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Andrew Flavelle Martin

Dalhousie University Schulich School of Law

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The Minister's Office Lawyer: A Challenge to the Role of the Attorney General?

*Andrew Flavelle Martin**

INTRODUCTION

As legal counsel in the Prime Minister's Office [PMO] of Stephen Harper, Ben Perrin was the archetype of a new legal role in government: the Minister's Office lawyer.¹ The PMO lawyer, a particularly notable iteration of the Minister's Office lawyer, understands himself as a practicing lawyer representing the government as client.² In doing so, he appears to pose an inherent and fundamental role challenge to the lawyers traditionally representing government: the Attorney General and her delegates, the government lawyers of the bureaucracy.³ How then, might this challenge be resolved?

The past few years have seen notable growth in the legal literature on government lawyers and on the Attorney General.⁴ However, this growing

* J.D., LL.M., S.J.D.; Assistant Professor, Peter A. Allard School of Law, University of British Columbia. Thanks to Adam Dodek, Ben Perrin, Ian Stedman, Ken Jull, Graham Reynolds, John Gregory, and Candice Telfer for comments on a draft.

¹ Adam Dodek, "How the PMO 'in-house lawyer' sidelines the Attorney-General", *The Globe and Mail* (25 August 2015). Online: <https://www.theglobeandmail.com/globe-debate/how-the-pmo-in-house-lawyer-sidelines-the-attorney-general/article26078805/> [Dodek, "Sidelines"]. Dodek considers only the PMO lawyer, but I argue that the PMO lawyer fits within a larger category of Minister's Office lawyers.

² Dodek, "Sidelines", *ibid.* Dodek restricts his analysis to the PMO lawyer, but similar considerations apply to other Minister's Office lawyers.

³ Dodek, "Sidelines", *ibid.* Dodek focuses primarily on the Attorney General herself, but similar considerations apply to government lawyers.

⁴ Government lawyers: Andrew Flavelle Martin, "Legal Ethics and the Political Activity of Government Lawyers" (2018) 49:2 *Ottawa L. Rev.* 263 [Martin, "Political Activity of Government Lawyers"]; Adam Dodek, "The 'Unique Role' of Government Lawyers in Canada" (2016) 49:1 *Israel L. Rev.* 23; Kerry Wilkins, "Reasoning with the Elephant: The Crown, Its Counsel and Aboriginal Law in Canada" (2016) 13 *Indigenous L.J.* 27; Micah B. Rankin, "The Trials, Tribulations and Troubling Revelations of Government Lawyers in Canada" (2014) 17:2 *Leg. Ethics* 303; Michael H. Morris & Sandra Nishikawa, "The Orphans of Legal Ethics: Why Government Lawyers Are Different—and How We Protect and Promote that Difference in Service of the Rule of Law and the Public Interest" (2013) 26 *Can. J. Admin. L. & Prac.* 171;

literature has largely ignored Minister's Office lawyers — that is, political staffers who practice law in the office of a Minister, or the Premier or Prime Minister, as government employees.⁵ (This absence is not surprising given that, until recently, such a role apparently did not exist.) In this article, I address fundamental questions about how this role should be understood and how it relates to the roles of government lawyers and the Attorney General. I structure my discussion as a response to Adam Dodek's critique in which he argues that lawyers in the PMO, insofar as they purport to represent the government, "sideline" or "marginalize" the Attorney General and so comprise a legal role that simply should not exist.⁶ While Dodek focused his critique on a lawyer in the PMO, I consider his critique in the context of lawyers in Minister's Offices more generally.

This article is organized into four parts. In Part I, I discuss the role of the Attorney General and the contested and unclear role of the Minister's Office lawyer in relation to the Attorney General and government lawyers. I consider the arguments for and against Minister's Office lawyers, as well as lessons from the US context. I then propose three alternative conceptions of Minister's Office lawyers that respond to Dodek's objections. In Part II, I consider the professional obligations of the Minister's Office lawyer. I argue that her (presumably) close political identification with, and personal loyalty to, the Minister pose particular challenges. In Part III, I consider how the Minister's Office lawyer should be understood in contrast to government lawyers in the bureaucracy. In Part IV, I consider the future of the Minister's Office lawyer in light of my analysis. I ultimately conclude that the Minister's Office lawyer is an appropriate role that need not, if understood properly, challenge the role of the Attorney General but does pose special ethical challenges.

Patrick J. Monahan, " "In the Public Interest": Understanding the Special Role of the Government Lawyer" (2013) 63 Sup. Ct. L. Rev. (2d) 43; Malliha Wilson, Taia Wong & Kevin Hille, "Professionalism and the Public Interest" (2011) 38 *Advocates' Q.* 1; Adam M. Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law" (2010) 33 *Dal. L.J.* 1 [Dodek, "Lawyering at the Intersection"]. Attorney General: Andrew Flavelle Martin, "The Immunity of the Attorney General to Law Society Discipline" (2016) 94:2 *Can. Bar. Rev.* 413; Andrew Flavelle Martin, "The Attorney General as Lawyer (?): Confidentiality upon Resignation from Cabinet" (2015) 38:1 *Dal. L.J.* 147 [Martin, "Attorney General as Lawyer"]; Brent Cotter, "The Prime Minister v the Chief Justice of Canada: The Attorney General's Failure of Responsibility" (2015) 18 *Leg. Ethics* 73.

⁵ But see Rankin, *ibid.* See also Alice Woolley, "What Do Bad Exam Answers and the Lawyers of the PMO (Maybe) Have in Common?" (30 December 2013) *Slaw*, online: <http://www.slaw.ca/2013/12/30/what-do-bad-exam-answers-and-the-lawyers-of-the-pmo-maybe-have-in-common/> [Woolley, "Bad Answers"].

