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Legal Ethics for Government Lawyers: Confronting Doctrinal Gaps

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LEGAL ETHICS FOR GOVERNMENT LAWYERS: CONFRONTING DOCTRINAL GAPS

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Despite the recent growth in the Canadian literature on legal ethics for government lawyers, the leading conceptual models have yet to be applied to resolve many of the most important legal questions facing government lawyers. In this article, I identify four key situations where the obligations of government lawyers as lawyers appear to clash with their obligations as public servants. I provide both a doctrinal analysis of how the current law applies in those situations and proposals for how the law can be clarified and improved. This analysis both provides much needed guidance to government lawyers and promotes a greater understanding by law societies as regulators, as well as other key stakeholders, of the unique challenges facing government lawyers and the need for legislative and regulatory reform.

TABLE OF CONTENTS

I.	INTRODUCTION	170
II.	DISCRETIONARY ASYMMETRICAL EXCEPTIONS TO CONFIDENTIALITY OR SECURITY: THE GOVERNMENT LAWYER CAN DISCLOSE BUT THE GOVERNMENT LAWYER CANNOT DISCLOSE	174
	A. THE DUTIES: THE LAWYER'S DUTY OF CONFIDENTIALITY AND THE PUBLIC SERVANT'S DUTY OF SECURITY	174
	B. THE ASYMMETRICAL DISCRETIONARY EXCEPTIONS TO THE DUTY OF SECURITY: WHISTLE-BLOWING LEGISLATION	178
	C. THE ASYMMETRICAL DISCRETIONARY EXCEPTIONS TO THE DUTY OF CONFIDENTIALITY: THE LAWYER'S EXCEPTIONS	182
	D. SOLUTIONS UNDER CURRENT LAW	183
	E. THE SIMPLE SOLUTION UNDER CURRENT LAW IS UNDESIRABLE AND FRUSTRATES POLICY GOALS	188
	F. LONG-TERM SOLUTIONS	189
III.	NON-DISCRETIONARY ASYMMETRICAL EXCEPTIONS TO CONFIDENTIALITY OR SECURITY: THE GOVERNMENT LAWYER MUST DISCLOSE BUT THE GOVERNMENT LAWYER MUST NOT DISCLOSE	191
	A. THE SOLUTIONS UNDER CURRENT LAW	192
	B. LONG-TERM SOLUTIONS	196
IV.	THE LAWYER'S PROFESSIONAL AND INDIVIDUALIZED DUTY TO REPORT UP	196

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A.	NO GOOD “SOLUTIONS” UNDER CURRENT LAW	197
B.	LONG-TERM SOLUTIONS	199
V.	CONCLUSIONS AND RECOMMENDATIONS	202

I. INTRODUCTION

Despite recent growth in the Canadian legal literature on government lawyers, that literature largely remains conceptual. And while that conceptual literature provides a foundation for answering specific practical questions that face government lawyers in practice, it does not itself provide those answers. Both Adam Dodek and Elizabeth Sanderson have recognized that government lawyers have three types of duties — Dodek in his three sides of the “rule of law triangle” model and Sanderson in her similar subsequent “three layers” model — insofar as government lawyers are simultaneously lawyers and public servants and delegates of the Attorney General.¹

However, while recognizing the potential for complex interactions among those three types of duties, such as whistle-blowing,² neither have applied their models to resolve the whistle-blowing scenario or to identify or resolve other specific situations where the law remains unclear and government lawyers require guidance. Nor, with few exceptions, have other commentators done so.³ The doctrinal utility and impact of the Dodek and Sanderson models thus remains both untested and untapped.

In this article, I identify four key situations in which the obligations of government lawyers clash. For each situation, I provide both a doctrinal analysis of how the current law applies and proposals for how the law can be clarified and improved. I do so for two reasons. The first reason is to advance the literature by demonstrating how Dodek’s and Sanderson’s models apply and the potential complexity involved in such application. The second and equally important reason is to provide much needed guidance not only to government lawyers, but also to law societies as regulators of the legal profession and to the provincial and territorial legislatures that delegate that regulatory authority to those law societies. I emphasize that my goal is certainly not to relieve government lawyers of their professional responsibilities as lawyers, but instead to promote regulators’ understandings of how those professional responsibilities properly apply in government lawyers’ unique practice circumstances and how they interact with their legal obligations as public servants.

¹ Adam M Dodek, “Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law” (2010) 33:1 Dal LJ 1 at 20–21 [Dodek, “Government Lawyers”]; Elizabeth Sanderson, *Government Lawyering: Duties and Ethical Challenges of Government Lawyers* (Toronto: LexisNexis Canada, 2018) at 2, 48.

² See e.g. Dodek, “Government Lawyers,” *ibid* at 7–8 (“The point is that the answers to these questions are not clear” at 8); Sanderson, *ibid* at 149–51.

³ Surprisingly, in his short discussion of confidentiality and whistle-blowing for government lawyers, Gavin MacKenzie does not mention whistle-blowing legislation for public servants: Gavin MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Toronto: Thomson Reuters Canada 1993) (loose-leaf updated Rel 2, June 2022) at ch 21, §21.4. Allan Hutchinson’s discussion of whistle-blowing focuses not on what the current law is, but on what he argues the law should be: Allan C Hutchinson, ““In the Public Interest”: The Responsibilities and Rights of Government Lawyers” (2008) 46:1 Osgoode Hall LJ 105 at 124–29. While Eric Pierre Boucher mentions but does not resolve the whistle-blowing dilemma, he does make an important policy point that I will return to below: Eric Pierre Boucher, “Civil Crown Counsel: Lore Masters of the Rule of Law” (2018) 12 JPPL 463 at 486. For dilemmas other than whistle-blowing, see Andrew Flavelle Martin, “Legal Ethics and the Political Activity of Government Lawyers” (2018) 49:2 Ottawa L Rev 263 [Martin, “Legal Ethics”]; Jennifer Leitch, “A Less Private Practice: Government Lawyers and Legal Ethics” (2020) 43:1 Dal LJ 315.

Individual government lawyers should not be left to resolve these legal dilemmas alone, even if there is an unavoidable and irreducible degree of professional judgment involved in some situations.

I focus my analysis using the following four scenarios:

Scenario 1: Government Lawyer Q learns of gross mismanagement within the public service. The information is not subject to solicitor-client privilege because it came from a third party outside government. As a public servant, Q is authorized under whistle-blowing legislation to disclose this information to a Commissioner external to government. However, as a lawyer, Q has a strict professional duty of confidentiality. What should Q do?

Scenario 2: Government Lawyer X is counsel in complex litigation. They determine that they need legal and ethical advice about how to proceed. Because of the unique nature of the situation, they are unable to obtain sufficient guidance from their colleagues or other lawyers within the government. The rules of professional conduct explicitly allow X to breach their lawyer's duty of confidentiality to seek ethical and legal advice from another lawyer. But doing so would breach their duty and oath of secrecy as a public servant. What should X do?

