t]he requirement of political neutrality sets government counsel apart from their private sector colleagues," but he is unclear as to whether this neutrality comes only from legislation on political activity of government employees or also from professional obligations (Keyes, *supra* note 5 at 30). Likewise, MacNair mentions only in passing that legislation on the political activity of government employees applies to government lawyers (MacNair, "Service of the Crown", *supra* note 7 at 529). MacNair also notes that "[i]n keeping with the principle that Crown prosecutors must be free from political influence, they cannot run for election in a federal or provincial election without taking a leave of absence" and that "[t]his is similar to rules in other jurisdictions governing the civil service"—but she is unclear whether this prohibition comes only from political activity legislation or also from the professional obligations of Crown prosecutors (Deborah MacNair, "Crown Prosecutors and Conflict of Interest: A Canadian Perspective" (2002) 7 Can Crim L Rev 257 at 295 [MacNair, "Crown Prosecutors"]).

because it is unclear both how those obligations affect political activity when the government is the client and how those obligations interact with the legislation on government employees. In this article, I propose answers to these questions in order to assist government lawyers in navigating this uncertainty and assist legislators and law societies in identifying ways to reduce or eliminate this uncertainty. I argue that these questions are important because they affect public confidence in the legal profession and the administration of justice.

This article is organized into three parts. In Part I, I examine legislation on the political activity of government employees and assess how it applies to government lawyers. In Part II, I argue that the professional obligations of lawyers restrict the political activity of government lawyers. For most government lawyers, the relevant professional obligation is the duty of loyalty to the client. However, different professional obligations are relevant for two other groups of lawyers. The specific professional obligations of Crown prosecutors impose a duty of political neutrality. Similarly, the professional obligation to encourage respect for the administration of justice requires political neutrality of counsel to courts and tribunals, to the extent political neutrality is required of judges and members of those courts and tribunals. In Part III, I consider how political activity legislation and professional obligations interact and how government lawyers may choose to exercise their political rights. While the most prudent option for government lawyers would be to refrain from political activity that is permitted under legislation but that may conflict with professional obligations, I acknowledge that foregoing such activity is a heavy price. I argue that most government lawyers may engage in political activity as permitted by the corresponding political activity legislation, based on a theory of waiver of the duty of loyalty by the government as the client. Finally, I conclude by providing recommendations and reflecting on the importance of these questions, given that this area does not appear to be a regulatory priority for law societies.

As a preliminary matter, definitions and key concepts require some attention. The term "government lawyer" is used in different ways by different commentators. For example, Allan Hutchinson defines it broadly as "those who are employed by or sub-contracted to work for federal, provincial, or local governments, related agencies, and public bodies,"[8] while

8 Allan C Hutchinson, "'In the Public Interest': The Responsibilities and Rights of Government Lawyers" (2008) 46:1 Osgoode Hall LJ 105 at 112.

Dodek defines it as "lawyers working for the executive branch."[9] I consider government lawyers to be those employed by the executive or a body established by the executive.[10] I include only those who practice law in the course of their employment.[11] There is much literature discussing who is the client of the government lawyer and from whom the government lawyer receives instructions.[12] For my purposes, I assume the client is the government—*i.e.* the Crown in right of Canada or a province—or a ministry of government, or a government body or agency.[13] I include as government lawyers those for whom the client is an adjudicative tribunal. I will also address lawyers who advise the judiciary, such as law clerks and staff lawyers. While the executive is not their client, and thus these lawyers may not be considered government lawyers in the strict sense, the executive is often the employer, and thus such lawyers are often subject to legislation on political activity.

I define political activity in a broad way that, as I will demonstrate in Part I, tracks closely with the definitions used in legislation on the political activity of government employees: generally, anything done for or against a specific party or candidate. At the outset, I acknowledge that any government lawyer who discloses privileged or merely confidential information to a political party, or who uses such information in support of a party, is clearly in breach of his or her professional obligations. My focus is on general political activity, such as belonging to a party, donating, fundraising, canvassing, endorsing, seeking a nomination, or running as

9 Dodek, "Intersection", *supra* note 5 at 9. See also Adam Dodek, "The 'Unique Role' of Government Lawyers in Canada" (2016) 49:1 Israel LR 23 at 25 [Dodek, "Unique Role"] (where Dodek situates "government lawyers" in the larger group of "public sector lawyers" who "work for governments and other public entities like public utilities, publicly owned corporations, regulators and courts").

10 For my purposes, I do not consider lawyers who are political staffers, *i.e.* in a Minister's office, to be government lawyers. Consider, for example, Ben Perrin as counsel to the Prime Minister's Office under Prime Minister Stephen Harper. See Micah B Rankin, "The Trials, Tribulations and Troubling Revelations of Government Lawyers in Canada" (2014) 17:2 Leg Ethics 303 at 303–04.

11 This is implicit in Dodek, "Intersection", *supra* note 5, and Hutchinson, *supra* note 8, and explicit in Dodek, "Unique Role", *supra* note 9 at 25, n 13.

12 See e.g. Dodek, "Intersection", *supra* note 5 at 10–14; Hutchinson, *supra* note 8 at 119–21. Dodek writes that "[g]overnment lawyers are…rightly obsessed with the question of who is their client" (Dodek, "Intersection", *supra* note 5 at 12 [footnotes omitted]). See also e.g. Keyes, *supra* note 5 at 18–20.

13 While I focus in this article on lawyers for the federal and provincial governments, similar considerations apply at the municipal level.

a candidate—as well as public comment on, and criticism of, policies or decisions of the government or a political party.

My analysis focuses on the interplay between three key legal concepts: the public service's duty of political neutrality, the lawyer's duty of loyalty to the client, and the *Charter*'s recognition of political rights and freedoms. The political neutrality of the public service,[14] which includes the requirement that "[p]ublic servants do not engage in partisan political activities,"[15] is a constitutional convention.[16] The lawyer's duty of loyalty has four recognized component duties: a duty of confidentiality, "the duty to avoid conflicting interests," "a duty of commitment to the client's cause," and "a duty of candour."[17] While the duty of loyalty is a duty to the client, it protects public confidence in the administration of justice.[18] The *Charter* in section 2(b) recognizes freedom of expression,[19] which includes political expression,[20] and in section 3 recognizes the right of all citizens to vote and run for office in federal and provincial elections.[21] As I will explain, the duty of political neutrality and the duty of loyalty overlap in part for most government lawyers, and both duties are mitigated by the *Charter*.

I. LEGISLATION ON THE POLITICAL ACTIVITY OF GOVERNMENT EMPLOYEES

In this part, I assess federal and provincial legislation on the political activity of government employees and identify how that legislation applies to government lawyers. As I will explain, this legislation balances the implementation of a constitutional convention against the *Charter* rights of

14 *Osborne v Canada* (*Treasury Board*), [1991] 2 SCR 69 at 86, 82 DLR (4th) 321 [*Osborne*].

15 Lorne Sossin, "Speaking Truth to Power?: The Search for Bureaucratic Independence in Canada" (2005) 55:1 UTLJ 1 at 6 [Sossin, "Truth to Power"]; *OLRC Report*, *supra* note 4 at 13. *OPSEU v Ontario* (*Attorney General*), [1987] 2 SCR 2 at 44, 41 DLR (4th) 1 [*OPSEU v Ontario*], quoting with approval from the reasons of MacKinnon ACJO below, expresses the duty as "political neutrality of Crown servants".

16 *Osborne*, *supra* note 14 at 86; *OPSEU v Ontario*, *supra* note 15 at 44.

17 *R v Neil*, 2002 SCC 70 at paras 16, 19, [2002] 3 SCR 631 [*Neil*].

18 *Ibid* at para 12.

19 *Charter*, *supra* note 3, s 2(b) ("[e]veryone has the following fundamental freedoms:... (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication").

20 See e.g. *Harper v Canada* (*Attorney General*), 2004 SCC 33 at para 1, [2004] 1 SCR 827 [*Harper*], McLachlin CJ and Major J dissenting in part but not on this point.

21 *Charter*, *supra* note 3, s 3 ("[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein").

government employees. While the legislation applies to government lawyers, it does not specifically consider government lawyers as a group.

Legislation at the federal level and in most provinces regulates the political activity of government employees.[22] The federal *Public Service Employment Act* (the federal *Act*) applies to employees of the federal government, and corresponding provincial regimes apply to employees of those provinces.[23] The legislation is a matter of labour and employment law, and as such, a breach is grounds for discipline and not an offence.[24] These

22 *Public Service Employment Act*, Part 7, ss 111–22, being Part 3 of the *Public Service Modernization Act*, ss 12–13, SC 2003, c 22 [Federal *Act*]; *Public Service of Ontario Act, 2006*, Part V, ss 72–107, being Schedule A to the *Public Service of Ontario Statute Law Amendment Act, 2006*, SO 2006, c 35 [Ontario *Act*]; *Public Service Act*, SNu 2013, c 26, Part 5, ss 30–37; *Public Service Act*, RSY 2002, c 183, Part 9, ss 144–50; *Public Service Act*, RSNWT 1988, c P-16, s 34 [NWT *Act*]; *Public Service Act*, CQLR, c F-3.1.1, ss 10–12; *The Public Service Act*, *1998*, SS 1998, c P-42.1, s 33; *The Civil Service Act*, RSM 1987, c C110, CCSM c C110, s 44 [MB *Act*]; *Civil Service Act*, SNB 1984, c C-5.1, ss 27.1–27.4; *Civil Service Act*, RSPEI 1988, c C-8, ss 38–41; *Civil Service Act*, RSNS 1989, c 70, ss 35–41. Three provinces have similar regimes in policies: Alberta Public Service Commission, *Code of Conduct and Ethics for the Public Service of Alberta* (22 February 2017), s 15, online: <pao.gov.ab.ca/legreg/code/Code-of-ConductandEthics-printable.pdf>; Newfoundland & Labrador Human Resource Secretariat, *Political Activity*, online: <exec.gov.nl.ca>; British Columbia Public Service, *Standards of Conduct* (3 November 2014) at 4, online: <www2.gov.bc.ca/assets/gov/careers/managers-supervisors/managing-employee-labour-relations/standards_of_conduct_printable_version.pdf>. While the *Public Service Act*, RSBC 1996, c 385, s 25(1)(g) allows for regulations respecting "standards of employee conduct," this regulation-making power has not been used. But see *Standards of Conduct for Political Staff Regulation*, BC Reg 67/2014. While my focus in this article is federal and provincial employees, similar regimes may exist for employees at the municipal level, in by-laws or provincial statutes (see e.g. *Act Respecting Elections and Referendums in Municipalities*, CQLR, c E-2.2, s 284, struck down in *Directeur général des élections du Québec* (*DGEQ*) *c Harvey*, 2014 QCCS 3331 at para 180, JE 2014-1444. See also *Toronto Municipal Code*, c 192 (Public Service), online: <toronto.ca/legdocs/municode/toronto-code-192.pdf>).