⁶ Dodek, "Sidelines", *ibid.* Given the space constraints of an op-ed, there are many issues Dodek understandably does not address — in addressing them, I in no way suggest he should have. Instead, I attempt to give as robust an argument against Minister's Office lawyers as I imagine Dodek might have if he had more space. Any shortcomings are my own.

First: clarity in the terms “government lawyer”, “Minister’s Office lawyer”, and “political legal advice”. I use the term “Minister’s Office lawyer” to refer to political staffers who openly practice law in the course of their duties and provide political legal advice. (I do acknowledge that lawyers may work in a Minister’s Office in an ostensibly non-practicing capacity, for example as a chief of staff, and that they may nonetheless provide legal advice.⁷)

The existing literature is noncommittal and mixed as to whether the Minister’s Office lawyer is properly considered a government lawyer. It is unclear whether the leading definitions would include them. For example, Dodek defines government lawyers as “lawyers working for the executive branch”,⁸ and Allan Hutchinson defines them as “those who are employed by or sub-contracted to work for federal, provincial, or local governments, related agencies, and public bodies.”⁹ Minister’s Office lawyers — if indeed they should exist — would seem to fall into these categories. Micah Rankin has included Minister’s Office lawyers in an article on government lawyers.¹⁰ In contrast, I have excluded them at least for some purposes.¹¹ For reasons I will demonstrate towards the end of this article, it is clearest to consider them as being in a separate group than government lawyers.

By “political legal advice”, I mean legal advice that incorporates what might be described as “capital-P” political considerations. This advice can be distinguished, at least in the abstract and albeit with some difficulty, from purely political advice. In the alternative, “political legal advice” can be understood as legal advice that is coordinated with simultaneous political advice.

1. THE ROLES OF THE ATTORNEY GENERAL AND THE MINISTER’S OFFICE LAWYER

In this Part, I address Dodek’s critique that the PMO lawyer encroaches on the role of the Attorney General, although I go beyond the narrow context of the PMO lawyer to the broader concept of Minister’s Office lawyers generally. I begin my analysis of the respective roles of the Attorney General and Minister’s Office lawyers with important context on the role of the Attorney General. I then consider the arguments for Minister’s Office lawyers and lessons from the US experience. Finally, I propose three models that resolve the role critique.

⁷ Dodek, “Sidelines”, *supra* note 1.

⁸ Dodek, “Lawyering at the Intersection”, *supra* note 4, at 9.

⁹ Allan C. Hutchinson, “‘In the Public Interest’: The Responsibilities and Rights of Government Lawyers” (2008) 46:1 Osgoode Hall L.J. 105, at 112.

¹⁰ Rankin, *supra* note 4.

¹¹ Martin, “Political Activity of Government Lawyers”, *supra* note 4.

(a) The role of the Attorney General

As Dodek emphasizes, the Attorney General is the chief law officer of the Crown.¹² All government lawyers report to the Attorney General,¹³ and she fulfills her functions through these lawyers as delegates.¹⁴ It is in this respect that a free-floating lawyer in a Minister's Office poses a serious problem: insofar as such a lawyer purports to represent the government, that lawyer is supplanting the role of the Attorney General and her delegates.¹⁵ This raises the real possibility, though unmentioned by Dodek, that the Minister's Office lawyer may give advice that is inconsistent with the advice of the Attorney General and her delegates. In turn, this may encourage the Minister to choose to follow whichever advice is more desirable and favour the lawyers that tend to provide that more desirable advice. Furthermore, such a lawyer does not share the unique positive obligation of the Attorney General and her delegates to see that government's affairs are conducted lawfully.¹⁶

Consistent with the role of the Attorney General and with the rules of professional conduct on lawyers representing an organization, the ultimate client of the Attorney General and of her government lawyer delegates is the Crown,¹⁷ the final decision-making body for which is Cabinet.¹⁸ Who then is the effective client of the government lawyer? While this question is complex, for my purposes I adopt my previous statement that, for the government lawyer, "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."¹⁹ This framing recognizes that while the ultimate client is indeed the Crown, different parts of the government, such as different ministries, may have

¹² Dodek, "Sidelines", *supra* note 1, quoting *Department of Justice Act*, R.S.C. 1985, c. J-2, s. 4 [*DOJ Act*]. At the provincial level, see e.g. *Ministry of the Attorney General Act*, R.S.O. 1990, c. M.17, s. 5 [*MAG Act*]. See also Wilkins, *supra* note 4, at 36; Wilson, Wong & Hille, *supra* note 4, at 6.

¹³ Dodek, "Lawyering at the Intersection", *supra* note 4, at 18, 21–22; Wilson, Wong & Hille, *supra* note 4, at 7.

¹⁴ Dodek, "Lawyering at the Intersection", *ibid.*, at 20–22. See also Wilkins, *supra* note 4, at 36.

¹⁵ Dodek, "Sidelines", *supra* note 1.

¹⁶ See e.g. *DOJ Act*, *supra* note 12, s. 4(a): "The Minister . . . shall (a) see that the administration of public affairs is in accordance with law"; *MAG Act*, *supra* note 12, s. 5(b): "The Attorney General, . . . (b) shall see that the administration of public affairs is in accordance with the law"; Dodek, "Lawyering at the Intersection", *supra* note 4, at 20–22.

¹⁷ Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2009, last amended 2017), r. 3.2-3 and commentary 1. Online: Federation of Law Societies of Canada www.flsc.ca [*FLSC Model Code*]. See e.g. Dodek, "Lawyering at the Intersection", *supra* note 4, at 11.

¹⁸ See e.g. Martin, "Attorney General as Lawyer", *supra* note at 4, 158–159.