Scenario 3: The Law Society is investigating a complaint against Government Lawyer Y. The Law Society requests all of Y's files from the past calendar year. As a lawyer, Y is required under the rules of professional conduct and legislation on the legal profession to co-operate with the investigation and provide the files. But the files in question are government records that Y, as a public servant, has no authority to release. What should Y do?

Scenario 4: Government Lawyer Z determines that the government's chosen course of action in a matter is dishonest. As a lawyer for an organizational client, Z is required under the rules of professional conduct to raise their concern with the person from whom they receive instructions — and if that person is not persuaded, Z is required to raise the matter with that person's superiors, and so on progressively until the ultimate decision-making authority for the client, and to withdraw from the matter if that ultimate decision-making authority is not persuaded. But as a public servant, Z operates in a layered hierarchy in which circumventing their supervisor (and the other intervening officials in the hierarchy) is an extraordinary step that may potentially lead to employment discipline. What should Z do?

My analysis is organized in three parts. In Parts II and III, I consider the interaction of the lawyer's professional duty of confidentiality with the public service duty of secrecy. I start in Part II with situations where the government lawyer is permitted to breach one duty but not the other, as set out in Scenarios 1 and 2. In Part III, I consider a situation where a government lawyer faces conflicting duties, i.e. where lawyer is required to provide their records to the law society but a public servant is not permitted to provide those records, as set out in Scenario 3. Then in Part IV I turn to the lawyer's professional duty to report up wrongdoing within the organizational client, as set out in Scenario 4, and consider the

challenges it poses in the particular practice environment of government lawyers. I then conclude by reflecting on the implications of my analysis.

I emphasize at the outset that not every difference between the duties of lawyers and the duties of public servants will cause a dilemma for government lawyers. For example, the rules on conflicts of interest for public servants are in some respects stricter than the rules on conflicts of interest for lawyers.⁴ Government lawyers can comply — and thus must comply — with both sets of obligations. Compliance with the rules on conflicts of interest for public servants does not prevent government lawyers from meeting their professional obligations as lawyers and does not otherwise frustrate the law of lawyering.

I also avoid a categorical approach to whether a government lawyer's obligations as a public servant prevail over their obligations as a lawyer, or vice versa. I instead approach each situation with a doctrinal analysis that focuses on the particular provisions at issue. Thus, I take no position on Allan Hutchinson's suggestion that "it can be argued that all government lawyers, including prosecution lawyers, are government bureaucrats first and lawyers only second."⁵ Although each government lawyer may have a personal perception of which role comes first, such perceptions are simply not helpful in resolving the legal questions that arise for government lawyers. For example, while some government lawyers may prioritize or hold themselves particularly honour-bound by their professional oaths as lawyers,⁶ government lawyers also swear the oaths required of government employees.⁷ (I will consider the oaths of secrecy for government employees in detail below.)⁸ Indeed, even if law societies consider government lawyers to be lawyers first and governments consider them to be public servants first, those views themselves are only legally relevant insofar as they are implemented in law.

Before proceeding with my analysis, I acknowledge and indeed emphasize a jarring mismatch between the traditional regulatory approach of law societies, which considers lawyers largely as individual professionals with individual and personalized obligations, and the complex and hierarchically layered institutional environment in which government lawyers work as public servants and delegates of the Attorney General. Some may suggest that my analysis neglects this institutional reality at the expense of the individualized law society perspective. While part of my goal in this project is to highlight this mismatch, at the end of the day under current law, the law societies consider each lawyer as an individual professional with "complete professional responsibility" for their practice.⁹ I remain unconvinced that the unique role of the Attorney General, albeit one with a constitutional

⁴ Sanderson uses the example of prohibitions on public servants accepting gifts: Sanderson, *supra* note 1 at 126–27.

⁵ Hutchinson, *supra* note 3 at 115.

⁶ See e.g. Law Society of Ontario, *By-Law 4* (1 May 2007, last amended 27 May 2021), s 21(1), online: <lso.ca/about-lso/legislation-rules/by-laws/by-law-4>. The oath includes the following: "I shall strictly observe and uphold the ethical standards that govern my profession."

⁷ See e.g. *Oaths and Affirmations*, O Reg 373/07, ss 1(1) [oath or affirmation of allegiance], 3(1) [oath or affirmation of office] [Ontario, *Oaths and Affirmations Regulation*]. See also below notes 115–16 and accompanying text.

⁸ See below notes 35 to 54 and accompanying text.

⁹ Federation of Law Societies of Canada, "Model Code of Professional Conduct" (Ottawa: FLSC, 2009, last amended 19 October 2019), r 6.1-1, online: <flsc.ca/wp-content/uploads/2019/11/Model-Code-October-2019.pdf> [FLSC Model Code].

foundation,¹⁰ displaces that approach as a matter of law. The fact that the Attorney General “shall have the regulation and conduct of all litigation for or against the Crown or any department” does not displace the regulatory role of the law society over the individual lawyers conducting that litigation.¹¹ Neither does the fact that the Attorney General (as Minister of Justice) “shall ... see that the administration of public affairs is in accordance with law” displace the regulatory jurisdiction of the law society.¹² The prudent government lawyer in the Scenarios I have identified will surely raise the issue with management. Nonetheless, in my view, the response of management to the issue cannot in any way change the legal obligations of the individual lawyer. The matters I discuss in this article are matters of professional conduct, and thus are matters over which the law society retains jurisdiction despite the practice setting of the lawyer as a delegate of the Attorney General.¹³ For this reason, my primary focus is on the other two elements of the Dodek and Sanderson models, that is, government lawyers as lawyers and as public servants, and not on government lawyers as delegates of the Attorney General. Indeed, with few exceptions, the Attorney General as the apex government lawyer must themselves comply with the rules of professional conduct.¹⁴

In my recommendations, I propose (among other things) amendments to the rules of professional conduct for lawyers. Dodek has proposed a specific code of conduct for government lawyers.¹⁵ With great respect, I suggest that it would be better to adequately incorporate government lawyers into the single code of conduct that applies to all lawyers in each province and territory. While Dodek is correct that “[t]he process of creating such a code would force those involved to articulate and address the particular ethical challenges and circumstances that they face,”¹⁶ the process of amending the existing rules of professional conduct would likewise force government lawyers and regulators alike to articulate and address those challenges. I note, for example, that the rules of professional conduct include a rule specifically addressing prosecutors,¹⁷ although the vast majority of lawyers do not practise as prosecutors. Given the large number of government lawyers, and the distinct issues they face, it is appropriate to address them in the rules of professional conduct as well. Indeed, the rule on prosecutors is important not just for prosecutors and law societies as regulators, but for the defence counsel and judges who interact with them and ultimately for the public. Likewise, incorporating government lawyering into the rules of professional conduct is important not only for government lawyers, the governments who are their clients, and law societies as regulators, but for the many lawyers who encounter government lawyers in their practice and for the public at large.