23 For the purposes of this article, I use the phrase "government employees" as being synonymous with "civil servants" or "public servants," although these phrases have particular and differing meanings in some contexts (see e.g. Sossin, "Truth to Power", *supra* note 15 at 3). That is, while the legislation I discuss may apply to only a subset of government employees, the exact boundaries of that subset are not relevant to my argument.

24 See e.g. the Ontario *Act*, *supra* note 22, s 99 ("[a] public servant who engages in political activity in contravention of this Part or a direction or regulation under this Part is subject to disciplinary measures, including suspension and dismissal"). See also Federal *Act*, *supra* note 22, s 118. But see *OPSEU v Ontario*, *supra* note 15 at 33 (in which Beetz J, writing for a total of three judges of the panel of six, held that the political activity provisions in the *The Public Service Act*, RSO 1970, c 386, cannot "be constitutionally justified on the basis, or at least on the sole basis, that they are in pith and substance labour relations legislation." Justice Lamer, as he then was, found it unnecessary to decide this point (at 58), while Chief Justice Dickson held that the *Act* and its provisions could be characterized as labour relations legislation or otherwise (at 15)).

laws typically define political activity broadly.[25] For example, the *Public Service of Ontario Act* (the Ontario *Act*) defines political activity as "do[ing] anything in support of or in opposition to a federal or provincial political party," "do[ing] anything in support of or in opposition to a candidate in a federal, provincial or municipal election," and being "or seek[ing] to become a candidate in a federal, provincial or municipal election."[26] The definition also includes "comment[ing] publicly and outside the scope of the duties of his or her position on matters that are directly related to those duties and that are dealt with in the positions or policies of a federal or provincial political party or in the positions or policies publicly expressed by a candidate in a federal, provincial or municipal election."[27] Similarly, the federal *Act* defines political activity as "carrying on any activity in support of, within or in opposition to a political party," "carrying on any activity in support of or in opposition to a candidate before or during an election period," or "seeking nomination as or being a candidate in an election before or during the election period," and it defines election as "a federal, provincial, territorial or municipal election."[28]

Such legislation implements the constitutional convention of the "political neutrality" of the public service, which is "central to the principle of responsible government."[29] This convention is necessary for confidence in the bureaucracy, both by its political masters and the public at large.[30] As Timothy Hadwen *et al*. put it:

> [p]ublic servants would not be able to fulfill their duties if their own political views were expressed in a fashion that caused politicians and the public to doubt their functional impartiality. Confidence in the public service would be diminished by concern that public servants were making

25 See e.g. Timothy Hadwen et al, *Ontario Public Service Employment and Labour Law* (Toronto: Irwin Law, 2005) at 231, discussing the predecessor legislation to the Ontario *Act*, *supra* note 22 (*Public Service Act*, RSO 1990, c P.47, ss 28.1–28.10, as added by *Crown Employees Collective Bargaining Act, 1993*, SO 1993, c 38, s 63) ("[p]olitical activity is defined, in the *PSA*, in the broadest possible terms").

26 Ontario *Act*, *supra* note 22, s 72.

27 *Ibid*, s 72.

28 Federal *Act*, *supra* note 22, s 111(1).

29 *Osborne*, *supra* note 14 at 86. See also e.g. Hadwen et al, *supra* note 25 at 230; *OLRC Report*, *supra* note 4 at 13. For a discussion of this convention, see e.g. Sossin, "Truth to Power", *supra* note 15 at 6–15. Some legislation also addresses the political activity of political staff, see e.g. the Ontario *Act*, *supra* note 22, ss 94–98. For the purposes of this paper, I do not consider lawyers among political staff to be government lawyers, and so provisions on the political activity of political staff are not relevant to my analysis.

30 See also e.g. *OLRC Report*, *supra* note 4 at 26–27.

> decisions to undercut the political party in power or, alternately, to further that party's electoral interests.[31]

Restrictions on political activity are consistent with the duty of loyalty of the public service, which is "loyalty…to the Government…not the political party in power at any one time."[32] This loyalty protects "the public interest in both the actual, and apparent, impartiality of the public service."[33] While Leslie Brown and Michael MacMillan dispute "the implied assumption that restrictions on political activity are a prerequisite to political impartiality," such an assumption seems fair—at least to the public perception of impartiality.[34]

However, the Supreme Court in *Osborne v Canada (Treasury Board)* held that a near absolute prohibition on the political activity of all government employees unjustifiably infringes freedom of expression under section 2(b) of the *Charter*.[35] Current legislation balances these freedoms against the convention of political neutrality,[36] often explicitly. For example, the federal *Act* states that "[t]he purpose of this Part [Part 7: Political Activities] is to recognize the right of employees to engage in political activities while maintaining the principle of political impartiality in the public service."[37] Similarly, at second reading of the bill that enacted the Ontario *Act*, the Minister of Government Services stated that the bill "will also balance the need to preserve a non-partisan, neutral public service with an individual's right to participate in political activity."[38] During debate on the

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31 *Supra* note 25 at 14.

32 *Fraser v PSSRB*, [1985] 2 SCR 455 at 470, 23 DLR (4th) 122 [*Fraser*]. But see e.g. Sossin, "Truth to Power", *supra* note 15 at 3 ("[i]n most cases, civil servants take instruction from the government of the day. Indeed, some would suggest that any distinction between the Crown and the government of the day is itself a legal fiction" [footnotes omitted]).

33 *Fraser*, *supra* note 32 at 470.

34 *Supra* note 4 at 192. See also *OLRC Report*, *supra* note 4 at 271, cited in Brown & MacMillan, *supra* note 4 at 207 ("a great deal of the institutional political neutrality of the government service depends not upon restrictions on political activity and critical comment by individual Crown employees, but upon the successful operation of the merit system").

35 *Osborne*, *supra* note 14 at 100. See also *Osborne*, *supra* note 14 at 100, citing with approval *Fraser*, *supra* note 32 at 467 ("[a]n absolute rule prohibiting all public participation and discussion by all public servants would prohibit activities which no sensible person in a democratic society would want to prohibit." The Court in *Osborne* found it unnecessary to consider section 2(d) of the *Charter*, on which point Wilson, LaForest and Stevenson JJ did not disagree (at 71–72, 76, 78, 106)).

36 See e.g. Hadwen et al, *supra* note 25 at 230–31.

37 Federal *Act*, *supra* note 22, s 112.

38 Ontario, Legislative Assembly, *Official Report of Debates* (*Hansard*), 38th Parl, 2nd Sess, No 120A (15 November 2006) at 6148 (Hon Gerry Phillips).

predecessor legislation to the Ontario *Act*, the Minister of Labour stated that the bill would allow government employees to "enjoy freedoms similar to their counterparts in the private sector without threatening the traditional neutrality of the public service."[39]

The Supreme Court of Canada in *Osborne* emphasized both a hierarchical and a functional approach to restrictions on political activity:

> The need for impartiality and indeed the appearance thereof does not remain constant throughout the civil service hierarchy…a substantial number of public servants neither provide policy advice nor have any discretion with respect to the administration…the impugned legislation bans all partisan-related work by all public servants, without distinction either as to the type of work, or as to their relative role, level or importance in the hierarchy of the public servant.[40]

I use the term 'hierarchical' to refer to the relative level of authority and 'functional' to mean relating to "the type of work" or "the job functions actually performed."[41] These approaches are evident in the current legislation.

While there is some variation among political activity legislation, the Ontario *Act* and the federal *Act* provide two major examples. The political activity provisions in the Ontario *Act* are generally hierarchical and divide "most public servants" from management.[42] "Most public servants" can engage in most political activity, so long as the activity is outside of the workplace and not while wearing a uniform; does not "use government premises, equipment or supplies;" and does not "associate his or

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39 Ontario, Legislative Assembly, *Official Report of Debates* (*Hansard*), 35th Parl, 3rd Sess, No 80 (4 November 1993) at 3963 (Hon Bob Mackenzie). See also Ontario, Legislative Assembly, *Official Report of Debates* (*Hansard*), 35th Parl, 3rd Sess, No 84 (18 November 1993) at 4145 (Mike Cooper), italicized portion quoted in Hadwen et al, *supra* note 25 at 63 ("we are expanding political activity rights for Ontario public servants *so that they have practically the same freedom to take part in the political process as their counterparts in the private sector*"). See also Ontario *Act*, *supra* note 22, s 1, paras 1–2, 6 (which includes two purposes of the *Act* as being "[t]o ensure that the public service of Ontario is effective in serving the public, the government and the Legislature" and "[t]o ensure that the public service of Ontario is non-partisan, professional, ethical and competent," with a third being "[t]o set out rights and duties of public servants concerning political activity").

40 *Osborne*, *supra* note 14 at 99–100.

41 *Ibid* at 100; *OLRC Report*, *supra* note 4 at 276 ("our restricted class is not defined entirely by job title, but is also partly defined by reference to the job functions actually performed…").

42 Ontario *Act*, *supra* note 22, s 74(a)–(b) (the phrase "most public servants" is used in the heading before s 74).

her position with political activity."[43] Some activities, such as running for office, require an unpaid leave of absence, which must be granted if requested for an election period.[44] Most public servants may not, without a leave of absence, "comment publicly…on matters that are directly related to…[their] duties and that are addressed in the policies" of a party or candidate.[45] In contrast, management faces significant restrictions that increase with seniority.

Most management may only vote, belong to a party, donate to a party or candidate, and "attend an all-candidates meeting"—and may, but only if leave is granted, run or campaign in a municipal election.[46] This group includes associate and assistant deputy ministers, directors, deputy directors of legal services branches, Crown attorneys, and senior officers of the Ontario Provincial Police.[47] (The term "Crown attorneys" should presumably be interpreted consistently with its meaning in the *Crown Attorneys Act*, which distinguishes between Crown attorneys and assistant Crown attorneys—the Crown attorney being the senior Crown in each district or county.[48]) The most senior members of management, which are the

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43 *Ibid*, ss 74, 77(a)–(d) (section 77(d) provides that a "public servant [who] is or is seeking to become a candidate in a federal, provincial or municipal election….[may] identify the public servant's position and work experience").

44 *Ibid*, ss 79–80. But see *ibid*, s 79(2) (a leave may be unnecessary to be a candidate outside an election period). See also *ibid*, s 79(1)(b)(i) –(ii) (these activities requiring a leave also include fundraising by employees who "supervis[e] other public servants" or "dea[l] directly with members of the public if those members of the public may perceive him or her as a person able to exercise power over them").