¹⁹ Martin, "Political Activity of Government Lawyers", *supra* note 4, at 271 [citations omitted].

separate legal interests. At the same time, government lawyers across all ministries report to the Attorney General.²⁰

Another critically important aspect of the role of the Attorney General, which Dodek does not identify in his critique, is that it is apolitical and non-partisan.²¹ A single person is simultaneously both the apolitical Attorney General and the political Minister of Justice.²² Government lawyers, in turn, doubly have a duty to be non-partisan — firstly as delegates of the Attorney General, and secondly as members of the civil service, the political neutrality of which is a constitutional convention.²³ The literature on government lawyers recognizes this non-partisanship as a special duty, what a former Deputy Attorney General for Ontario described as an “obligation to act in an independent and impartial manner, independently of partisan political considerations”.²⁴ Indeed, under a traditional civil service lens government lawyers, as government employees in the Ministry of the Attorney General, report not to the Attorney General but to the Deputy Attorney General, who then interfaces with the Minister’s office.²⁵ For these reasons, government lawyers and the Attorney General are unable to give political legal advice.

(b) The arguments for the Minister’s Office lawyer

In response to Dodek’s critique and other arguments against the existence of Minister’s Office lawyers, there are at least two viable arguments in favour. The first argument is that Ministers will seek political legal advice, which government lawyers and the Attorney General cannot provide. The second argument is that the Minister has or can have separate legal interests from the government or the ministry, and thus a need for separate legal advice.

Ministers desire, if not require, both apolitical and political legal advice. As described above, the Attorney General and government lawyers can only provide apolitical legal advice. This leaves Minister’s Office lawyers uniquely situated to provide political legal advice. The Minister’s Office lawyer, like all

²⁰ Wilson, Wong & Hille, *supra* note 4, at 7.

²¹ See e.g. Kent Roach, “Not Just the Government’s Lawyer: The Attorney General as Defender of the Rule of Law” (2006) 31:2 Queen’s L.J. 598, at 622.

²² See e.g. Wilson, Wong & Hille, *supra* note 4, at 6.

²³ See e.g. *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, 82 D.L.R. (4th) 321 (S.C.C.) at p. 86 [S.C.R.]; discussed e.g. in Lorne Sossin, “Speaking Truth to Power?: The Search for Bureaucratic Independence in Canada” (2005) 55:1 U.T.L.J. 1, at 6–15 and in Martin, “Political Activity of Government Lawyers”, *supra* note 4, at 274–275. See also e.g. *Public Service of Ontario Act, 2006*, S.O. 2006, c. 35, Sched. A [PSOA], s. 1 [emphasis added]: “The following are the purposes of this Act: . . . 2. To ensure that the public service of Ontario is *non-partisan*, professional, ethical and competent.”

²⁴ Monahan, *supra* note 4, at 45.

²⁵ See e.g. *PSOA*, *supra* note 23, s 29(1), (3): “The deputy minister of a ministry, acting on behalf of the minister, is responsible for the operation of the ministry. . . . Deputy ministers shall promote effective, non-partisan, professional, ethical and competent public service by public servants.” See also Sossin, *supra* note at 23, 39–40.

Minister's Office staffers, has a legitimately political role. As Kerry Wilkins puts it,

The job of a political staff-person in government just is to be (responsibly) partisan: to seek to maintain and increase the governing party's relative popularity and credibility; to assist with the development and promote the realization of the government's political agenda, especially in respect of matters within her minister's portfolio; and, in so doing, to support the career and facilitate the success of her particular minister.²⁶

Similarly, Ian Brodie observes that political staffers are paid from public funds, not party funds, "because the government has long recognized that ministers require something more than the expert, but non-partisan, advice of the public service to meet the demands on them."²⁷ In the same way as a ministry and a Minister's Office will have separate communications staff who perform separate functions,²⁸ separate legal staff would perform separate legal functions for the Minister (the Minister's Office lawyer) and the ministry (the government lawyer). Indeed, the presence of a Minister's Office lawyer may reduce pressure on government lawyers to inappropriately incorporate political considerations into their advice.

In addition to a desire for political legal advice, a Minister potentially has separate legal interests from the government or the ministry, and thus may require separate legal advice. The client of the Attorney General, and government lawyers, is the Crown. They cannot provide the Minister herself with separate legal advice.²⁹

I acknowledge here Alice Woolley's concern that political considerations risk detracting from such lawyers' focus on the quality of the legal advice being given:

My guess is that the circumstances of the PMO would create a similar blindness to the actual quality and significance of the acts in which they were engaged. The focus on the political — on the effect for the Conservative Party and the PMO from [Mike] Duffy's profligate expenditures — made the legal and moral ramifications of

²⁶ Wilkins, *supra* note 4, at 33.

²⁷ Ian Brodie, "In Defence of Political Staff" (2012) 35:3 Can. Parl. Rev. 33, at 33.

²⁸ See e.g. Brodie, *ibid.* at 34: "political staff are able to draft speeches, press releases and other documents that conform to the overall political direction of the government. . . . all functions that cannot and should not be assigned to non-partisan public servants."

²⁹ Conceivably, the government lawyer could provide advice both to the Crown and to the individual Minister under a joint retainer, but this would unacceptably interfere with representation of the Crown. See *FLSC Model Code*, *supra* note 17, r. 3.2-3, commentary 2: "In addition to acting for the organization, a lawyer may also accept a joint retainer and act for a person associated with the organization. For example, a lawyer may advise an officer of an organization about liability insurance. In such cases the lawyer acting for an organization should be alert to the prospects of conflicts of interests and should comply with the rules about the avoidance of conflicts of interests." [Cross-reference omitted.]

their handling of the situation invisible. [Chief of Staff Nigel] Wright and [PMO counsel Ben] Perrin would want to solve the political problem, and so would not be able to see that the problem also had legal and ethical dimensions. It wasn't what was salient, and they couldn't see it.³⁰

While Woolley may of course be correct in extreme circumstances of political crisis — and arguably the Duffy debacle was such a crisis — an effective lawyer should be able to incorporate these considerations into competent legal advice. Regardless, Ministers will seek political legal advice, and so it is necessary to address how that advice can most properly be provided.