¹⁰ See e.g. Sanderson, *supra* note 1.

¹¹ *Department of Justice Act*, RSC 1985, c J-2, s 5(d).

¹² *Ibid*, s 4(a).

¹³ *Krieger v Law Society of Alberta*, 2002 SCC 65 at paras 50–60 [*Krieger*].

¹⁴ There are some exceptions and immunities uniquely applicable to the Attorney General. See Andrew Flavelle Martin, “The Immunity of the Attorney General to Law Society Discipline” (2016) 94:2 *Can Bar Rev* 413.

¹⁵ Dodek, “Government Lawyers,” *supra* note 1 at 42. See also Sanderson, *supra* note 1 at 228–50, who appears to suggest a Code for government lawyers but appears to use the concept in a different way.

¹⁶ Dodek, “Government Lawyers,” *ibid*.

¹⁷ *FLSC Model Code*, *supra* note 9, r 5.1-3.

II. DISCRETIONARY ASYMMETRICAL EXCEPTIONS TO CONFIDENTIALITY OR SECRECY: THE GOVERNMENT LAWYER CAN DISCLOSE BUT THE GOVERNMENT LAWYER CANNOT DISCLOSE

Government lawyers have a professional duty of confidentiality and a public service duty of secrecy. These duties are similar but not identical. In particular, an exception to one may not be an exception to another. In this Part, I consider the dilemma government lawyers face where there is an exception that relieves the government lawyer from one duty but there is no corresponding exception relieving them from the other duty. I refer to these as “discretionary asymmetrical exceptions.” These overlaps are what Ruth Sullivan refers to as a “contradiction: one provision *permits* what another provision prohibits.”¹⁸ Here the codified law of confidentiality for lawyers permits the disclosure of information, while the statutes on public servants prohibit that disclosure — or vice versa, that is, the statutes on public servants permit the disclosure of information but the codified law of confidentiality for lawyers prohibits that disclosure.

After canvassing the two differing duties, I consider the whistle-blowing exception to the public servant’s duty of secrecy. I then turn to the so-called lawyers’ exceptions to the professional duty of confidentiality.

A. THE DUTIES: THE LAWYER’S DUTY OF CONFIDENTIALITY AND THE PUBLIC SERVANT’S DUTY OF SECRECY

Government lawyers have a professional duty of confidentiality as lawyers.¹⁹ The lawyer’s duty of confidentiality is recognized both in case law and in the rules of professional conduct. Justice Binnie for the Supreme Court of Canada in *R. v. Neil* identified confidentiality as one of four “aspects of the duty of loyalty.”²⁰ More recently, Justice Cromwell for the majority in *Canada (Attorney General) v. Federation of Law Societies of Canada* characterized it as “essential to the due administration of justice.”²¹ The duty of confidentiality has likewise been described as “critical to the proper functioning of the solicitor-client relationship and ... at the very core of every lawyer’s duty towards his or her clients,”²² and its violation as “subversive of the privileged position of members of the legal profession.”²³

The *Model Code of Professional Conduct* of the Federation of Law Societies of Canada provides that “[a] lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship,”²⁴ subject to a closed list of exceptions:

¹⁸ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada, 2014) at para 11.22 [emphasis in original].

¹⁹ For a discussion see Sanderson, *supra* note 1 at 142–46.

²⁰ 2002 SCC 70 at para 19.

²¹ 2015 SCC 7 at para 1.

²² *McLeod (Re)*, 2015 LSBC 03 at para 24 [*McLeod*].

²³ *Bjerman (Re)*, 2009 LSBC 05 at para 8, as quoted in *McLeod*, *ibid*.

²⁴ *FLSC Model Code*, *supra* note 9, r 3.3-1. See also *Code of Professional Conduct of Lawyers*, CQLR c B-1, r 3.1, s 60 [*Quebec Code*].

- where “expressly or impliedly authorized by the client”,²⁵
- where “required by law or a court to do so”,²⁶
- where “required to deliver the information to the Law Society”,²⁷
- “when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm”,²⁸
- to defend themselves against allegations of wrongdoing, be those professional, civil, or criminal,²⁹
- “in order to establish or collect the lawyer’s fees”,³⁰
- “to another lawyer to secure legal or ethical advice about the lawyer’s proposed conduct”,³¹ and
- “to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a law firm.”³²

For my purposes, I emphasize that the lawyer is relieved of this duty of confidentiality and disclosure is permissible where “*required* by law or a court to do so” — not when merely *authorized* by law or a court to do so.³³

Government lawyers also have a duty of secrecy as public servants.³⁴ Of the 14 Canadian jurisdictions, 11 have a statutory requirement for public servants to swear an oath of, among other things, secrecy.³⁵ These statutory provisions have been described as “essential to the functioning of the public service in serving the elected government” and indeed to “the viability of our system of democratic government,” because these oaths “reflect the importance of a trusting relationship between ministers and officials.”³⁶

The oaths vary across Canadian jurisdictions but can mostly be grouped into two categories. British Columbia and Ontario both prohibit disclosure unless “authorized” or

²⁵ *FLSC Model Code, ibid*, r 3.3-1(a). See also *Quebec Code, ibid*, s 65(1).

²⁶ *FLSC Model Code, ibid*, r 3.3-1(b). See similarly *Quebec Code, ibid*, s 65(2) (“if an express legal provision orders or authorizes him to do so”).

²⁷ *FLSC Model Code, ibid*, r 3.3-1(c). See also *Professional Code, CQLR c C-26*, s 14.3.

²⁸ *FLSC Model Code, ibid*, r 3.3-3. See also *Quebec Code, supra* note 24, s 65(6).

²⁹ *FLSC Model Code, ibid*, r 3.3-4. See similarly *Quebec Code, ibid*, s 65(4) (“in order to defend himself in the event of proceedings, complaints or allegations calling his professional competence or conduct into question”).

³⁰ *FLSC Model Code, ibid*, r 3.3-5. See similarly *Quebec Code, ibid*, s 65(3) (“in order to collect his unpaid fees before a tribunal”). This exception is not relevant for government lawyers.

³¹ *FLSC Model Code, ibid*, r 3.3-6. There is no corresponding exception in the *Quebec Code, ibid*.

³² *FLSC Model Code, ibid*, r 3.3-7. See also *Quebec Code, ibid*, s 65(5).

³³ *FLSC Model Code, ibid*, r 3.3-1(b) [emphasis added].