45 *Ibid*, s 79(1)(c) (section 79(1)(c) allows such public comment within "the scope of his or her duties as a public servant…").

46 *Ibid*, ss 89(1)(a)–(d), 90(1)(a)–(b). I note that merely attending an all-candidates meeting may not properly fall into the very broad definition of political activity in the Ontario *Act*, discussed above at page 274.

47 *Ibid*, s 85(2), paras 3–8. This group also includes members of prescribed adjudicative tribunals: Ontario *Act*, *ibid*, s 85(2), para 9, s 107(1)(b); *Political Activity: Specially Restricted Public Servants*, O Reg 377/07, s 1 and Schedule 1 [*Political Activity*]. While the inclusion of tribunal members is not relevant directly for my purposes, as I do not consider them to be "government lawyers" as defined above, I will argue below that counsel for those tribunals and members have particular professional obligations around political activity. Additional classes of employees may be prescribed as being in this group, but that regulation-making power has been used sparingly: Ontario *Act*, *ibid*, s 85(2), para 10, s 107(1)(c); *Political Activity*, *supra* note 47, s 2 ("1. The government appointees to the Niagara Escarpment Commission who are not members of the council of a municipality. 2. The Independent Police Review Director and the government appointees in his or her office").

48 RSO 1990, c C.49, s 1(1) [*Crown Attorneys Act*]. Similarly, the *Canada Elections Act*, SC 2000, c 9, s 65(d), precludes "a…county Crown Attorney in any of the provinces" from being a candidate in federal elections. See *Taman* Fed Ct, *supra* note 4 at para 59 ("[t]he *Canada*

secretary of the cabinet and deputy ministers, may only vote and "attend an all-candidates meeting"—they may not belong to a party or donate to a party or candidate.[49]

The Ontario *Act* is also functional: unless on leave, "most public servants" are prohibited from political activity that "could interfere with the performance of his or her duties as a public servant" or "could conflict with" the government's interests.[50] All employees are also subject to conflict-of-interest provisions that political activity may engage.[51]

The federal *Act*, on the other hand, uses a model that is more functional than hierarchical: "[a]n employee may engage in any political activity so long as it does not impair, or is not perceived as impairing, the employee's ability to perform his or her duties in a politically impartial manner."[52] (The federal *Act* does apply the hierarchical model to the most senior management, deputy heads, who are prohibited from "any political activity other than voting in an election."[53]) The federal *Act* includes a regulation-making power to "specif[y] political activities that are deemed to impair the ability of an employee, or any class of employees, to perform their duties in a politically impartial manner,"[54] for which relevant considerations may include "the nature of the political activity and the nature of the duties of an employee or class of employees and the level and visibility of their positions."[55] However, that regulation-making power has not been used. The federal *Act* further specifies that an employee may only be a candidate, or seek a nomination as a candidate, with the permission of the Public Service Commission.[56] (An unpaid leave of absence is required to be a federal, provincial, or territorial candidate during an

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Elections Act continues to bar County Crown Attorneys from becoming candidates, but by definition, this means the Senior or Regional Crown Attorney and does not include assistant Crown Attorneys, such as the applicant").

49 Ontario *Act*, *supra* note 22, ss 89(1)(a)–(d), 89(2) (this group also includes the Conflict of Interest Commissioner).

50 *Ibid*, s 79(1)(d)–(e) (more specifically, s 79(1)(e) prohibits political activity that "could conflict with,

(i) in the case of a public servant who works in a ministry, the interests of the Crown,

(ii) in the case of a public servant who works in a public body, the interests of the public body").

51 *Ibid*, ss 56–71; see e.g. discussion in Hadwen et al, *supra* note 25 at 238.

52 Federal *Act*, *supra* note 22, s 113(1).

53 *Ibid*, s 117.

54 *Ibid*, s 113(2).

55 *Ibid*, s 113(3).

56 *Ibid*, ss 114 (federal, provincial, or territorial), 115 (municipal).

election period, and may be required to be a candidate outside an election period, seek a nomination, or be a municipal candidate.[57]) Permission may be granted "only if [the Commission] is satisfied that the employee's ability to perform his or her duties in a politically impartial manner will not be impaired or perceived to be impaired."[58] The Commission may consider factors including "the nature of the election, the nature of the employee's duties and the level and visibility of the employee's position."[59]

The leave provisions in the federal *Act* are the focus of *Taman v Canada* (*Attorney General*), the only reported decision concerning any of these political activity statutes as they apply to lawyers. In *Taman*, a federal prosecutor sought judicial review of the Commission's denial of her request to seek a nomination for the federal New Democratic Party.[60] The Federal Court of Appeal set aside the decision on the grounds that the Commission had not adequately justified its reasoning.[61] The Court distinguished between "political impartiality, in and of itself" and "the impairment, or the perception of impairment, of a public official's ability to perform their duties in a politically impartial matter," holding that Parliament, in the political activity provisions of the federal *Act*, was addressing the latter and not the former.[62] The Court held that the Commission had erred by "*equating* autonomy, discretion and visibility with the impairment of Ms. Taman's ability to perform her duties with political impartiality"—that is, by assuming these "causal relationships…to be self-evident."[63] The Court also questioned the assertion that "a prosecutor's candidacy and the significant allegiance to a political party and its platform implicit in that candidacy undermines the independence" of the Public Prosecutions Service.[64]

Typically, these regimes are multi-jurisdictional. The federal *Act* restricts federal government employees from political activity not only at the federal level but also at the provincial and municipal levels. Similarly, provincial legislation restricts provincial government employees from

57 *Ibid*, ss 114(3), 114(7), 115(4).

58 *Ibid*, ss 114(4). See also ss 114(5), 115(2) (to the same effect).

59 *Ibid*, ss 114(6), 115(3).

60 *Taman* FCA, *supra* note 4. Similar issues were raised in *Harquail v Canada* (*Public Service Commission*), 2004 FC 1549, 264 FTR 181, but the application for judicial review was dismissed as moot (at para 25). The application judge, in *obiter*, stated that if the application had not been moot, the refusal decision would have been unreasonable (at para 33).

61 *Taman* FCA, *supra* note 4 at paras 35–36.

62 *Ibid* at para 20.

63 *Ibid* at paras 35–36 [emphasis added].

64 *Ibid* at para 35.

political activity not only at the provincial level but also at the federal and municipal levels.[65] It seems understandable, and perhaps intuitive, that an employee's political activity at another level of government, even outside the workplace, would appear to suggest the possibility of partisanship in the same way as political activity at the same level of government. The Supreme Court in *OPSEU v Ontario* (*Attorney General*) observed:

> [t]he plain fact is that even in a federation with divided jurisdictions, the object of the political discourse, the ultimate form of political activity, remains indivisible. It follows therefore that if Ontario wanted to ensure the impartiality of its public servants, it had no choice but to include political activities in the federal field in the impugned provisions.[66]

Similarly, the Ontario Law Reform Commission in its *Report on Political Activity, Public Comment and Disclosure by Crown Employees* noted the close connections among federal and provincial parties and concluded that "it is simply not possible, at the level of partisan political activity, to separate the impact of involvement at the federal level by a provincial Crown employee from involvement with the same political party organization, and often the same persons, at the provincial level."[67]

None of this legislation restricts lawyers *per se* as a class,[68] and indeed these statutes typically allow most government lawyers a broad range of political activity. Under the Ontario *Act*, for example, all lawyers outside of management have the same broad political activity rights as most other government employees. Government lawyers can belong to, donate to, canvass for, and in some cases fundraise for, any political party. They may seek a leave of absence to seek a nomination for, and be a candidate for, any political party—and that leave must be granted if requested for an election period.

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65 See e.g. Ontario *Act*, *supra* note 22, s 72.

66 *OPSEU v Ontario*, *supra* note 15 at 54.

67 *OLRC Report*, *supra* note 4 at 284 (the Report elaborated that "the identification of any individual Crown employee with a political party at the federal level will of necessity colour that employee's activity as a Crown employee at the provincial level, and give rise to a perception of political partisanship" (at 284)).

68 This is consistent with the recommendations on political activity in the *OLRC Report*, which concluded that "we have been unable to identify a compelling reason to impose political restrictions on Crown employees merely because they serve as lawyers" (at 278). However, the *OLRC Report* acknowledged that "most [lawyers]…will be caught [by the OLRC's proposed restrictions] either because they are directly involved in the administration of justice, or because they have a policy role" (at 278).

However, government lawyers are subject not only to political activity legislation but also to the professional obligations of lawyers. As I will demonstrate, these professional obligations impose different, and often stricter, limitations on political activity.

II. THE IMPLICATIONS OF LAWYERS' PROFESSIONAL OBLIGATIONS FOR POLITICAL ACTIVITY

In this part, I argue that lawyers' professional obligations, particularly as expressed in the rules of professional conduct and the case law, impact the political activity of government lawyers. I also consider how *Charter* considerations apply. I do not argue that government lawyers (other than Crown prosecutors) have higher or additional professional obligations,[69] but instead that the obligations on all lawyers have particular implications where government is the client. I begin my analysis with "most" government lawyers, and then I address the special cases of Crown prosecutors and lawyers for courts and tribunals. I then turn to *Charter* considerations.

While the rules of professional conduct on outside interests do not specifically address this situation,[70] they do provide some context. These rules warn lawyers against outside interests that may "impair the exercise of the lawyer's independent judgment on behalf of a client" or may "jeopardize the lawyer's professional integrity, independence or competence."[71]

Recall from the introduction that my focus is on general political activity, such as belonging to a party, donating, fundraising, canvassing, endorsing, seeking a nomination, or running as a candidate—as well as public comment on, and criticism of, policies or decisions of the government or a political party. While the goal of my analysis is to determine the professional obligations of lawyers employed by government, my conclusions in

69 For this position, see e.g. *New Brunswick v Rothmans*, 2009 NBQB 198 at paras 22, 33, 352 NBR (2d) 226, aff'd on other grounds 2010 NBCA 35, 320 DLR (4th) 561 [*Rothmans*]; *Everingham v Ontario* (1991), 84 DLR (4th) 354 at 359–60, 3 CPC (3d) 87 (Ont Gen Div), rev'd on this point by (1992), 8 OR (3d) 121 at 125–26, 88 DLR (4th) 755 (Div Ct) [*Everingham*]; Dodek, "Intersection", *supra* note 5 at 8, 18–22, 25; 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 Adam M Dodek, "Government Lawyers" in Alice Woolley et al, eds, *Lawyers' Ethics and Professional Regulation*, 3rd ed (Toronto: LexisNexis Canada, 2017) 595 at 614–19 [Woolley, *Lawyers' Ethics*].