(c) Lessons from the American experience

While Dodek does not make this point explicitly, the addition of a lawyer to the Prime Minister's Office appears to constitute an Americanization of the Canadian model of legal service delivery within government, in which the Prime Minister's Office lawyer mimics the White House Counsel — a lawyer who identifies with the office of the chief executive as client instead of the executive branch itself. While I follow what I have described as Dodek's "imperative" — as Dodek puts it, that "Canadian legal ethics must also attempt to situate legal ethics within a distinctly *Canadian* context" — it is worthwhile to consider some of the challenges or problems that the American model has caused.³¹

The relationship between the White House Counsel, on the one hand, and the US Attorney General and the Department of Justice, on the other, provides some insights into the respective roles of the Canadian Attorney General and of the Minister's Office lawyer. First, the Attorney General and the Justice Department at times saw the White House Counsel as illegitimately supplanting their role.³² Second, the White House Counsel grew out of a desire

³⁰ Woolley, "Bad Answers", *supra* note 5. See also Jennifer Wang, "Raising the Stakes at the White House: Legal and Ethical Duties of the White House Counsel" (1994) 8 *Geo. J. Legal Ethics* 115, at 134–135, arguing that the White House Counsel cannot have both legal and political roles.

³¹ Adam Dodek, "Canadian Legal Ethics: Ready for the Twenty-First Century at Last" (2008) 46 *Osgoode Hall L.J.* 1, at 7 [emphasis in original], quoted in Andrew Flavelle Martin, "Legal Ethics versus Political Practices: The Application of the Rules of Professional Conduct to Lawyer-Politicians" (2013) 91:1 *Can. Bar Rev.* 1, at 3, note 3. I put it more simply at 3: "that Canadian legal ethics must be Canadian".

³² See e.g. Jeremy Rabkin, "White House Lawyering: Law, Ethics and Political Judgments" in Cornell W. Clayton, ed., *Government Lawyers: The Federal Legal Bureaucracy and Presidential Politics* (Lawrence, KN: University Press of Kansas, 1995) 107, at 110, describing how, at the time of the first appointment of the predecessor to the White House Counsel, the Attorney General "insisted that the attorney general was the sole proper channel of legal counsel for the president." See also Michael Strine, "Counsels to the President: The Rise of Organizational Competition" in Clayton, ed., 257 at 262: "Attorneys at the Justice Department. . . resented what they perceived as an encroachment on their turf".

for loyalty and political congruency over professionalism. As Michael Strine characterizes it:

The development of the White House Counsel's office as a functional competitor to lawyers in the Justice Department was an outgrowth of presidential fears of a disloyal bureaucracy and the tensions that resulted when the professional values of department lawyers clashed with the political values of the White House. . . . The strengthening of the White House counsel illustrates the consistent desire of presidents to receive supportive (as distinct from independent) legal advice.³³

Third, the White House Counsel faces pressure to provide the advice desired, and resists that pressure at the risk of being sidelined.³⁴ On the other hand, the existence of the White House Counsel does not preclude the president exercising pressure on the Department of Justice and particularly the Office of Legal Counsel.³⁵ Indeed, some of that pressure may come via the White House Counsel.³⁶

These lessons provide important context for an assessment of the proper role for the Minister's Office lawyer in Canada. To connect these lessons to Dodek's critique, the central concern is not merely that the Minister's Office lawyer is providing political legal advice alongside the apolitical legal advice provided by the Attorney General and government lawyers, raising the real possibility of inconsistent legal advice. Instead, it is that the political legal advice from the Minister's Office lawyer is supplanting and replacing the advice from the Attorney General and government lawyers. That is, the Minister may prefer the political legal advice, which may, not coincidentally, be more conducive to the Minister's purposes. Most serious would be the

³³ Strine, *ibid.*, at 261, 276.

³⁴ See e.g. Rabkin, *supra* note 32, at 128, 130: "[T]he counsel remains under continual pressure to tell higher officials (up to and including the president) what they want to hear. . . . [A] counsel who is considered to be overly fastidious risks being circumvented in deliberations." On the other hand, see e.g. Nelson Lund, "Guardians of the Presidency: The Office of the Counsel to the President and the Office of Legal Counsel", in Clayton, ed., *supra* note 32, 209, at 211, who argues that "[m]ost commentaries on the advisory function of the presidential lawyer exaggerate the deep and inherent tensions that are supposed to exist between the political and professional obligations of those responsible for providing the president with legal advice. Real tensions between these obligations undoubtedly do exist, but in many cases the dilemmas are specious."

³⁵ See e.g. "Presidential Power and the Office of Legal Counsel" (2012) 125 Harv. L. Rev. 2090. See e.g. at 2093: "Notwithstanding OLC's 'independent role', the White House exerts a great deal of influence over the office in various ways. . . . The temptation to approve the President's policies is strong, especially in areas such as foreign policy and national security where the President may justify the power he seeks as necessary in order to protect the public."

³⁶ *Ibid.*, at 2093: "the White House Counsel's Office can (and often does) attempt to convince OLC to take the White House perspective on pending issues". See also 2107–2108.

Minister's Office lawyer attempting to influence the apolitical advice of the Attorney General or government lawyers.

(d) Alternative conceptions of the Minister's Office lawyer

So far in this Part, I have set out the challenges that the role of the Minister's Office lawyer poses for the traditional conception of legal services delivery within government, acknowledged the arguments that this role is nonetheless a useful and arguably necessary one, and considered lessons from the US experience. The fundamental problem is that the Minister's Office lawyer purports to represent the government without reporting to the Attorney General and thus may supplant the Attorney General and government lawyers. I now propose three alternative conceptions of the Minister's Office lawyer that attempt to reconcile these issues.

Model one: The Minister's Office lawyer is a Party lawyer

Dodek argues that a lawyer for the political party in power should handle matters that concern the party but not the government itself.³⁷ One way, then, to understand the Minister's Office lawyer is as a seconded lawyer for the political party.