³⁴ See e.g. Deborah MacNair, “In the Service of the Crown: Are Ethical Obligations Different for Government Counsel?” (2005) 84:3 *Can Bar Rev* 501 at 528: “[T]he oath of loyalty that each public servant takes on appointment to office ensures that they will keep confidential information obtained through the course of employment with the Crown and only disclose it when they have authority to do so.”

³⁵ The *Public Service Act*, RSNS 1989, c 376 includes neither an oath nor another explicit reference to secrecy or confidentiality. The oath in Newfoundland and Labrador is adopted not by statute but by Treasury Board: Newfoundland and Labrador, *Oath/Affirmation of Office*, online: <www.gov.nl.ca/exec/tbs/files/forms-oath-affirmation-of-office.pdf> and <www.gov.nl.ca/exec/tbs/working-with-us/oath/> [NL, *Oath*]. Quebec imposes a duty of confidentiality without a statutory oath: *Public Service Act*, CQLR c F-3.1.1, s 6. Yukon legislation provides for a prescribed oath (*Public Service Act*, RSY 2002, c 183, s 69), but no such oath is currently prescribed.

³⁶ *George v Harris* (2003), 102 CRR (2d) 316 (Ont Sup Ct) at para 29 [*George*], costs at [2003] OJ No 1500, leave to appeal to Div Ct refused, [2003] OJ No 1900 (Div Ct).

“required” by law.³⁷ The other larger category prohibits disclosure absent “due authority.”³⁸ However, the phrase “due authority” is not defined in these statutes and regulations. There are some outliers: the oath in Newfoundland and Labrador, adopted not in statute but by Treasury Board, allows disclosure only “to those authorized to know.”³⁹ The Saskatchewan oath allows disclosure only if “(a) that ... disclosure is permitted by *The Freedom of Information and Protection of Privacy Act* or *The Health Information Protection Act*; and (b) I have authorization from my employer to make that ... disclosure.”⁴⁰ Likewise, the Quebec statutory duty imposes confidentiality “[s]ubject to the provisions relating to access to information and the protection of personal information.”⁴¹

Despite the absence of specific statutory language, there are likely exceptions to the duty and oath of secrecy. Lorne Sossin has argued that there are implicit exceptions to the oath of secrecy parallel to the exceptions to the duty of loyalty identified in *Fraser v. Public Service Staff Relations Board*,⁴² though *Fraser* does not explicitly identify confidentiality or secrecy as components of the common law duty of loyalty: “[T]he oath of confidentiality may be breached where it is in the public interest to do so (where, for example, the government of the day is undertaking unlawful action).”⁴³ The other exception articulated in *Fraser* was a threat to “life, health or safety.”⁴⁴ However, the Federal Court of Appeal has emphasized that “the purpose of the exceptions formulated in *Fraser*, is not to encourage or allow public servants to debate issues as if they were ordinary members of the public, unencumbered by responsibilities to their employer ... [but instead] to allow public servants to expose, in exceptional circumstances, government wrongdoing.”⁴⁵ Sossin also notes that “[t]he common law duties of loyalty and confidentiality, at least since the nineteenth century, have contained whistle-blower exceptions, based on the theory that there can be no breach of the duty by the ‘disclosure of iniquity.’”⁴⁶ Sossin is likely correct that a duty of secrecy

³⁷ *Public Service Oath Regulation*, BC Reg 228/2007, s 1 (“unless ... either authorized to do so or required to do so by law”); Ontario, *Oaths and Affirmations Regulation*, *supra* note 7, s 3(1) (“except as I may be legally authorized or required”). See also *Conflict of Interest Rules for Public Servants (Ministry) and Former Public Servants (Ministry)*, O Reg 381/07, ss 5(1) (“A public servant shall not disclose confidential information obtained during the course of his or her employment by the Crown to a person or entity unless the public servant is authorized to do so by law or by the Crown”), 1 (“In this Part, ‘confidential information’ means information that is not available to the public and that, if disclosed, could result in harm to the Crown or could give the person to whom it is disclosed an advantage”).

³⁸ *Public Service Employment Act*, SC 2003, c 22, ss 12, 13 at s 54; *Public Service Act*, RSA 2000, c P-42, s 20(1) [“due authorization”; violation of the oath is a specific provincial offence: s 20(2)]; *The Public Service Act*, SM 2021, c 11, s 16; *Civil Service Act*, RSPEI 1988, c C-8, Schedule II; *Civil Service Act*, SNB 1984, c C-5.1, s 22; *Public Service Act*, RSNWT 1988, c P-16, s 39, *Public Service Regulations*, RRNWT 1990, c P-28, s 51; *Public Service Act*, SNU 2013, c 26, s 15; *Public Service Regulations*, RRNWT (Nu) 1990, c P-28, s 51.

³⁹ NL, *Oath*, *supra* note 35.

⁴⁰ *The Public Service Regulations*, 1999, RRS c P-42.1, Reg 1, s 96(2).

⁴¹ *Public Service Act*, CQLR c F-3.1.1, s 6.

⁴² [1985] 2 SCR 455 at 470 [*Fraser*]. On the duty of loyalty, see Sanderson, *supra* note 1 at 43–48 (44 on *Fraser* specifically), 149.

⁴³ Lorne Sossin, “Speaking Truth to Power?: The Search for Bureaucratic Independence in Canada” (2005) 55:1 UTLJ 1 at 22 (now Justice Sossin of the Court of Appeal for Ontario).

⁴⁴ *Fraser*, *supra* note 42 at 470.

⁴⁵ *Read v Canada (Attorney General)*, 2006 FCA 283 at para 119.

⁴⁶ Sossin, *supra* note 43 at 33 [citation omitted]. See also at 32:

While the balancing approach is doubtless the appropriate one, given the competing duties at stake in these cases, characterizing the issue around individuals’ rights to express criticism of government policy, or as a labour dispute between a particular employee and employer, misses the larger set of duties and obligations that flow from the civil service as an ‘organ of government.’ In other words, at issue in these cases is not only a particular individual’s right to speak her mind but also the fabric of the executive branch in Canada’s constitutional quilt.

can be considered a component or subsidiary element of the common law duty of loyalty from *Fraser*.