70 Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2009, last amended 2017), rr 7.3-1, 7.3-2, online: Federation of Law Societies of Canada <www.flsc.ca> [*FLSC Model Code*].

71 *Ibid*.

this part apply equally to lawyers in private practice who are retained by government.

I argue that lawyers' professional obligations have three major differences from the legislated regimes on political activity. First, the professional obligations of lawyers are not hierarchical but instead apply equally to all lawyers. Second, the operative professional obligation for most government lawyers is not political neutrality *per se*, but the duty of loyalty to the client—and the duty of loyalty has different implications for the scope of permissible political activity than does a duty of political neutrality. Third, the implications of the duty of loyalty are not functional: they are determined not by the nature of the lawyer's practice but by the identity of the client.

Unlike the legislated regimes on political activity, the professional obligations of lawyers are not hierarchical. That is, all lawyers have the same professional obligations regardless of whether or not they play a management role. Indeed, the rules of professional conduct apply even to an articled student in the same way as they do to a lawyer.[72] Thus, any restrictions on political activity imposed by professional obligations will apply to all lawyers, whether or not they are classified as management or have management-like functions.

A. Most Government Lawyers

For most government lawyers, the operative professional obligation is not political neutrality *per se* but the duty of loyalty to the client. Justice Binnie, writing for the Supreme Court of Canada in *R v Neil*, emphasized that "[t]he duty of loyalty is intertwined with the fiduciary nature of the lawyer-client relationship" and includes three "dimensions" aside from confidentiality: "the duty to avoid conflicting interests," "a duty of commitment to the client's cause," and "a duty of candour."[73] Chief Justice McLachlin, writing for the Court in *Canadian National Railway Co v McKercher LLP*, reaffirmed these three dimensions.[74] Both Justice Binnie and Chief Justice

72 See e.g. *FLSC Model Code*, *supra* note 70, r 1.1-1 ("'lawyer' means a member of the Society and includes a law student registered in the Society's pre-call training program").

73 *Neil*, *supra* note 17 at paras 16, 19. Woolley argues that not all violations of the duty of loyalty, as articulated in *Neil* at para 19, are necessarily violations of the lawyer's fiduciary duty (see Alice Woolley, "The Lawyer as Fiduciary: Defining Private Law Duties in Public Law Relations" (2015) 65:4 UTLJ 285 at 298 [Woolley, "Lawyer as Fiduciary"]).

74 *Canadian National Railway Co v McKercher LLP*, 2013 SCC 39, [2013] 2 SCR 649 [*McKercher*]. Colin Jackson, Richard Devlin & Brent Cotter, "Of Lodestars and Lawyers: Incorporating

McLachlin made it clear that the duty to avoid conflicts contemplates not only the misuse of confidential information but also impediments to zealous advocacy.[75] As Chief Justice McLachlin put it, "[e]ffective representation may be threatened in situations where the lawyer is tempted to prefer other interests over those of his client"—whether those other interests be those of the lawyer, another client, or a third party.[76] While this duty of loyalty is emphasized in the case law, it is arguably underemphasized in the Federation of Law Societies of Canada's *Model Code of Professional Conduct* (*FLSC Model Code*), as well as the corresponding law society codes.[77]

Both case law and the *FLSC Model Code* are explicit that the duty of loyalty is important not only for the client to whom it is owed. Justice Binnie in *Neil* observed that "the duty of loyalty…endures because it is essential to the integrity of the administration of justice and it is of high importance that public confidence in that integrity be maintained."[78] Similarly, the *FLSC Model Code* recognizes that the duty of loyalty is "essential" to "maintain public confidence in the integrity of the legal profession and the administration of justice."[79]

However, the duty of loyalty—at least in its typical application—is not all-encompassing. Indeed, Justice Binnie in *Neil* cautioned against an overly broad interpretation of the duty of loyalty, stating that "[a]n unnecessary expansion of the duty may be as inimical to the proper functioning of the legal system as would its attenuation."[80] That is, the duty of loyalty is recognized as being violated in *Neil* and *McKercher* only if the lawyer misuses confidential information, has a competing interest that

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the Duty of Loyalty into the *Model Code of Conduct*" (2016) 39:1 Dal LJ 37 at 39 characterize the court in *McKercher* as "unequivocally endors[ing] the duty of loyalty as a foundational ethical principle".

75 *McKercher*, *supra* note 74 at paras 23–26; *Neil*, *supra* note 17 at paras 17, 24.

76 *McKercher*, *supra* note 74 at para 26. See also para 43, where the Court adopts the language of *Neil*, *supra* note 17 at para 19 ("ensuring that a divided loyalty does not cause the lawyer to 'soft peddle' his or her defence of a client"). *McKercher* recognizes that this part of the duty to avoid conflicts "is closely related to" the duty of commitment to the client's cause (at para 43).

77 See Jackson, Devlin & Cotter, *supra* note 74.

78 *Neil*, *supra* note 17 at para 12.

79 *FLSC Model Code*, *supra* note 70, r 3.4-1, commentary 5.

80 *Neil*, *supra* note 17 at para 15. See also *Strother v 3464920 Canada Inc*, 2007 SCC 24 at para 136, [2007] 2 SCR 177, McLachlin CJ dissenting in part ("[i]f the duty of loyalty is described as a general, free-floating duty owed by a lawyer or a law firm to every client, the potential for conflicts is vast").

tends to impede his or her zealous and loyal representation, or withholds relevant information from the client.[81]

Under this typical view of loyalty, political activity would infringe the government lawyer's duty of loyalty only under fairly narrow circumstances that would largely depend on the nature of the lawyer's practice. If the lawyer leaked confidential information to a political party or misused confidential information for the benefit or harm of a political party, there would be a breach of loyalty. If the lawyer 'soft peddled'[82] his or her efforts in order to benefit or harm a political party, or changed his or her arguments or position or tactics in order to benefit a political party, there would be a breach of loyalty. Political activity, and allegiance to a political party, suggests the reasonable possibility of these things occurring. Recall Lawyer X, the litigator who represents the provincial government in controversial matters upon which the opposition parties hammer the government. Lawyer X's political activity may preclude him or her from fulfilling, or from the appearance of fulfilling, his or her duty of loyalty to the government as the client. However, if Lawyer X instead represented the government in routine negligence cases or advised the government on commercial transactions, then his or her political activity would be unlikely to breach the duty of loyalty.

However, in the particular case of government lawyers, this narrow view of loyalty is incomplete because of the nature of the lawyer, the client, and the lawyer-client relationship, as well as the unique relationships between the government and any political parties that control or seek to control the government.[83] The nature of the government as the client—changing political masters commanding a continuing entity served by a continuing civil service—and the government employee as the lawyer—a fixed member of that continuing civil service—requires another level or kind of loyalty. This loyalty is an absence of professed allegiance to a political party at that level of government. While the government as the client can always retain outside counsel, it does not choose lawyers or law firms in the same way as

81 Woolley argues that the part of the duty of loyalty that is a fiduciary duty is breached only in three circumstances: "where [lawyers] violate obligations to clients as a consequence of a conflict of interest or duty;" "where they undercut the very nature of the representation they undertook to provide;" and "where, through failing to provide information or by providing the client with misinformation, they undermine the client's ability to make decisions." (Woolley, "Lawyer as Fiduciary", *supra* note 73 at 291–92).

82 *McKercher*, *supra* note 74 at para 43, adopting the language of *Neil*, *supra* note 17 at para 19.

83 My approach here is consistent with Dodek, who argues that "the Crown is a very different type of client from any other organization" (Dodek, "Intersection", *supra* note 5 at 11).

other clients. As such, a different kind of trust in the lawyer is engaged, and that different kind of trust requires a different kind of loyalty.

The duty of loyalty is challenged by the political activity of government lawyers because the interests of a government are, by definition, separate from—and always potentially adverse to—the interests of the political parties who control or seek to control that government. The federal government has separate interests from all federal political parties, not only the opposition parties but also the party that happens to be in power at any given time. Similarly, each provincial government has separate interests from any of that province's political parties. Support for any political party at the same level of government detracts from the lawyer's loyalty to the government as the client, including commitment to the client's cause—even where it does not amount to a conflict of interest, *i.e.* there is not "a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person."[84] From a principled perspective, the threshold is low: even membership in, or a donation to, a party would be inconsistent with the duty of loyalty to the client. Membership and donations are active expressions of allegiance. In this way, professed allegiance is binary and is not a matter of degree.

For these purposes, public comment on, and criticism of, policies or decisions of the government or a political party should be considered political activity that raises equivalent allegiance concerns, even if the comment is unrelated to the lawyer's duties. Recall, for example, that the Ontario *Act* defines political activity as including "comment[ing] publicly and outside the scope of the duties of his or her position on matters that are directly related to those duties and that are dealt with in the positions or policies of a federal or provincial political party or in the positions or policies publicly expressed by a candidate in a federal, provincial or municipal election."[85] This narrow kind of public comment—related to the government lawyer's duties—would violate the duty of confidentiality in spirit, if not in letter.[86] However, public comments on matters unrelated

84 *FLSC Model Code*, *supra* note 70, r 1.1-1.

85 Ontario *Act*, *supra* note 22, s 72.

86 See e.g. *FLSC Model Code*, *supra* note 70, r 3.3-1, commentary 8 ("[a] lawyer should avoid indiscreet conversations and other communications, even with the lawyer's spouse or family, about a client's affairs and should shun any gossip about such things even though the client is not named or otherwise identified. Similarly, a lawyer should not repeat any gossip or information about the client's business or affairs that is overheard or recounted to the lawyer. Apart altogether from ethical considerations or questions of good taste,

to the lawyer's duties are also problematic. Indeed, the commentary to the rule on confidentiality cautions against "gossip," "speculation," or "commen[t]" "concerning clients' affairs or business"—not just the affairs or business relevant to the lawyer's representation.[87] Again, this particular duty of loyalty of government lawyers is a matter of allegiance given the unique nature of the relationships among the government and the political parties that seek to form that government.[88]

As with the legislated regimes on political activity, the issue is both actual loyalty and public confidence in that loyalty. I disagree with the observation of the Federal Court of Appeal in *Taman* that there may be a meaningful distinction between impartiality and impairment of the ability to practice impartially. Similarly, I disagree with the argument of the applicant in *Taman* that the rules of professional conduct supported her request for a leave of absence, particularly, as she put it, "the principle that lawyers are expected to separate their personal views from the positions they take on behalf of a client."[89] While competent lawyers are able to separate their views and preferences from the positions of the client, political activity is not a matter of views and preferences, but of loyalty and allegiance.[90]

Some commentators do identify some level of political neutrality *per se* as an obligation of most or all government lawyers—although it is often unclear whether they consider this a professional obligation of lawyers, and they do not address whether this obligation requires foregoing political activity. Lorne Sossin, for example, has argued that "government lawyers in civil litigation matters owe a duty to act…independent of partisan or political preferences."[91] Patrick Monahan has argued for a similar duty

indiscreet shoptalk among lawyers, if overheard by third parties able to identify the matter being discussed, could result in prejudice to the client. Moreover, the respect of the listener for lawyers and the legal profession will probably be lessened. Although the rule may not apply to facts that are public knowledge, a lawyer should guard against participating in or commenting on speculation concerning clients' affairs or business").