This model recognizes that the Minister and the Minister's Office, as appropriately political actors, have interests separate from the government and require legal advice that takes into account those different interests and has political character. Thus, the Minister's Office lawyer is not supplanting the Attorney General and government lawyers but instead giving advice that these others cannot give, to a client that these others cannot advise. As the ultimate client is the political party, this model presumes that the Minister's interests are — or should be — the same as the political party's interests.

Model two: The Minister's Office lawyer reports to the Attorney General

Recall, as discussed above, that all government lawyers report to the Attorney General — or, more precisely through a civil service lens, that all government lawyers report to the Deputy Attorney General, who reports to the Attorney General. Dodek's critique is that the Minister's Office lawyer might purport to represent the government but does not report to the Attorney General. This issue can be resolved by requiring the Minister's lawyer to report to somebody, but not to the Deputy Attorney General nor to the ruling political party itself. Instead, the Minister's Office lawyer would report to a lawyer in the Attorney General's Office — we might call this person a chief political counsel — or to the Attorney General herself. Thus, the mechanism for uniformity of advice under the Attorney General is maintained and the Minister's Office lawyer, like government lawyers, shares the Attorney General's positive obligation of ensuring lawfulness. Under this model, the Minister's Office lawyer does not pose a challenge to the role or the authority

³⁷ Dodek, "Sidelines", *supra* note 1.

of the Attorney General. At the same time, the Minister's Office lawyer is able to give political legal advice.

The problem with this model is that the Attorney General, in her role as chief law officer of the Crown, must be apolitical. If the Attorney General has oversight of Minister's Office lawyers and is the person ultimately responsible for politicized legal advice, that apolitical quality is damaged. However, perhaps this problem can be overlooked if this is the best approach available. It is somewhat naïve, in any event, to expect a perfect separation between the roles of the Attorney General and the Minister of Justice, although the separation remains important in theory despite any weaknesses in practice.

Model three: The Minister's Office lawyer's client is the Minister herself

Recall that the client of the Attorney General, and her government lawyer delegates, is the Crown. The Minister herself may have separate interests from the Crown and thus have, or at least perceive, a need for her own legal advice. Thus, the Minister's Office lawyer can be understood as representing the Minister herself.

Like the first model, this model recognizes that the Minister, as an appropriately political actor, has interests separate from the government and requires legal advice that takes into account those different interests and has political character. This model recognizes that the Attorney General does not and cannot give legal advice to the Minister herself as client, and thus the Minister's Office lawyer is not supplanting the Attorney General and government lawyers but instead giving advice that these others cannot give. Unlike the first model, this model does not assume that the Minister has the same legal interests as the political party. (For this reason, I presume political parties would be hostile to this model.)

A best model

While all three of these models are viable, the second model is preferable. It acknowledges that Ministers' Office lawyers have a role separate from the government lawyers of the bureaucracy, but it folds them into a reporting hierarchy that culminates in the Attorney General — thus negating or at least reducing the challenge to the Attorney General's role and ultimate legal authority. It also reinforces the Minister's appropriate role as the head of the Ministry, a role that is largely but not entirely political, in a way that the first and third models do not.

While these models do not eliminate the possibility that the Minister's Office lawyer may give advice that is inconsistent with the advice of the Attorney General and government lawyers, they emphasize that the Minister's Office advice is based on differing considerations and potentially different clients, which means differing advice is not truly inconsistent advice.³⁸

However, none of these models preclude the Minister's Office lawyer from attempting to influence the apolitical advice given by government lawyers or

³⁸ I reject, however, Wang's assertion that multiple sources of legal advice are preferable: Wang, *supra* note 32, at 131.

the Attorney General. As Brodie acknowledges, “[t]he major cause for concern about the regulation of political aides is in protecting the public service from undue pressure from political aides.”³⁹ There is little reason to believe this concern would not apply to the relationship between the Minister’s Office lawyer and government lawyers. Indeed, the flaw in the second model may exacerbate this risk, because the Minister’s Office lawyer reports to the Attorney General’s office. Even where a strict separation is maintained, a Minister may well use the advice of a Minister’s Office lawyer to pressure a government lawyer to change her advice.

2. PROFESSIONAL OBLIGATIONS OF THE MINISTER’S OFFICE LAWYER

Assuming, then, that the Minister’s Office lawyer is a legitimate role, or is one that will exist despite any illegitimacy, in this Part I consider the professional obligations of the Minister’s Office lawyer.

The Minister’s Office lawyer would be subject to the same professional obligations of all practicing lawyers and to the regulatory and disciplinary jurisdiction of the law society.⁴⁰ These obligations, and their implications, are worth emphasizing.

Like all lawyers, the Minister’s Office lawyer must carefully identify the actual client — be that the political party, the government, or the Minister herself, depending on which model the Minister’s Office lawyer is retained within. It is essential that the Minister’s Office lawyer, the Minister, and the political party all understand who precisely is the client, lest the Minister’s Office lawyer inadvertently create multiple lawyer-client relationships that may put her into a conflict.⁴¹ Under models one and two, where the client is the Crown or the political party, it is equally essential that the Minister’s Office lawyer distinguish between the client and the person from whom she takes instructions.⁴² Moreover, under those models the Minister’s Office lawyer is required to report up in case of fraud, dishonesty, illegality or criminality.⁴³

³⁹ *Supra* note 27, at 35.

⁴⁰ While there may be federalism obstacles to law society discipline of a federal Minister’s Office lawyer, including a PMO lawyer, those issues are beyond the scope of this article.

⁴¹ *FLSC Model Code*, *supra* note 17, r. 1.1, definition of “client”: “‘client’ means a person who:

(a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or (b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf.”

See also rr. 1.1-1, commentary 1 (“A lawyer-client relationship may be established without formality.”); 3.3-1, commentary 4 (“A solicitor and client relationship is often established without formality.”)