Even if the statutory oath of secrecy purported to oust those common law exceptions to the common law duty of loyalty, the post-*Fraser* case law holds that such exceptions are required by the *Canadian Charter of Rights and Freedoms*.⁴⁷ The leading case, *Osborne v. Canada (Treasury Board)*, held that absolute restrictions on political activity were not a reasonable limit on the freedom of expression of public servants.⁴⁸ In the context of alerting the public to problems within government, the common law duty of loyalty in *Fraser* — with its exceptions — likewise constitutes a reasonable limit on freedom of expression.⁴⁹ (While articulated in terms of the broader duty of loyalty, the conclusion would likewise apply to the component duty of secrecy.) Moreover, post-*Fraser* case law emphasizes that “[a] large and liberal interpretation should be given to the exceptions mentioned in *Fraser*.”⁵⁰ Similarly, the preamble to federal whistle-blowing legislation, the *Public Servants Disclosure Protection Act*, recognizes that “public servants owe a duty of loyalty to their employer and enjoy the right to freedom of expression as guaranteed by the *Canadian Charter of Rights and Freedoms* and . . . this Act strives to achieve an appropriate balance between those two important principles.”⁵¹ While case law and statute focus on freedom of expression under section 2(b) of the *Charter*, Richard Haigh and Peter Bowal have argued that whistle-blowing may also be protected by the freedom of conscience under section 2(d) of the *Charter*.⁵² Thus, an absolute duty of loyalty of public servants is inconsistent with the *Charter* — some exceptions are necessary.

Government lawyers, however, may reasonably be held to a stricter duty of loyalty (including a stricter duty of secrecy) than other public servants, because their *Charter* rights are subject not only to the restrictions or balancings appropriate for public servants, but also to the restrictions or balancings appropriate for lawyers. It is clear if not trite that, at least in the context of civility and advertising, lawyers accept restrictions on their freedom of expression that would not be acceptable for the general public.⁵³ The Manitoba Court of Appeal, albeit in *obiter*, has also recognized that restrictions on lawyer expression to protect fair trial rights are likewise acceptable.⁵⁴ Given the importance of loyalty and secrecy to the lawyer-client relationship, I would expect the *Charter* to likewise require lesser protections for lawyers than for non-lawyers — whether under freedom of expression or freedom of

⁴⁷ *Canadian Charter of Rights and Freedoms*, s 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

⁴⁸ [1991] 2 SCR 69. See Sanderson, *supra* note 1 at 45.

⁴⁹ *Haydon v Canada (TD)*, [2001] 2 FC 82.

⁵⁰ *Haydon v Canada (Treasury Board)*, 2004 FC 749 at para 69.

⁵¹ SC 2005, c 46, Preamble [*PSDPA*].

⁵² Richard Haigh & Peter Bowal, “Whistleblowing and Freedom of Conscience: Towards a New Legal Analysis” (2012) 35:1 Dal LJ 89.

⁵³ *Doré v Barreau du Québec*, 2012 SCC 12 at paras 63–66 (civility); *Histed v Law Society of Manitoba*, 2007 MBCA 150 at para 79 [*Histed*], leave to appeal to SCC refused, 32478 (24 April 2008) (civility); *Law Society of Upper Canada v Barnett*, [1997] LSDD No 94 (Ont LST) (specific restrictions on lawyer advertising a justifiable infringement of section 2(b), applying *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232). See also Martin, “Legal Ethics,” *supra* note 3 at 293–95 (discussing political expression under section 2(b) of the *Charter* and democratic rights under section 3).

⁵⁴ *Histed*, *ibid*: “While litigants and other interested persons may comment publicly on cases before the courts . . . lawyers are bound by the constraints of the professional standards which apply to all members of the legal profession.” See also in the US context *Gentile v State Bar of Nevada*, 501 US 1030 at 1075 (1991) (restrictions on public comment by lawyers acceptable to protect fair trial rights).

conscience. For example, under the whistle-blowing legislation that I turn to next, it seems eminently justifiable that such legislation explicitly forbids the disclosure of information that is protected by solicitor-client privilege.

B. THE ASYMMETRICAL DISCRETIONARY EXCEPTIONS TO THE DUTY OF SECRECY: WHISTLE-BLOWING LEGISLATION

Scenario 1: Government Lawyer Q learns of gross mismanagement within the public service. The information is not subject to solicitor-client privilege because it came from a third party outside government. As a public servant, Q is authorized under whistle-blowing legislation to disclose this information to a Commissioner external to government. However, as a lawyer, Q has a strict professional duty of confidentiality. What should Q do?

Most if not all Canadian jurisdictions allow — but do not *require* — public servants to disclose wrongdoing, although this authorized disclosure is typically to a legislatively created authority and not to the media or the public.⁵⁵ While these statutes tend to prohibit the disclosure of “any information that is subject to solicitor-client privilege,”⁵⁶ they do not prohibit the disclosure of information that is not privileged but is covered by the lawyer’s professional duty of confidentiality. Moreover, the potential categories of reportable wrongdoing are not limited to criminal conduct (to which the crime-fraud exclusion to confidentiality and privilege would apply).⁵⁷ Many of these whistle-blowing statutes include “gross mismanagement” as one category.⁵⁸ Can the government lawyer make a disclosure of such information under the corresponding whistle-blowing statute?

⁵⁵ See e.g. *PSDPA*, *supra* note 51. On whistle-blowing legislation, see Sanderson, *supra* note 1 at 149–50. *PSDPA*, *ibid.*, s 13(2). See also *Public Service of Ontario Act, 2006*, SO 2006, c 35, Schedule A, Part VI, s 113(2)(b) (see also s 113(2)(c) on litigation privilege) [*PSOA*]; *Act to Facilitate the Disclosure of Wrongdoings Relating to Public Bodies*, CQLR c D-11.1, s 8 [*AFDWRPB*]; *Public Interest Disclosure of Wrongdoing Act*, SNS 2010, c 42, s 11(b) [*NS PIDWA*]; *Public Interest Disclosure Act*, RSNB 2012, c 112, s 16(1)(b) [*NB PIDA*]; *The Public Interest Disclosure (Whistleblower Protection) Act*, CCSM 2006, c P217, s 16(1)(b) [*Manitoba PID(WP)A*]; *Public Interest Disclosure Act*, SBC 2018, c 22, ss 5(1)(a), 5(2)(b) (see also ss 5(1)(b), 5(2)(c) on “any common law rule of privilege”) [*BC PIDA*]; *Public Interest Disclosure and Whistleblower Protection Act*, RSPEI 1988, c P-31.01 [*PEI PIDWPA*]; *The Public Interest Disclosure Act*, SS 2011, c P-38.1, s 13(1)(b) [*Saskatchewan PIDA*]; *Public Interest Disclosure (Whistleblower Protection) Act*, SA 2012, c P-39.5, s 28.1(1)(b) (“solicitor-client privilege or litigation privilege”) [*Alberta PID(WP)A*]; *Public Interest Disclosure and Whistleblower Protection Act*, SNL 2014, c P-37.2, s 11(1)(b) [*NL PIDWPA*]; *Public Interest Disclosure of Wrongdoing Act*, SY 2014, c 19, s 15(1)(b) [*Yukon PIDWA*]. Curiously, Nunavut legislation appears to impose this restriction not on an initial disclosure, but only on an investigation prompted by a disclosure: *Public Service Act*, SNu 2013, c 26, Part 6, s 43(5)(c). Given that litigation privilege was previously considered a “branch” of solicitor-client privilege until *Blank v Canada (Minister of Justice)*, 2006 SCC 39 (see Adam M Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis Canada, 2014) at para 2.18), it is arguable that the phrase “solicitor-client privilege” should be interpreted as including litigation privilege, at least in those statutes last amended before that decision.