87 *Ibid*.

88 While my focus in this article is partisan political activity, I note that, under my approach, support of a non-partisan advocacy organization is not *necessarily* problematic for most government lawyers. If and when these organizations take positions on actions or policies or decisions made by the government lawyer's level of government or political parties at that level, support then becomes problematic.

89 *Taman* Fed Ct, *supra* note 4 at para 76.

90 The term "allegiance" was used repeatedly in *Taman* FCA, *supra* note 4 and *Taman* Fed Ct, *supra* note 4.

91 *Rothmans*, *supra* note 69 (Expert Report of Professor Lorne Sossin, Court File No F/C/88/08 at para 33 [Sossin Report]). The motions judge did not address this point in his reasons. See also Sossin Report at para 30 ("[t]he duty to act independent of any improper

of government lawyers, although he identifies this duty as a "public interest" responsibility as opposed to one of legal ethics:

> The obligation to act in an independent and impartial manner, independently of partisan political considerations,…is a responsibility shared in common by all government lawyers who are expected to conduct litigation and offer legal advice on the basis of an independent and principled analysis of what the law requires, even when that advice may be inconsistent with the policy aims of the government of the day.[92]

Similarly, John Mark Keyes states that government lawyers have a "requirement of political neutrality,"[93] and Deborah MacNair notes that "[t]he legislative drafter has a duty to be non-partisan."[94] To the extent that this duty is a matter of professional obligations as lawyers, as opposed to legal obligations or public interest obligations as government employees, I suggest that these statements are better read not as reflecting a duty of political neutrality *per se*, but as a duty of loyalty to the Crown as opposed to the political party in power.

I argue, however, most government lawyers' political activity at a different level of government does not directly engage the duty of loyalty. I acknowledge that the federal and provincial governments often have separate and sometimes conflicting interests, political parties may criticize governments at any level, and federal and provincial political parties are often closely intertwined. However, a federal government lawyer's support of a provincial political party, or *vice versa*, does not engage the duty of loyalty to the government client in as direct a fashion. Thus, any political activity restrictions deriving from the professional obligations of most government lawyers are restrictions only at the same level of government. Most lawyers for the federal government may engage in political activity at

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political interference is closely related to the government lawyer's duty to uphold the rule of law"). The focus of Sossin's report is on whether government lawyers have special professional obligations, not whether government lawyers can engage in political activity. See also *Rothmans*, *supra* note 69 at 22, 33; *Everingham*, *supra* note 69 at 369–60; Dodek, "Intersection", *supra* note 5 at 8, 18–22, 25; and Woolley, *Lawyers' Ethics*, *supra* note 69 at 614–19.

92 Patrick J Monahan, "'In the Public Interest': Understanding the Special Role of the Government Lawyer" (2013) 63 SCLR 43 at 45 (Monahan—now Justice Monahan of the Superior Court of Justice—wrote this article while serving as Deputy Attorney General for Ontario. As with the Sossin Report, *supra* note 91, Monahan's focus is on whether government lawyers have special professional obligations, not whether government lawyers can engage in political activity).

93 Keyes, *supra* note 5 at 30.

94 MacNair, "Legislative Drafters", *supra* note 5 at 131.

the provincial or municipal level without violating their professional obligations. Likewise, most lawyers for a provincial government may engage in political activity at the federal or municipal level without violating their professional obligations.

Under my approach, the duty of loyalty and its implications for the political activity of most government lawyers are not functional. That is, this duty turns on the identity of the client and does not depend on the specific function the lawyer performs or the kinds of matters the lawyer handles. A litigator, an advisory solicitor, or a policy lawyer all have the same duty of loyalty to the government as the client and thus cannot engage in political activity at the same level of government.

B. Special Cases: Crown Prosecutors and Counsel for Courts and Tribunals

However, there are two groups of government lawyers for whom I argue that professional obligations require political neutrality *per se*, as opposed to mere loyalty to the client. The first group is Crown prosecutors, and the second is counsel to courts and tribunals.

I argue that the professional obligations of Crown prosecutors require a level of political neutrality that precludes political activity.[95] The imperative for political neutrality is emphasized in the case law on prosecutorial

95 This approach is consistent with the *OLRC Report* arguing that restrictions on political activity should apply to all government employees with "direct involvement in the administration of justice," although the OLRC would have included not just Crown prosecutors, but also any lawyers appearing for the government before any court or tribunal (*OLRC Report*, *supra* note at 277). As the term "Crown prosecutor" is sometimes applied to non-lawyers, for my purposes I mean only lawyers. While I acknowledge the argument that legislative drafters are prosecutor-like (MacNair, "Legislative Drafters", *supra* note 5 at 131), it is unnecessary for my purposes to decide this question. If indeed legislative drafters have equivalent obligations to Crown prosecutors, then my conclusions on Crown prosecutors would also apply to legislative drafters. I also note that for legislative drafters whose client is the legislative assembly, political neutrality may be essential to client confidence. Recall MacNair notes that "[i]n keeping with the principle that Crown prosecutors must be free from political influence, they cannot run for election in a federal or provincial election without taking a leave of absence" and that "[t]his is similar to rules in other jurisdictions governing the civil service"—but she is unclear whether this prohibition comes only from political activity legislation or also from the professional obligations of Crown prosecutors (MacNair, "Crown Prosecutors", *supra* note 7 at 295). I note also that the duty of loyalty cannot apply to the political activity of Crown prosecutors in the same way as it applies to most government lawyers, as the Crown prosecutor does not have "an identifiable client" (MacNair, "Crown Prosecutors", *supra* note 7 at 262).

discretion and independence: "a prosecutor…has a constitutional obligation to act independently of partisan concerns and other improper motives."[96] This imperative is reinforced by the rules of professional conduct, as they consider the importance of prosecutorial discretion and the apolitical prosecutor:

> When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect….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 must act fairly and dispassionately.[97]

This imperative is also reinforced by the "constitutional principle that the Attorneys General of this country must act independently of partisan concerns when exercising their delegated sovereign authority to initiate, continue or terminate prosecutions."[98] While "the law presumes that the Attorney General—also a member of Cabinet—can and does set aside partisan duties in exercising prosecutorial responsibilities,"[99] it is less clear that the public and the law can or should make this presumption of Crown prosecutors generally. Indeed, arguably it is the fact that the Attorney General almost never exercises this power personally that promotes public confidence in apolitical criminal justice.[100] Concerns about

96 *R v Cawthorne*, 2016 SCC 32 at para 24, [2016] 1 SCR 983, McLachlin CJ [*Cawthorne*]. For a critical reconsideration of the special ethical obligations of Crown prosecutors, see Alice Woolley, "Reconceiving the Standard Conception of the Prosecutor's Role" Can Bar Rev [forthcoming], online: SSRN <papers.ssrn.com/sol3/papers.cfm?abstract_id=3027557>.

97 *FLSC Model Code*, *supra* note 70, r 5.1-3 and commentary 1.

98 *Krieger v Law Society of Alberta*, 2002 SCC 65 at para 3, [2002] 3 SCR 372 [*Krieger*].

99 *Cawthorne*, *supra* note 96 at para 32.

100 See e.g. Law Reform Commission of Canada, "Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor" (1990) Law Reform Commission of Canada Working Paper No 62 at 16 [LRCC] ("while Crown prosecutors are theoretically accountable to, and under the control of, the Attorney General, it is only in the most exceptional cases that the Attorney General would become directly involved in, or even knowledgeable about, a particular case…. The day-to-day administration of justice must be in the hands of the local Crown attorneys or agents"). See also LRCC, *ibid* at 17 ("[t]he Attorney General is accountable to the legislature for the actions of the agents employed as prosecutors, and so must have the right to intervene in any particular case and direct the manner of the prosecution. Such direct interventions, however, leave the Attorney General vulnerable to allegations of partisan political influence"). See also Bruce A MacFarlane, "Sunlight and Disinfectants: Prosecutorial Accountability and Independence Through Public

prosecutorial independence and discretion arise primarily with the protection of the Attorney General from partisan political pressure, and with the protection of the individual Crown prosecutor from political interference from the Attorney General. However, stakeholders—including but not limited to the public and the law societies—should also be concerned with the protection of the individual Crown prosecutor from political interference arising, or appearing to arise, from his or her own political activity and allegiance.[101] Given the considerable discretion granted to each Crown prosecutor, I argue that any political activity of Crown prosecutors risks undermining public confidence in the political neutrality of prosecutors and prosecutions.[102] Such political activity not only infringes the specific professional obligations of Crown prosecutors but also infringes the more general duty on Crown prosecutors, as on all lawyers, to "encourage public respect for…the administration of justice."[103] Whereas the Ontario *Act*, for example, restricts the political activity of Crown attorneys and not assistant Crown attorneys in their capacity as government

Transparency" (2001) 45 Crim LQ 272 at 293 ("[a]t law, Attorneys General in Canada unquestionably can direct individual prosecutorial decisions.... That is the theory. In practice, such direction is virtually unheard of…these types of decisions are routinely made by professionals in the department, detached from partisan political considerations. A direction from the Attorney General in a particular case, though supportable in law, cannot be done without conveying at least the impression that the direction was politically inspired" [footnotes omitted]). While prosecutions for some offences require the personal consent of the Attorney General, these offences are rare and exceptional. See also e.g. the Honourable Marc Rosenberg, "The Attorney General and the Administration of Criminal Justice" (2009) 34:2 Queen's LJ 813 at 847 (arguing that it would be inappropriate for the Attorney General to appear in court "in any criminal case").

101 See e.g. MacFarlane, *supra* note 100 at 278–79 ("the independence of a prosecution service flows from the independence of the Attorney General to be free, in the decision-making process, from the partisan political pressures of the day…. Independence, in this context [the prosecution service and the individual Crown prosecutor], therefore involves the insulation of the prosecution process from partisan political considerations"). See also Stuart J Whitley, "Prosecution Ethics: A Proposal for Formalizing Rules of Conduct" (2010) 55:4 Crim LQ 508 at 510 ("the decisions of the prosecutor are to be exercised independently, free from inappropriate or unwarranted interference of any kind, *including personal preferences or motivations*, and direction in specific cases that are of a politically motivated kind" [emphasis added]).