⁴² *FLSC Model Code*, *ibid.*, r. 3.2-3 and commentary 2. See also e.g. Lund, *supra* note 34, at 211–212, emphasizing that the White House Counsel, like lawyers for private corporations, does not and cannot represent the individual in her private capacity.

A seemingly particular risk to the Minister's Office lawyer is over-identification with the interests of the client.⁴⁴ As Hutchinson puts it:

lawyers are to regard themselves as being neutral on the substance and form of the law as well as on their clients' agendas and interests. Not only is there no need for lawyers to act in solidarity with their clients' stance, but there are important political and moral reasons why lawyers should be consciously indifferent to their clients' causes and goals.⁴⁵

As a political staffer, the Minister's Office lawyer may reasonably be expected to share and to further the partisan goals of the governing party and the Minister herself and exhibit zealous loyalty to the party and the Minister. Models one and three, in which the client is the Minister or the political party itself, increase this risk. This identification with the client's interests may tempt the Minister's Office lawyer to change her advice to fit the desires of the client,⁴⁶ infringing her duties of competence and candour.⁴⁷ It may also tempt the Minister's Office lawyer to overemphasize her professional obligations to the client over her other professional obligations. Both of these risks are pronounced because the Minister's Office lawyer, like all political staffers, does not have the job security of the government lawyers in the bureaucracy.⁴⁸ While these risks are not unique to the Minister's Office lawyer, and do not delegitimize this role, they remain important considerations.

Of these professional obligations, one of the most important conceptually may be the obligation of mandatory withdrawal. Unlike other political

⁴³ *FLSC Model Code*, *supra* note 17, r. 3.2-8.

⁴⁴ "[T]he concern about political staff is that they are potentially too zealous in their loyalty to the Prime Minister or their minister, and too inclined to see governing as a permanent campaign in which protecting the boss is the number one priority": Paul G Thomas, "Who Is Getting the Message? Communications at the Centre of Government", in Craig Forcece, ed., *Public Policy Issues and the Oliphant Commission: Independent Research Studies* (Ottawa: Minister of Public Works and Government Services Canada, 2010) 77, at 106. Online: <https://www.publicsafety.gc.ca/lbrr/archives/cn000037949806-eng.pdf.pdf>, quoted in Brodie, *supra* note 27, at 34.

⁴⁵ Hutchinson, *supra* note 9, at 109–110. See also e.g. Michel Proulx, "The Defence of the Unpopular or Repugnant Client: Some of the Hardest Questions" (2000) 5 *Can. Crim. L. Rev.* 221, at 224: "A standard conception of the lawyer's role calls for a detachment from the client, which serves to maintain an objective and independent approach in the relationship with the client."

⁴⁶ See e.g. *FLSC Model Code*, *supra* note 17, r. 3.1-2, commentary 9: "A lawyer should be wary of providing unreasonable or over-confident assurances to the client, especially when the lawyer's employment or retainer may depend upon advising in a particular way." See also r. 3.2-2, commentary 3: "Occasionally, a lawyer must be firm with a client. Firmness, without rudeness, is not a violation of the rule. In communicating with the client, the lawyer may disagree with the client's perspective, or may have concerns about the client's position on a matter, and may give advice that will not please the client. This may legitimately require firm and animated discussion with the client."

⁴⁷ *FLSC Model Code*, *ibid.*, rr. 3.2-2 (candour), 3.1-2 (competence).

⁴⁸ See e.g. Brodie, *supra* note 27, at 33.

staffers, the Minister's Office lawyer has the same obligations as all lawyers to withdraw in certain circumstances — most importantly, if “a client persists in instructing the lawyer to act contrary to professional ethics”,⁴⁹ or persists in dishonest, fraudulent, criminal, or illegal conduct in a matter in which the lawyer is involved.⁵⁰ Political loyalty would seem to make fulfilling these obligations particularly challenging for the Minister's Office lawyer.

On the other hand, Minister's Office lawyers may be well-positioned — as trusted and politically loyal advisors who are also lawyers — to encourage the Minister and her staff to act lawfully and to encourage respect for the administration of justice.⁵¹ Indeed, in this respect they play a parallel role to government lawyers, who “advocate for, and defend, values of legality and the rule of law within government”⁵² and “are involved in protecting the rule of law from the inside.”⁵³ Minister's Office lawyers may also be able impress upon the Minister and her other political staff the professional obligations of government lawyers who advise the Ministry.

Another particularly relevant obligation is that lawyers must separate their legal advice from their non-legal advice.⁵⁴ While there may be some difficulties distinguishing legal advice that incorporates political considerations, on the one hand, from purely political advice, on the other, the concept remains important.

How then does the Minister's Office lawyer understand her role as advisor and reconcile her obligations of political loyalty and candid and competent advice? Here I draw on and apply the work of Alice Woolley on the professional obligations of lawyers as advisors.⁵⁵ The Minister's Office lawyer cannot merely give the advice the client wants to hear — presumably, the most politically expedient advice — but also need not, and indeed cannot, ignore the client's particular interests and goals.⁵⁶ Instead, as Woolley puts it, “[t]he lawyer's opinion must provide an objectively reasonable assessment of the law while tailoring that assessment towards accomplishment of the client's

⁴⁹ *FLSC Model Code*, *supra* note 17, r. 3.7-7(b).

⁵⁰ *Ibid.*, rr. 3.2-7, 3.2-8.

⁵¹ *Ibid.*, r. 5.6-1.

⁵² Monahan, *supra* note 4, at 55.

⁵³ Dodek, “Lawyering at the Intersection”, *supra* note 4, at 23.

⁵⁴ *FLSC Model Code*, *supra* note 17, r. 3.1-2, commentary 10 [emphasis added]: “In addition to opinions on legal questions, a lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy or social complications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field *and should clearly distinguish legal advice from other advice.*”

⁵⁵ Alice Woolley, “The Lawyer as Advisor and the Practice of the Rule of Law” (2014) 47:2 U.B.C. L. Rev. 743 [Woolley, “Lawyer as Advisor”].