⁵⁷ On the crime-fraud exclusion, see e.g. Dodek, *Solicitor-Client Privilege*, *ibid* at paras 3.73–3.76.

⁵⁸ See e.g. *PSDPA*, *supra* note 51, s 8(c); *AFDWRPB*, *supra* note 56, s 4(4) (“gross mismanagement within a public body, including an abuse of authority”); *NS PIDWA*, *supra* note 56, s 3(j)(ii) (“a misuse or gross mismanagement of public funds or assets”); *Manitoba PID(WP)A*, *supra* note 56, s 3(c) (“gross mismanagement, including of public funds or a public asset”); *Alberta PID(WP)A*, *supra* note 56, s 3(1)(c) (“gross mismanagement ... of (i) public funds or a public asset”); *Saskatchewan PIDA*, *supra* note 56, s 3(c) (“gross mismanagement of public funds or a public asset”). In Nova Scotia, “gross mismanagement” is defined in regulation as “an act or omission that is (i) deliberate, and (ii) shows a reckless or wilful disregard for the efficient management of significant government resources”: *Public Interest Disclosure of Wrongdoing Regulations*, NS Reg 323/2011, s 2(2).

It seems clear that the discretionary public safety exception to the lawyer's professional duty of confidentiality could be applicable here,⁵⁹ depending on the nature of the wrongdoing that the government lawyer sought to disclose and so long as that wrongdoing posed a current risk that the disclosure could mitigate. If the criteria for that exception were met, the government lawyer could make the disclosure without violating their professional duty of confidentiality. One would hope, however, that those criteria would be met with respect to a government only rarely. What about where the public safety exception to confidentiality does not apply?

Recall first that the professional duty of confidentiality applies unless *required* — not *authorized* — by law.⁶⁰ Canadian whistle-blowing legislation merely authorizes disclosures by public servants; it does not *require* them. Thus, in this respect, the legislation does not authorize a breach of a government lawyer's professional duty of confidentiality.

However, another exception to the lawyer's professional duty of confidentiality potentially applies: where disclosure is "expressly or impliedly authorized by the client."⁶¹ The client of a government lawyer is the Crown, that is, the executive.⁶² Does whistle-blowing legislation constitute authorization by the client? The answer depends on how one understands the relationship between the executive on one hand and the legislature or Parliament on the other. Given the interrelationship between the two in the Canadian system of responsible government, a plausible argument could be made that an authorization in statute should be understood as an authorization by the client. However, in my respectful view, that argument is not compelling because it conflates the legislature with the executive. (In contrast, a regulation adopted by Cabinet pursuant to statutory authority granted by the legislature would appear to constitute authorization by the client — unless perhaps the legislation required such a regulation to be made.⁶³)

Thus, under current law, a provincial government lawyer who purports to make a disclosure permitted to them as a provincial public servant under provincial whistle-blowing legislation appears to violate their professional duty of confidentiality as a lawyer — except in those rare cases where the public safety exception to the duty of confidentiality applies — unless the whistle-blowing legislation prevails over the rules of professional conduct made by law societies pursuant to their delegated authority via legislation on the legal profession.

While the success of such an argument would turn in part on the particular legislative history in each jurisdiction, I argue that whistle-blowing legislation would likely prevail over the rules of professional conduct.

At the outset, a standard statutory interpretation analysis would suggest that since whistle-blowing legislation specifies that it does not override solicitor-client privilege but is silent about overriding the lawyer's duty of confidentiality, the legislature intended whistle-

⁵⁹ *FLSC Model Code*, *supra* note 9, r 3.3-3; *Smith v Jones*, [1999] 1 SCR 455.

⁶⁰ See above note 33 and accompanying text.

⁶¹ *FLSC Model Code*, *supra* note 9, r 3.3-1(a).

⁶² See e.g. Sanderson, *supra* note 1 at 101–108; Dodek, "Government Lawyers," *supra* note 1 at 11–13.

⁶³ Thanks to John Mark Keyes on this point.

blowing legislation to override that duty of confidentiality.⁶⁴ If this interpretation is correct, there is no conflict to resolve. However, in the alternative, I turn to that conflict analysis now.

As explained by Sullivan, in the case of two statutes passed by the same legislature, “mere contradiction is enough to bring two provisions in conflict.”⁶⁵ As discussed above,⁶⁶ there is contradiction where “one provision *permits* what another provision prohibits.”⁶⁷

One basis to resolve this conflict is that statutory whistle-blowing regimes typically contain provisions that expressly indicate that they prevail over other legislation.⁶⁸ Thus, provincial statutory whistle-blowing regimes would prevail over the confidentiality obligations of lawyers even if those obligations were codified in another provincial statute.

Another basis to resolve this conflict is that provincial statutory whistle-blowing regimes prevail because the confidentiality obligations of lawyers are imposed not by provincial statutes on the legal profession but by rules of professional conduct made by law societies pursuant to delegated authority under those statutes. As Sullivan explains, “if conflict is unavoidable, in the absence of evidence of a contrary legislative intent, the statutory provision prevails.”⁶⁹ However, John Mark Keyes argues that this approach “misses the point that if executive legislation completes the details of a scheme established by its enabling legislation, the inconsistency is really between the enabling legislation and the other primary legislation.”⁷⁰ With respect, and if I am reading Keyes correctly, while Keyes makes an important point about statutes and regulations, in the absence of specific language in the legislation on the legal profession, it is difficult to presume that the legislature intended to allow law societies to adopt rules that would prevail over other provincial legislation.

A third potential basis to resolve this conflict is what Sullivan refers to as “[i]mplied exception,” where a specific provision prevails as an implied exception to a general provision.⁷¹ However, the difficulty with this approach is determining whether whistle-blowing provisions are specific and confidentiality provisions are general, or whether whistle-blowing statutes are general and rules of professional conduct are specific.⁷² In a way, this debate parallels the question of whether government lawyers are a subset of the

⁶⁴ See e.g. Sullivan, *supra* note 18 at paras 8.90-8.93, citing *Canadian Private Copying Collective v Canadian Storage Media Alliance*, 2004 FCA 424 [CPCC]. See CPCC at para 96: “The rule is that the expression of one thing in a statute usually suggest[s] the exclusion of another (*expressio unius est exclusio alterius*). Pursuant to this maxim, if a statute specifies one exception (or more) to a general rule, other exceptions are not to be read in. The rationale is that the legislator has turned its mind to the issue and provided for the exemptions which were intended.”