102 My position is consistent with the prohibition in the federal *Canada Elections Act*, *supra* note 48, s 65(d), on a provincial Crown attorney being a candidate in a federal election. See also *Crown Attorneys Act*, *supra* note 48, s 1(1); *Taman* Fed Ct, *supra* note 4 at 59.

103 *FLSC Model Code*, *supra* note 70, r 5.6-1. See also MacNair, "Crown Prosecutors", *supra* note 7 at 263 ("[t]he role of the Crown prosecutor, more so than is the case for other lawyers, is a direct link to public confidence in the criminal justice system. Their work is highly visible and is always in the public eye").

employees, all Crown prosecutors should refrain from political activity because of their professional obligations.

The second group for whom professional obligations require political neutrality *per se*, as opposed to merely loyalty to the client, are lawyers who are counsel to adjudicative tribunals or courts.[104] Neutrality for this group is anchored in lawyers' duty to "encourage public respect for…the administration of justice" and is derived from the political neutrality required of judges and members of these courts and tribunals.[105] This duty, to the extent that it is applied in disciplinary decisions, is typically breached by unsupported allegations of bias or wrongdoing against judges or courts.[106] However, this duty engages the political activity of counsel to courts or tribunals because that activity calls into question the political neutrality of those courts and tribunals. Judges are required to refrain from all political activity, including but not limited to "partisan political activity," because any such activity "would undermine confidence in a judge's impartiality."[107] Members of some adjudicative tribunals are also required to refrain from some political activity.[108] If all or some of the political activity of judges and tribunal members compromises public confidence, it seems to follow that

104 This approach is consistent with the *OLRC Report* arguing that restrictions on political activity should apply to all government employees "in a position confidential to…a judge of a Provincial or District Court or of the Supreme Court" (*OLRC Report*, *supra* note 4 at 279); and with the *Report* arguing that restrictions on political activity should apply to all government employees "in a position confidential to any adjudicative board, agency, or commission in relation to its adjudicative functions" (at 280).

105 *FLSC Model Code*, *supra* note 70, r 5.6-1.

106 See e.g. *Nova Scotia Barristers' Society v Morgan*, 2010 NSBS 1 (the non-practicing lawyer and mayor in a radio interview alleged bias by the courts in the province); *Law Society of Upper Canada v Napal*, 2014 ONLSTH 109 at para 41, [2014] LSDD No 130 (QL) (unsupported allegation of bias against the judge); *Law Society of Upper Canada v Kimberly Lynne Townley-Smith*, 2012 ONLSHP 52 at paras 1, 79, [2012] LSDD No 60 (QL) (unsupported allegations of bias and other misconduct against several judges in court filings and correspondence); *The Law Society of Manitoba v Troniak*, 2009 MBLS 9 at para 51 (unsupported allegations that an arbitrator did not proceed fairly); *Law Society of Upper Canada v Ann Bruce*, 2013 ONLSHP 6, [2013] LSDD No 15 (QL) (unsupported allegations of bias and other incivility towards judges in court). But see *Argiris, Re*, 1996 CanLII 466, [1996] LSDD No 88 (Ont Disc Committee) (breach of a court order); *The Law Society of Newfoundland and Labrador v Brian D Wentzell*, 2017 CanLII 54199 (NLLS) ("being intoxicated in Court and drinking alcohol in Court").

107 Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: CJC, 2004) at 28–29, Impartiality, principles D.1 to D.3 (quotation from D.1 and D.2), online: <www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf> (principle D.2 refers to "[a]ll partisan political activity," and principle D.3 explicitly mentions "membership in political parties," "fund raising," and "contributing to political parties or campaigns").

108 For example, the Ontario *Act*, *supra* note 22, restricts the political activity of members of many tribunals: ss 85(2) para 9, and 107(b); *Political Activity*, *supra* note 47, s 1 and Schedule 1.

the same political activity of their counsel would also compromise public confidence.[109] While counsel to courts and tribunals do not supplant the decision-making powers and responsibilities of judges and members, they necessarily provide substantive and discretionary advice that cannot be discounted as merely technical or mechanical in nature.[110] My argument here is not that tribunal members should necessarily be restricted from political activity,[111] but that whatever restrictions apply to those members should also apply to their counsel. Thus, as a matter of professional obligations, lawyers for tribunals and courts should refrain from political activity to the same extent required of the members and judges of these tribunals and courts. In effect, the rules and laws governing the political activity of judges and members of courts and tribunals are transposed into professional obligations of their counsel.

It is unclear whether these professional obligations of government lawyers continue to apply during a leave of absence. A formal approach might suggest that during a leave of absence, the lawyer-client relationship is suspended. However, depending on the length of the leave, this approach may appear to be a technicality or a fiction, at least in the perception of the general public. Moreover, the duty of loyalty, for example, survives the solicitor-client relationship, at least for the purposes of conflicts and confidentiality.[112] For my purposes, I assume that a leave of absence does not negate the restrictions on political activity imposed by the rules of professional conduct.

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109 See also Joshua Wilner, "To Be or Not to Be? Some Legal Ethics for Judicial Law Clerks" (2010) 89:3 Can Bar Rev 611 at 639–40 ("[i]mpartiality and the perception of impartiality are also critically at play in the community involvement of law clerks. They must be prudent in any civic, charitable, and political activities in which they take part, particularly if these involve remuneration"). I would argue that no political activity is prudent for a law clerk. Indeed, Wilner's suggestion of prudence instead of abstention is curious, as elsewhere in the article he notes that "clerks may be bound by the judicial standards binding their principal" (*ibid* at 621 [footnotes omitted]).

110 See e.g. Wilner, *supra* note 109 at 612 (law clerks' "functions are derivative of the judicial function, arising out of and dependent upon the judicial office held by the judge they serve"). See also Wilner, *ibid* at 616 ("[w]hile clerks are not the ones who make the decisions, they do participate in the decision-making process as facilitators of decisions"). For a discussion of the ways in which law clerks influence judges, see Wilner, *ibid* at 624–32.

111 But for such an argument, see e.g. Murphy & Zurbrigg, *supra* note 4.

112 See e.g. *FLSC Model Code*, *supra* note 70, r 3.4-1, commentary 3 (conflicts) and 7 (confidentiality); see also r 1.1-1 (where the definition of "conflict of interest" includes conflict with duties to a former client).

C. The Impact of the *Charter*

Thus, as a strict matter of professional obligations, all government lawyers should refrain from at least some political activity. Most government lawyers should refrain from any political activity at the same level of government. Prosecutors should refrain from any political activity at any level of government. Government lawyers who are counsel to tribunals or courts should refrain from political activity to the same extent required of members or judges of those tribunals or courts. However, like the legislated regimes on the political activity of government employees, these imperatives must be tempered by *Charter* considerations—that is, some restrictions on political activity may need to be reduced to comply with the *Charter*.

At the outset, I note that a *Charter* challenge could target the rules of professional conduct themselves or the application of those rules in a specific disciplinary decision. The former would follow a section 1 analysis, while the latter would follow a reasonableness review.[113] The difference in mechanics is not important for my purposes, except to note the concern that the protection for *Charter* rights under a reasonableness review may be weaker than the protection under a section 1 analysis.[114] For clarity, I will refer to potential infringements of *Charter* rights.

I begin with three general propositions. The first is that lawyers—at least practicing lawyers—face greater restrictions on their *Charter* rights than members of the public.[115] Indeed, these restrictions may be severe and

113 *Doré*, *supra* note 1 at para 57 ("[o]n judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play").

114 See e.g. Audrey Macklin, "Charter Right or Charter-Lite? Administrative Discretion and the Charter" (2014) 67 SCLR (2d) 561.

115 See e.g. *Doré*, *supra* note 1 at para 68 ("lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint"). See also e.g. *Histed v Law Society of Manitoba*, 2007 MBCA 150 at para 80, 287 DLR (4th) 577 [*Histed*], citing *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232, 71 DLR (4th) 68 (for the proposition that "a limited prohibition on freedom of expression within a regulated profession can be justified"). See also *Histed*, *supra* note 115 at para 79 ("[w]hile litigants and other interested persons may comment publicly on cases before the courts and may criticize judicial decisions in terms which some might consider offensive, lawyers are bound by the constraints of the professional standards which apply to all members of the legal profession.... If Histed wishes to have that same unfettered right to criticize the administration of justice, he may do so, but not while a member

apply even to the language used in a private letter to a judge or another lawyer.[116] The second proposition is that the *Charter* rights protecting political activity are important, and infringements of those rights will be difficult to justify. This is true both for freedom of expression under section 2(b) and for the rights to vote or run for office (at the provincial and federal level) under section 3. Justice Iacobucci, for the majority of the Supreme Court of Canada in *Figueroa v Canada* (*Attorney General*), observed that "[t]he fundamental purpose of s. 3, in my view, is to promote and protect the right of each citizen to play a meaningful role in the political life of the country. Absent such a right, ours would not be a true democracy."[117] Similarly, in *Sauvé v Canada* (*Chief Electoral Officer*), Chief Justice McLachlin for the majority stated that "[t]he right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside."[118] Likewise, political expression is "core" expression that will be strongly protected under section 2(b).[119] The third proposition is that greater restrictions on political activity may be justifiable for Crown prosecutors and counsel to courts and tribunals than for most government lawyers. For most lawyers, these restrictions support the duty of loyalty and thus maintain both the

of the Law Society"). See also *Histed*, *supra* note 115 at para 69, citing with approval *R v Kopyto* (1987), 62 OR (2d) 449 at 528, 39 CCC (3d) 1 (CA), Dubin JA, citing with approval *In re Sawyer*, 360 US 622 at 646–47, 79 S Ct 1376 (1959) ("[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech"). As government lawyers, as I have defined them, are necessarily practicing lawyers, it is unnecessary to address whether restrictions on expression can and should apply to non-practicing lawyers.

116 *Histed*, *supra* note 115 (to another lawyer); *Doré*, *supra* note 1 (to a judge).

117 2003 SCC 37 at para 30, [2003] 1 SCR 912.

118 *Sauvé*, *supra* note 3 at para 9 (further, "[t]he framers of the *Charter* signaled the special importance of this right not only by its broad, untrammeled language, but by exempting it from legislative override under s. 33's notwithstanding clause" (at para 11)).