⁵⁶ *Ibid.*, at 746.

goals.”⁵⁷ That assessment must be “subjectively believe[d]” and made in good faith.⁵⁸ Under these requirements, the advice of the Minister’s Office lawyer may legitimately diverge from the advice of the government lawyers advising the Ministry for at least two reasons. The first is that the Minister’s Office lawyer incorporates political considerations forbidden to the government lawyer. The second reason is that there may well be more than one objectively reasonable interpretation of the law. A third reason, which applies under models one and three where the client is the Minister or the party, is that the Minister’s Office lawyer has a different client than do government lawyers.

While my analysis is largely independent of what level of government and which jurisdiction the Minister’s Office lawyer exists in, I note that those at the federal level and in some provinces will face particular requirements under the duty of competency. Like all lawyers practicing in Canada, a unilingual Minister’s Office lawyer takes a risk when she interprets federal law without assistance.⁵⁹ Similar considerations apply in those provinces where English and French versions of statutes have equal authority and court decisions may be issued in only one of English or French.⁶⁰ A Minister’s Office lawyer at the federal level may also need to be bijural, at least to some degree and depending in part on the nature of the Minister’s portfolio, to meet her competency obligations.⁶¹ In these respects, Minister’s Office lawyers are like senior government lawyers or lawyers for organizations that operate across the country.

I acknowledge here that challenges may arise, for both Minister’s Office lawyers and their client Ministers alike, when a Minister holds more than one portfolio and has more than one Minister’s Office and more than one Minister’s Office lawyer.⁶² In this situation, the multiple lawyers may well give conflicting advice. The potential, and potential resolutions, for conflicting advice will vary depending on which model of the Minister’s Office lawyer has been adopted. Under the first model (the political party is the client) and the third model (the Minister herself is the client), the lawyers are representing the same client and should attempt to coordinate their advice accordingly. But as any client who has multiple lawyers, if the disagreement is irreconcilable, the Minister will have to choose the advice of one over the advice of the other. Under the second model, in which Minister’s Office lawyers report to someone in the Office of the Minister of Justice, the Minister of Justice will be responsible for resolving the disagreement and determining the final advice.

⁵⁷ *Ibid.*, at 746.

⁵⁸ *Ibid.*, at 761, 773.

⁵⁹ See e.g. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Toronto: LexisNexis Canada, 2014) at paras. 5.3, 5.14-5.16.

⁶⁰ See e.g. Sullivan, *ibid.*, at paras. 5.3, 5.4, 5.6.

⁶¹ See e.g. Sullivan, *ibid.*, at paras. 5.64-5.65.

⁶² Similar issues may arise where a legislator is Parliamentary Secretary to multiple Ministers.

Indeed, as mentioned above, this mechanism for uniformity of advice is a key advantage of the second model.

3. MINISTER'S OFFICE LAWYERS AND GOVERNMENT LAWYERS

So, then, are Minister's Office lawyers better understood as a subcategory of government lawyers or as being in a category of their own? That requires a reconsideration of how we understand the meaning of the phrase, "government lawyers".

The thinnest conception of government lawyers would define them by their client, i.e. those lawyers who *represent* the government, whether we define government as "the executive" or as "federal, provincial, or local governments, related agencies, and public bodies".⁶³ This would include those sole practitioners or lawyers in firms retained by the government, as well as government employees. Under this thin conception, Minister's Office lawyers are government lawyers, at least under the preferable second model (in which they report to the Attorney General or someone in her office).

A thicker conception would define government lawyers as government employees who represent the government. This thicker conception takes as its defining element the duality of government lawyers — as Dodek puts it, "they are both lawyers and public servants at the same time."⁶⁴ This duality poses special ethical challenges, and has special ethical ramifications, as these government lawyers must grapple with how their legal obligations as government employees interact with their professional obligations as lawyers.⁶⁵ This duality, and its challenges and ramifications, are arguably the defining feature of government lawyers.⁶⁶ (On the other hand, this thicker conception suggests that there may be substantive differences between those government lawyers who are government employees and those who are not, which in turn supports the problematic view that government can contract out of the professional obligations of its lawyers.⁶⁷)

⁶³ Dodek, "Lawyering at the Intersection", *supra* note 4; Hutchinson, *supra* note 9.

⁶⁴ Dodek, *ibid.*, at 6.

⁶⁵ See e.g. Martin, "Political Activity of Government Lawyers", *supra* note 4.

⁶⁶ In contrast, Dodek argues that it is the identity of the client that is defining: "The defining characteristic of government lawyers is their one and only client: the Crown." (Dodek, "Lawyering at the Intersection", *supra* note 4, at 11.) However, Dodek goes on to identify government lawyers as situated in "a rule of law triangle", the three sides of which being "as delegates of the Attorney General, as public servants and as members of the legal profession": Dodek, "Lawyering at the Intersection", *ibid.*, at 21. The triangle is consistent with the duality, because the two sides of public servants and delegates of the Attorney General both come from being government lawyers.

⁶⁷ See e.g. *New Brunswick v. Rothmans*, 2009 NBQB 198, 352 N.B.R. (2d) 226 (N.B. Q.B.) at para. 33, leave to appeal refused 2010 CarswellNB 66 (S.C.C.), leave to appeal refused 2010 CarswellNB 68 (S.C.C.), affirmed 2010 CarswellNB 245 (N.B. C.A.), leave to appeal refused 2010 CarswellNB 490 (S.C.C.), leave to appeal refused 2010 CarswellNB 492 (S.C.C.).