⁶⁵ Sullivan, *ibid* at para 11.33, citing *Lévis (City) v Fraternité des policiers de Lévis Inc*, 2007 SCC 14. See more recently *Thibodeau v Air Canada*, 2014 SCC 67 at paras 89–96.

⁶⁶ See above note 18 and accompanying text.

⁶⁷ Sullivan, *supra* note 18 at para 11.22 [emphasis in original].

⁶⁸ See e.g. Sullivan, *ibid* at para 11.44. See *PSOA*, *supra* note 56, s 113(1); *AFDWRPB*, *supra* note 56, s 8; *NB PIDA*, *supra* note 56, s 15; *Manitoba PID(WP)A*, *supra* note 56, s 15; *BC PIDA*, *supra* note 56, s 3; *PEI PIDWPA*, *supra* note 56, s 9(4); *Saskatchewan PIDA*, *supra* note 56, s 12; *Alberta PID(WP)A*, *supra* note 56, s 28; *NL PIDWPA*, *supra* note 56, s 10; *Yukon PIDWA*, *supra* note 56, s 14. There is no such provision in the *NS PIDWA*, *supra* note 56.

⁶⁹ Sullivan, *ibid* at para 11.56, citing *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3.

⁷⁰ John Mark Keyes, *Executive Legislation*, 3rd ed (Toronto: LexisNexis Canada, 2021) at 467–69 (quotation is from 467).

⁷¹ Sullivan, *supra* note 18 at para 11.58, citing and synthesizing several cases.

⁷² See e.g. *ibid* at para 11.63.

general class of public servants or instead government lawyers are a subset of the general class of lawyers. I note here that the rules on confidentiality provide both a general rule — all information obtained is confidential — and specific exceptions to that rule. For these reasons, this basis is not helpful to resolve this conflict.

A fourth potential basis to resolve this conflict is what Sullivan refers to as “[i]mplied repeal”: whistle-blowing regimes prevail because they are much more recent than rules of professional conduct on confidentiality.⁷³ However, this basis is less helpful than the first two because “[t]he accepted test . . . is stringent. The court must conclude that the more recently enacted provision was meant to completely displace or subsume the earlier provision so that the continued operation of both would be impossible or inappropriate.”⁷⁴

Thus, in my view, the best answer is that whistle-blowing legislation prevails over lawyers’ duty of confidentiality, at least at the provincial level.

For federal government lawyers, however, the current situation is complicated by federalism considerations. On the one hand, federal legislation authorizing whistle-blowing by federal public servants would appear to prevail via paramouncy over provincial law society rules purporting to prohibit whistle-blowing.⁷⁵ The law society rules would “frustrate the purpose” of the federal whistle-blowing regime.⁷⁶ Such legislation (the federal *PSDPA*) clearly falls under the authority of Parliament provided by section 91(8) of the *Constitution Act, 1867*.⁷⁷ On the other hand, by requiring government lawyers to belong to a provincial or territorial law society as a condition of employment, arguably the federal government accepts the burdens of their lawyers submitting to provincial law society jurisdiction.⁷⁸ (The situation might be more complicated for those federal government lawyers who happened to be members of a law society in the absence of such membership being a condition of employment.) But federal statute would presumably still prevail where there is an explicit conflict. In other words, the federal government accepts the burdens of law society regulation for their lawyers only insofar as that regulatory scheme is not overridden by federal law. On balance, it would be incongruous if provincial whistle-blowing legislation prevailed over statutory provincial law society rules on confidentiality, as I have argued, but federal whistle-blowing legislation did not prevail over those statutory provincial law society rules — particularly insofar as the federal whistle-blowing legislation, like provincial whistle-blowing legislation, indicates that it should prevail over other legislation.⁷⁹

For the reasons described above,⁸⁰ it would be difficult to argue that *Charter* considerations require whistle-blowing legislation to prevail over a lawyer’s duty of

⁷³ *Ibid* at paras 11.64–11.66, citing *R v Mercure*, [1988] 1 SCR 234.

⁷⁴ *Ibid* at para 11.66.

⁷⁵ Andrew Flavelle Martin, “The Implications of Federalism for the Regulation of Federal Government Lawyers” (2020) 43:1 Dal LJ 363 at 380 [Martin, “Federalism”].

⁷⁶ See e.g. Sullivan, *supra* note 18 at paras 11.23–11.26.

⁷⁷ *PSDPA*, *supra* note 51; *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(8), reprinted in RSC 1985, Appendix II, No 5; Martin, “Federalism,” *supra* note 75 (explaining how the scope of s 91(8) has been interpreted broadly beyond its specific language of “[t]he fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada” at 378).

⁷⁸ Martin, “Federalism,” *ibid* at 384–85.

⁷⁹ *PSDPA*, *supra* note 51, s 15(b).

⁸⁰ See above notes 53 and 54 and accompanying text.

confidentiality, given the existing exceptions to that duty.⁸¹ There appears to be no case law in which the lawyer's duty of confidentiality has been challenged on the basis of the lawyer's freedom of expression (or, for that matter, freedom of conscience). Neither is there such case law challenging solicitor-client privilege on those bases. Indeed, *Smith v. Jones* in recognizing a future harm exception to solicitor-client privilege did not consider the freedom of expression (or freedom of conscience) of the lawyer who seeks to disclose the information.⁸²

C. THE ASYMMETRICAL DISCRETIONARY EXCEPTIONS TO THE DUTY OF CONFIDENTIALITY: THE LAWYER'S EXCEPTIONS

Scenario 2: Government Lawyer X is counsel in complex litigation. They determine that they need legal and ethical advice about how to proceed. Because of the unique nature of the situation, they are unable to obtain sufficient guidance from their colleagues or other lawyers within the government. The rules of professional conduct explicitly allow X to breach their lawyer's duty of confidentiality to seek ethical and legal advice from another lawyer. But doing so would breach their duty and oath of secrecy as a public servant. What should X do?

As canvassed above, the rules of professional conduct recognize several exceptions to the lawyer's duty of confidentiality. My focus here is on two of what are sometimes referred to as the "lawyers' exceptions"⁸³ — or less flatteringly, "lawyer self-interest exceptions"⁸⁴ — to confidentiality.⁸⁵ Lawyers may breach confidentiality to defend themselves against allegations of wrongdoing, be those professional, civil, or criminal.⁸⁶ There is little case law concerning this exception.⁸⁷ Lawyers may also breach confidentiality, but only to a fellow lawyer, "to secure legal or ethical advice about the lawyer's proposed conduct."⁸⁸

While there is no case law on this advice-seeking exception, some commentary does provide guidance. I note first that the Law Society of Upper Canada (as it then was) made a modification when adopting this model rule, omitting the reference to "ethical advice" and

⁸¹ See above note 53 and accompanying text. More precisely, the difficult argument would be that insofar as the rule of professional conduct establishing duty of confidentiality precludes the application of whistle-blowing legislation, that rule constitutes an unjustifiable infringement of section 2(b) of the *Charter* is of no force or effect — or that a law society disciplinary decision purporting to discipline a lawyer for making a disclosure authorized by whistle-blowing legislation but not by the rule on confidentiality inadequately balanced *Charter* considerations.