119 See e.g. *Harper*, *supra* note 20, at para 1, McLachlin CJ and Major J dissenting in part, but not on this point ("[t]his Court has repeatedly held that liberal democracy demands the free expression of political opinion, and affirmed that political speech lies at the core of the *Canadian Charter of Rights and Freedoms*' guarantee of free expression"). See also Bastarche J for the majority ("Most third party election advertising constitutes political expression and therefore lies at the core of the guarantee of free expression" (*ibid* at para 66)). More recently, see e.g. *Whatcott v Saskatchewan Human Rights Tribunal*, 2013 SCC 11 at para 115, [2013] 1 SCR 467 ("[w]hile hate speech constitutes a type of expression that lies at the periphery of the values underlying freedom of expression, political expression lies close to the core of the guarantee" [footnotes omitted]). Compare the civility case *Histed*, *supra* note 115 at para 81 (noting "the limited value attached to insults as forms of expression"). See also e.g. *Doré*, *supra* note 1 at para 16 (noting that the disciplinary committee "concluded that his statements had little expressive value, as they were 'merely opinions, perceptions and insults'").

confidence of the government client in its lawyers and public confidence in the legal profession. While this is surely an important objective, the restrictions on Crown prosecutors and counsel to courts and tribunals have the more important objective of maintaining public confidence in the administration of justice. (To the extent that the duty of loyalty does indeed support public confidence in the administration of justice,[120] it does so less directly.)

In this context, one sensible approach would be to arrange political activity on a spectrum, with restrictions on activity at one end being relatively easy to justify and restrictions on activity at the other end being relatively difficult to justify. It would appear that the right to vote under section 3 of the *Charter* cannot be justifiably infringed. (Disclosing how one intends to vote, or did vote, may be problematic.) One reason is that Canadian law allows voting by judges, for whom impartiality and the appearance of impartiality are absolutely critical.[121] While some judges may choose not to exercise this right, that choice is theirs.[122] Any restriction on government lawyers, even lawyers for courts, could not reasonably be any greater than the restriction on judges. A second reason is that legislation on political activity typically allows even the most senior government employees to vote.[123] If the political neutrality of the public service, which is a critical constitutional convention, does not or cannot prohibit this group from voting, it would seem that voting should or must also be allowed of government lawyers. I do acknowledge the concern that "it is overly simplistic to rely entirely on the secrecy of the ballot box to

120 Recall the *FLSC Model Code*, *supra* note 70 at r 3.4-1 and commentary 5.

121 *Muldoon v Canada*, [1988] 3 FC 628, 21 FTR 154 [*Muldoon* cited to FC], striking down a prohibition on voting by judges in *Canada Elections Act*, RSC 1970, c 14 (1st Supp), s 14(4)(d) (note that the decision in *Muldoon* was on consent (at 630–32). Likewise, *Ethical Principles for Judges* states that "[j]udges in Canada (as in the U.S. and England) are entitled to vote and there is nothing unethical in doing so" (*Ethical Principles for Judges*, *supra* note 107 at 39, n 36).

122 See e.g. *Muldoon*, *supra* note 121 at 632–33 ("I am of the view that even if permitted to vote many judges would not wish to do so.... The removal of the restriction…will have the effect of leaving this decision to the individual consciences of the judges"). See also e.g. Cameron MacLean & Chanakya Sethi, "Amici Curiae: The Chief Speaks, Political Patronage and Banning All Divorce Edition" (4 December 2009), *Thecourt.ca* (blog), online: <thecourt.ca> (quoting an interview in which Chief Justice McLachlin stated that she does not vote, although she clarified that "I'm not suggesting judges shouldn't vote." Thank you Adam Dodek for bringing this interview, and this specific remark, to my attention).

123 See e.g. Ontario *Act*, *supra* note 22, s 89 (allowing the conflict of interest commissioner, the secretary of the cabinet, and deputy ministers to vote); Federal *Act*, *supra* note 22, s 117 (allowing deputy heads to vote).

protect…from any perceived politically partisan views."[124] Voting is nonetheless permissible as a minimal level of political activity that should not be denied and that the *Charter* will not permit to be denied.[125]

However, any political activity beyond voting would seem to infringe the duty of loyalty of most government lawyers or the political neutrality of Crown prosecutors or counsel for courts or tribunals, and it is not clear that any of these activities would be *de minimis*. I note that the Ontario *Act*, for example, allows all but the most senior managers to belong to a party and to donate to a party or candidate.[126] But political donations and membership in a political party inescapably call into question the loyalty of a government lawyer or the political neutrality of a Crown prosecutor or counsel for courts or tribunals. Moreover, if the *Charter* allows for the professional discipline of a lawyer for expression in the form of a private letter to a judge or another lawyer that breaches civility, it would presumably allow professional discipline of a lawyer for public political expression that breaches the duty of loyalty to the client or duties that protect public confidence in the administration of justice.

Another way to implement these *Charter* considerations would be to narrow this aspect of the duties of loyalty or political neutrality so that they are suspended during a leave of absence. That is, these restrictions on political activity would likely be justifiable as they apply to active government lawyers but likely not justifiable as they apply to a government lawyer on a leave of absence. That is, most government lawyers—and perhaps even prosecutors and counsel to courts and tribunals—should be able to run for office while on leave and return after that leave, and such leave should be available to all such lawyers. Likewise, prospective government lawyers should not be disqualified by prior political activity, and government lawyers should be able to engage in political activity after leaving the government.

If I am mistaken that most government lawyers can engage in political activity at other levels of government without violating their professional

124 *Muldoon*, *supra* note 121 at 632 (specifically referring to judges).

125 I do acknowledge that the right to vote may justifiably be denied to some very select government employees. See e.g. *Canada Elections Act*, *supra* note 48, s 4(a)–(b) (prohibiting the Chief Electoral Officer and the Assistant Chief Electoral Officer from voting in federal elections). See e.g. *Stevens v Conservative Party of Canada*, 2005 FCA 383 at para 21, [2006] 2 FCR 315 (Decary JA for the panel, while not considering the constitutionality of this prohibition, did note that it was 'rare:' "The Chief Electoral Officer is one of the rare people who is disentitled from voting").

126 Ontario *Act*, *supra* note 22, s 89 (it also allows them to "attend an all-candidates meeting").

obligations, then another way to implement *Charter* considerations would be to allow government lawyers to engage in such political activity. That is, infringements of these political rights may be justifiable in their application to political activity at the same level of government, but not justifiable in their application to political activity at a different level of government.

Thus, the professional obligations of lawyers have implications for the political activity of government lawyers. For most government lawyers, the duty of loyalty to the client precludes political activity at the same level of government. The special professional obligations of Crown prosecutors preclude them from all political activity. The professional obligation to encourage respect for the administration of justice requires lawyers for courts and tribunals to refrain from political activity to the same extent required of judges and members of those courts. *Charter* considerations suggest that all government lawyers should be allowed to vote, and that most, if not all, government lawyers should be able to engage in political activity while on a leave of absence, and that such leave should be available to all such lawyers.

III. THE INTERACTION OF PROFESSIONAL OBLIGATIONS AND THE LEGISLATED REGIMES

I have argued above that lawyers' professional obligations impose different, and often stricter, restrictions on the political activity of government lawyers than do legislated regimes on the political activity of government employees. *Charter* considerations may reduce these restrictions but do not eliminate them. It is thus necessary to determine how the political activity legislation interacts with the professional obligations of lawyers under provincial legislation on the legal profession.

There are three compelling approaches. The first approach is that the political activity legislation trumps the legal profession legislation as a matter of statutory interpretation. Under this approach, any government lawyer—even a prosecutor or counsel to a court or tribunal—engaging in political activity permitted by the political activity legislation cannot be subject to law society discipline for conduct that infringes professional obligations. The second approach is that the political activity legislation constitutes a waiver of the duty of loyalty to the extent that it permits the political activity of government lawyers. Under this approach, most government lawyers complying with the political activity legislation do not violate their professional obligations. However, prosecutors and counsel

to tribunals or courts remain subject to the professional ethics regime despite political activity legislation, as the government, as the client, cannot waive the duty underlying the requirement of political neutrality. The third approach is that government lawyers must comply with both political activity legislation and their professional obligations. Under this approach, political activity permitted by the legislation could theoretically be grounds for professional discipline.

The first approach is that political activity legislation trumps legal profession legislation. That is, political activity legislation not only allows the political activity of government employees as a matter of labour and employment law but also constitutes the only restrictions on such activity and sets out a positive statutory right to political activity. This approach is a matter of statutory interpretation: did the legislature intend the political activity legislation to prevail over all other legislation or the legal profession legislation specifically? Only two of these statutes state such an intention explicitly, and only for some purposes: Manitoba's *Civil Service Act*, but only in relation to some political activity,[127] and the Northwest Territories' *Public Service Act*, but only in relation to leaves of absence for candidacy.[128] Presumably, those two legislatures did not intend the other political activity rights to prevail over other statutes. This intention, or a contrary intention, may also be implicit in legislation. For example, the text of Part VI of the Ontario *Act*, the Part on whistleblowing, suggests that the legislature did not intend for the political activity provisions to prevail over other statutes. Section 113(1) provides that, with some exceptions, "a right under this Part [Part VI] to make a disclosure prevails over anything provided under any other Act or otherwise at law that prohibits

127 Manitoba *Act*, *supra* note 22, s 44(1):

> 44(1) Nothing in this Act, *or any other Act of the Legislature*, prohibits an employee in the civil service or a person employed by any agency of the government
> (a) from seeking nomination as or being a candidate or supporting a candidate or political party in a provincial or federal general election or by-election, and if elected, from serving as an elected representative in that public office; or
> (b) from speaking or writing on behalf of a candidate or a political party in any election, or by-election, if in doing so he does not reveal any information or matter concerning the department, branch or agency in which he is employed or any information that he has procured or which comes to his knowledge solely by virtue of his employment or position [emphasis added].

128 NWT *Act*, *supra* note 22, s 34(6) ("[*n*]*otwithstanding any other Act*, the Deputy Minister of the department responsible for the administration of this Act shall, on application in writing, grant a leave of absence without pay to an employee who wishes to seek nomination as a candidate and to be a candidate for election" [emphasis added]).

the disclosure."[129] There is no such provision regarding Part V, the Part on political activity. If the legislature had intended the political activity provisions in the Ontario *Act* to likewise prevail over any other legislation, it would have said so.[130] Thus, this first approach will be generally be difficult to apply to lawyers for provincial governments because of the absence of evidence of the necessary legislative intent.