The implications of this thicker conception for Minister's Office lawyers depend on how political staff in Minister's Offices are understood. While they are government employees, their roles and legal obligations are very different from those of members of the apolitical bureaucracy.⁶⁸ For the most part, they do not share the government lawyer's duties as a member of the bureaucracy, and so do not experience the duality that is characteristic of government lawyers. A gloss on this thicker conception would include only lawyers in this bureaucracy, whether we describe this as the civil service, the public service, or some other term. Under this glossed thicker conception, Minister's Office lawyers are not government lawyers but instead are in a category of their own. This final conception is preferable because it promotes clarity and it recognizes that Minister's Office lawyers have a unique role and provide a particular kind of legal advice, and face different professional issues than those of the 'true' government lawyers of the bureaucracy. The role of the Minister's Office lawyer is useful precisely *because* it is different from the role of the government lawyers of the bureaucracy.

4. THE FUTURE OF THE MINISTER'S OFFICE LAWYER

In this part, I consider the future of the Minister's Office lawyer and the need for academic and regulatory attention to this emerging role.

My analysis has suggested several reasons for this role to exist, which may explain its origins and do indicate a promising future for it. The major substantive reason is that Ministers desire and require political legal advice, which government lawyers cannot legitimately provide. A secondary substantive reason is that Ministers may have independent legal interests from the government, which government lawyers cannot advise them on. A less substantive, but potentially equally important, reason is that Ministers will seek and value loyalty — including personal loyalty — and political congruency that government lawyers again cannot provide. None of these reasons are particular to any one political party or any one point in time. Given these realities, this role will presumably continue to exist and proliferate. To the extent that the role of the Minister's Office lawyer is perceived as interfering with the role of the Attorney General, the relative political strength of the Minister of Justice may determine whether Minister's Office lawyers exist and flourish at any given time in any given jurisdiction.

While I acknowledge that there may be specific legal and policy barriers to this role, those barriers are not immutable — and governments may well decide that the benefits of Minister's Office lawyers warrant the removal of those barriers. At the federal level, for example, while the *Public Service Employment Act* provides that “[a] minister. . . may appoint an executive assistant and other persons required in his or her office,”⁶⁹ the current

⁶⁸ See e.g. Brodie, *supra* note 27, at 331; *PSOA*, *supra* note 23, setting out separate rules for Ministers' Offices for ethical conduct (ss. 66-71) and political activity (ss. 94-98).

⁶⁹ *Public Service Employment Act*, s. 128(1), being Part 3 of the *Public Service Modernization Act*, ss. 12-13, S.C. 2003, c. 22.

Treasury Board *Policies for Ministers' Offices* allow only a limited complement to be appointed, and only to specified positions.⁷⁰ The position of Lawyer or Counsel is not recognized as an approved position,⁷¹ and additional positions are permitted only “[s]ubject to approved budgetary limits, and only in exceptional circumstances”, and with the permission of the PMO and the President of Treasury Board.⁷² Moreover, the Treasury Board *Policies for Ministers' Offices* also provide that “contracts to perform legal services may be entered into only by or under the authority of the Minister of Justice.”⁷³ Thus it would appear that the Prime Minister, the President of Treasury Board, and the Minister of Justice each have a veto over any minister hiring a Minister’s Office lawyer. Indeed, the Minister of Justice ostensibly has a veto over the Prime Minister herself hiring a Minister’s Office lawyer. (Presumably, the Minister of Justice will feel less threatened, and be more likely to approve such a position, under my second model where the Minister’s Office lawyer reports to someone in the Office of the Minister of Justice.) However, Treasury Board policies and related policy and legal barriers could easily be amended to allow Minister’s Office lawyers, and even to recognize them as a legitimate and standard position.

While I have discussed and attempted to resolve the role conflict with the Attorney General and the government lawyers of the bureaucracy, and I have considered some of the expected ethical issues facing Minister’s Office lawyers, additional issues may well present themselves. Given that this emerging role will likely continue to exist, and indeed may proliferate, academic and regulatory attention to this role is necessary and appropriate.

CONCLUSION

Minister’s Office lawyers — including but not limited to PMO lawyers — appear to pose a considerable challenge to the role of the Attorney General and government lawyers. However, there are at least three viable models that resolve or avoid this challenge. So long as the role of the Attorney General is respected and not encroached upon — i.e., the advice of the Minister’s Office lawyer does not replace the advice of the Attorney General and government lawyers, and the Minister’s Office lawyer does not seek to influence their advice — there is nothing inherently wrongful about Ministers receiving legal advice that incorporates political considerations. They will seek, and receive, that advice from somebody, regardless of that person’s title. Moreover, the Minister’s Office lawyer, as a trusted and loyal advisor who is also a lawyer, may be able to promote lawfulness and educate the Minister and her staff on the proper function of, and ethical constraints on, government lawyers.

⁷⁰ Treasury Board of Canada Secretariat, *Policies for Ministers' Offices – January 2011*, s. 3.2.1.1. Online: <https://www.canada.ca/en/treasury-board-secretariat/services/policies-ministers-offices-january-2011.html>.

⁷¹ *Ibid.*, s. 3.2.1.1 and Appendix A.

⁷² *Ibid.*, s. 3.2.1.5.

⁷³ *Ibid.*, s. 8.6.

Indeed, the ability to receive political legal advice from a Minister's Office lawyer may reduce the pressure on government lawyers to inappropriately provide such advice. At the same time, Minister's Office lawyers face particular ethical pressures that flow from their political identification with, and loyalty to, the Minister. For these reasons, the Minister's Office lawyer is best understood not as a subset of the government lawyer but instead as being in a *sui generis* category of its own. There is no indication that this role will disappear in the future — indeed, its advantages suggest it may proliferate.

While the concept of a Minister's Office lawyer is apparently a new one, similar functions may have previously been performed — and may still be performed — by persons with titles such as “policy advisor” or “Chief of Staff”.⁷⁴ It is preferable that there be no pretence that such a person is not providing legal advice, and no confusion about who the client is. The explicit role of the Minister's Office lawyer avoids this pretence and confusion.

⁷⁴ Dodek, “Sidelines”, *supra* note 1.