This first approach is even more difficult to apply to federal government lawyers under the federal *Act*. Even if the necessary legislative intent could be established,[131] the effectiveness of such an intention would be subject to a federalism analysis on the interaction with provincial legislation on the legal profession. While it is unnecessary to decide the question for my purposes, I do note that the answer is unclear. Keyes has argued that the federal regime would prevail in "any conflicts between provincial regimes for the legal profession and the regulation of the professional conduct of members of the federal public service."[132] He does so by analogizing to *Law Society (British Columbia) v Mangat*, in which "a federal regulatory regime for immigration consultants prevails over provincial regulatory regimes for the legal profession to the extent of any inconsistency."[133] However, the opposite result is more likely in this specific context: federal legislation cannot change the professional obligations of lawyers under provincial legislation on the legal

129 Ontario *Act*, *supra* note 22, s 113.

130 I do acknowledge that section 1 of the Ontario *Act* identifies one purpose of the *Act* as being "[t]o set out rights and duties of public servants concerning political activity." See also section 75, which states that "[a] public servant is entitled to engage in political activity, subject to the restrictions set out under this Part." On their own, these sections might suggest that the Part on political activity establishes positive rights to engage in political activity. However, this suggestion is undercut by the absence of a section specifying that the provisions in that Part prevail over any other Act.

131 Such an intent may be contrary to the approach that the federal Department of Justice takes to provincial law societies. See MacNair, "The Federal Public Sector Lawyer", *supra* note 5 at 162 ("[w]hile there is a different constitutional issue concerning jurisdiction over the affairs of federal lawyers, which necessitates certain regulatory limitations, the Department does attempt to respect, to the extent that it can, the regulatory authority of the law society").

132 Keyes, *supra* note 5 at 16.

133 *Law Society (British Columbia) v Mangat*, 2001 SCC 67, [2001] 3 SCR 113, as discussed and characterized in Keyes, *supra* note 5 at 16. Peter Hogg takes a narrower reading of *Mangat*, in which the particular purpose of the federal legislation is critical to the outcome (Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2007) vol 1 (loose-leaf 2016), ch 16 at 16.3(b)). See also MacNair, "Legislative Drafters", *supra* note 5 at 134–35 (concluding at 135 that federal legislative drafters cannot be required to be lawyers, and so "it is reasonable to conclude that the law society does not regulate federal legislative drafters, including their mandate or the licensing requirements that apply to them").

profession. Such a change would be substantively different than that in *Mangat* of allowing non-lawyers to engage in the practice of law (or what would otherwise be the practice of law) by appearing in front of a federally regulated body. Indeed, the Supreme Court of Canada in *Krieger v Law Society of Alberta* held, albeit in *obiter*, that provincial law societies have the jurisdiction to discipline federal prosecutors.[134] Presumably, provincial law societies also have the jurisdiction to set and apply professional standards for those federal prosecutors, and federal government lawyers more generally. If federal legislation could override professional obligations, this disciplinary authority would lose significance. While it is unnecessary to resolve the question here, I emphasize that federalism would be an additional legal hurdle in arguing that political activity rights under the federal *Act* override the professional obligations of federal government lawyers.

This first approach would also not apply in the three provinces in which the political activity of public servants is governed not by legislation but by human resources policies, as such policies would clearly not prevail over legislation on the legal profession.

A second and more modest approach is that political activity legislation can be interpreted as a waiver of the duty of loyalty to the extent that it permits the political activity of government lawyers. This approach sidesteps the formal question of whether the political activity legislation prevails over the legal profession legislation, as well as the federalism issue. This approach does not necessarily require an explicit statement in the legislation itself. For example, the *FLSC Model Code* provides that a client may consent to a lawyer acting despite a conflict of interest, and that such consent does not require independent legal advice.[135] Moreover, governments are recognized as sophisticated clients for whom such consent may be inferred or implied.[136] That is, political activity legislation, insofar as it

134 *Krieger*, *supra* note 98 at para 56. While Keyes mentions this part of *Krieger*, it is unclear how he reconciles it with his federalism prediction (Keyes, *supra* note 5 at 13–14). Keyes does not mention, however, that this part of *Krieger* was *obiter*. MacNair mentions this part of *Krieger*, but it is unclear what she concludes from it, other than it being "an example of an emerging trend whereby the courts are exhibiting an interest in reviewing certain aspects of the conduct of public sector lawyers" (MacNair, "Legislative Drafters", *supra* note 5 at 135).

135 *FLSC Model Code*, *supra* note 70, r 3.4-2 and commentary.

136 *Ibid*, r 3.4-2 and commentary 6. See also *Neil*, *supra* note 17 at para 28 (on the duty of loyalty and acting against a current client: "In exceptional cases, consent of the client may be inferred. For example, governments generally accept that private practitioners who do their civil or criminal work will act against them in unrelated matters, and a contrary position in a particular case may, depending on the circumstances, be seen as tactical rather than principled").

appears to allow government lawyers to engage in political activity, constitutes an express waiver or evidence of an implied waiver of the duty of loyalty. However, this approach cannot apply to prosecutors or counsel for tribunals or courts, as the duties of prosecutorial independence or encouraging respect for the administration of justice are not duties to the client and thus cannot be waived by the government as the client.

This second approach has many advantages over the first approach. It provides a principled basis to maintain the apparent status quo, at least for most government lawyers, while recognizing that there are some subsets of government lawyers that should be treated differently. It can also apply more broadly than the first approach. It could apply to federal government lawyers without engaging federalism issues, as the federal government as the client is equally free to waive the duty of loyalty as is a provincial government. It could also apply to government lawyers in those provinces that do not have political activity legislation, since human resources policies allowing the political activity of civil servants could constitute a waiver of the duty of loyalty. Most of all, it provides protection for most lawyers' *Charter* rights.

A third approach, and the most restrained, would be that government lawyers must comply with both regimes. That is, they should only engage in political activity that is permitted both by the political activity legislation and by their professional obligations. This approach seems the most principled and accurate: it acknowledges that there is little evidence that political activity legislation was intended to prevail over legislation on the legal profession, or that legislators even considered whether political activity legislation might constitute a waiver of the duty of loyalty. However, it imposes a significant sacrifice on government lawyers and a derogation of *Charter* rights. That sacrifice and derogation, if they are appropriate, should be imposed explicitly and deliberately, and so this approach is an inappropriate response to uncertainty.

In the face of this uncertainty, I suggest that the second approach is best. That is, most government lawyers can engage in political activity as set out in the relevant legislation, even where that activity might constitute a violation of the duty of loyalty to the client. However, prosecutors should not engage in any political activity, even if it appears to be permitted by the relevant legislation. Likewise, counsel for tribunals or courts should not engage in any political activity beyond that permitted of members or judges of those tribunals or courts.

Recall the example of Lawyer X, a lawyer for the provincial government who is neither a Crown prosecutor nor a lawyer for a court or tribunal.

Under this approach, regardless of the nature of his or her practice, he or she may engage in political activity at the provincial level as allowed by the applicable legislation on the political activity of government employees.

CONCLUSION

Government lawyers who wish to engage in political activity face substantial uncertainty. While legislation explicitly recognizes their right to do so as government employees, it is unclear what their professional obligations as lawyers require and how those requirements interact with the legislated regimes. I have argued that the duty of loyalty to the client precludes most lawyers for the federal government from political activity at the federal level. Likewise, that duty precludes most lawyers for the provincial government from political activity at the provincial level. These implications come from the identity of the client and are not dependent on the nature of the lawyer's practice or the kind of matters the lawyer works on. In contrast, I have argued that Crown prosecutors are precluded from all political activity by a professional duty of political neutrality. Similarly, I have argued that counsel for tribunals and courts are subject to the same constraints on political activity as members and judges of those tribunals and courts, as an application of the duty to encourage respect for the administration of justice. However, *Charter* considerations may reduce these restrictions.

The safest and most principled approach to this uncertainty would be for government lawyers to refrain from political activity. However, such restrictions are a drastic response to uncertainty. A better approach is that legislation on the political activity of government lawyers constitutes a waiver of the duty of loyalty, and so most government lawyers can engage in political activity as permitted in the corresponding legislation without violating their professional obligations.

Both legislators and law societies have a role to play in reducing this uncertainty. Legislators should amend political activity legislation to explicitly state how it interacts with legislation on the legal profession, and law societies should amend the rules of professional conduct to address these issues specifically. While I acknowledge that the rules of professional conduct cannot and should not attempt to cover every possible situation,[137] the number of government lawyers and the importance

137 See e.g. *FLSC Model Code*, *supra* note 70, preface at 6 ("[s]ome circumstances that raise ethical considerations may be sufficiently unique that the guidance in a rule or commentary may not answer the issue or provide the required direction").

of the values at stake warrant some additions.[138] Legislators should allow most government lawyers some degree of political activity in recognition of the importance of the corresponding *Charter* rights. However, they should defer to the expertise of the law societies on the political activity of Crown prosecutors and counsel for tribunals and courts. Amendments to the rules of professional conduct should explicitly state that Crown prosecutors have a professional duty to refrain from political activity, as do counsel for tribunals and courts to the same extent as members and judges of those tribunals and courts. The law societies may also wish to provide some guidance to most government lawyers as to how the rules of professional conduct apply in this context.

So, then, are government lawyers political eunuchs? To some extent, yes—particularly Crown prosecutors and counsel to courts. But for good reason. At the end of the day, the political activity of government lawyers is unlikely to be a regulatory and disciplinary priority for law societies. However, the professional obligations involved—the duty of loyalty, the special duty of Crown prosecutors, and the duty to encourage respect for the administration of justice—are central to the legal profession. This situation is a good reminder that government lawyers face special considerations and that each lawyer must carefully consider how the professional obligations on all lawyers apply in his or her particular circumstances, using his or her own judgment.[139] Indeed, the *FLSC Model Code* requires lawyers to comply with their professional obligations in both letter and spirit.[140] Reasonable government lawyers can disagree: some may choose to follow only the restrictions applicable to government employees, while others may choose to refrain from political activity altogether.

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138 According to figures from the Association of Justice Counsel, there are approximately 2600 lawyers in the federal government (Association of Justice Counsel, online: <ajc-ajj.net>). Similarly, the two bargaining agents for government lawyers in Ontario represent about 750 members (Association of Law Officers of the Crown) and 850 members (Ontario Crown Attorneys Association) (see Association of Law Officers of the Crown, online: <aloc.ca>; Ontario Crown Attorneys Association, online: <ocaa.ca/about-us>).

139 See e.g. *FLSC Model Code*, *supra* note 70 ("[t]he Code in its entirety should be considered a reliable and instructive guide for lawyers that establishes only the minimum standards of professional conduct expected of members of the profession" (preface at 6)).

140 *Ibid*, r 3.1-1(g) (a "competent lawyer…compl[ies] in *letter and spirit* with all rules pertaining to the appropriate professional conduct of lawyers" [emphasis added]).