⁸² *Smith v Jones*, *supra* note 59.

⁸³ See e.g. Malcolm Mercer, "Professional Conduct Rules and Confidential Information Versus Solicitor-Client Privilege: Lawyers' Disputes and the Use of Client Information" (2013) 92:3 *Can Bar Rev* 595 at 598.

⁸⁴ MacKenzie, *supra* note 3 at ch 3, § 3.7. See also § 3.8: "The real difficulties [with the confidentiality rule] are... second, that the exceptions are inadequate and sometimes self-serving."

⁸⁵ The third lawyers' exception, "to establish or collect the lawyer's fees" (*FLSC Model Code*, *supra* note 9, r 3.3-5) is not relevant to government lawyers and so I do not consider it here.

⁸⁶ *FLSC Model Code*, *ibid*, r 3.3-4. Whether a government lawyer can disclose confidential information to their labour organization or union in circumstances concerning employment discipline appears to be an open question — but the closed-ended nature of this rule would suggest the answer is no.

⁸⁷ But see *Rumancik v Hardy*, 2021 ABQB 374 at para 32, mentioning it "*en passant*."

⁸⁸ *FLSC Model Code*, *supra* note 9, r 3.3-6. Note that the Quebec provisions on confidentiality recognize exceptions roughly corresponding to those listed above at notes 25–32, except for this one: *Quebec Code*, *supra* note 24, s 65. Oddly, Mercer, *supra* note 83 at 598, does not include this exception as one of the "lawyers' exceptions," perhaps because it is more recent and thus not traditionally in that category. Like Mercer, MacKenzie, *supra* note 3 does not include this exception in this group, perhaps because it is not necessarily as self-serving as the others.

thus limiting the exception to securing legal advice, on the basis that “when a lawyer gives ‘legal advice’, legal ethics considerations are also taken into account. Further, permitting disclosure to obtain ethical advice that is not legal advice raises privilege issues.”⁸⁹ Brent Olthuis explains that under this exception, “the advising lawyer is him- or herself bound to hold those matters in confidence, and all that has occurred is that the circle of confidence is incrementally enlarged.”⁹⁰ I would observe that this exception removes the general duty to obtain the client’s consent before a lawyer consults another lawyer.⁹¹ Given the possibility that the client’s conduct may be creating or exacerbating an ethical dilemma, it would be odd to require the client’s consent for the lawyer to obtain ethical advice about that dilemma. Moreover, a refusal of such consent would be problematic. Indeed, the Law Society of Alberta adopted the original predecessor to this exception so that a client who instructs a lawyer to engage in dubious conduct cannot prevent that lawyer from seeking legal or ethical advice about that dubious conduct by explicitly refusing consent for the lawyer to seek such advice.⁹²

These exceptions to the professional duty of confidentiality are complicated — perhaps even illusory — for government lawyers because there are no explicit corresponding exceptions to the oath and duty of secrecy of public servants.⁹³ While larger governments may have designated in-house professional responsibility counsel, smaller governments may not — and government lawyers may be hesitant to consult with them where they do exist.

D. SOLUTIONS UNDER CURRENT LAW

I do acknowledge that in a situation such as Scenario 2, a government lawyer’s superior would potentially grant permission to seek outside legal advice. Recall, however, that the purpose of this exception was to prevent clients who give a lawyer dubious instructions from being able to stop that lawyer from seeking legal or ethical advice about those instructions. Parallel considerations would seem to apply where a superior lawyer, not the client, is giving

⁸⁹ Law Society of Upper Canada, Professional Regulation Committee, *Report to Convocation: October 24, 2013* at 15, para 58.

⁹⁰ Brent Olthuis, “Professional Conduct,” in Adam M Dodek, ed, *Canadian Legal Practice: A Guide for the 21st Century* (Toronto: LexisNexis Canada, 2022) (loose-leaf, release 87) § 3.87.

⁹¹ See e.g. *FLSC Model Code*, *supra* note 9, r 3.1-2, commentary 6(b).

⁹² Law Society of Alberta, *Minutes of Benchers’ Convocation, November 29 & 30, 2001* at 24–25 (on file with author):

Although it has not been a problem and many thought there was a implied consent, there is a concern where a lawyer is being asked to do something that he/she questions the legality or ethics of and seeks consent from the client to get another opinion and the client specifically withholds that consent. The concern of the subcommittee is the lack of such a rule may be preventing some lawyers from seeking advice on difficult ethical situations because they believe they cannot do so without the client’s consent.

See also the Commentary adopted at 25, r 8(e.1):

Usually, a lawyer who needs to disclose confidential information to secure legal or ethical advice from another lawyer about the lawyer’s proposed conduct will be impliedly authorized to make the disclosure under Rule 8(e) [implied consent] or will obtain the client’s consent, [but this may not always be the case,] such as when the client is pressing the lawyer to act in a way that the lawyer is concerned may be contrary to ethics or law and the client does not want the lawyer to get advice from a colleague. In such cases, the lawyer may disclose confidential information without the client’s consent for the purpose of securing legal or ethical advice from another lawyer.

Like Olthuis, *supra* note 90, the commentary specifies that the consulted lawyer would be bound by confidentiality.

⁹³ I assume that, where the public safety exception to the professional duty of confidentiality applies, the disclosure would be authorized under whistle-blowing legislation.

the lawyer dubious instructions and refuses to allow that lawyer to seek outside legal or ethical advice about those instructions.

The doctrinal question becomes whether these exceptions in the rules of professional conduct, made by law societies using the authority delegated to them by provincial statute, are sufficient to fit in the general exceptions to the duty of secrecy.⁹⁴ Government lawyers in those jurisdictions where secrecy applies except where “authorized or required by law” would appear to be able to use these exceptions in the rules of professional conduct without breaching their duty of secrecy. However, for government lawyers in those jurisdictions where the duty of secrecy applies absent “due authority,” it is less clear whether the rules of professional conduct constitute such authority.

The two reported decisions that have interpreted the phrase “due authority” provide little guidance as to its meaning. Justice de Weert in *R. v. Lines* rejected the argument that the phrase “means ministerial consent, and nothing less” and instead held that it includes a subpoena.⁹⁵ However, that aspect of the reasons has never been applied in any subsequent case. Likewise rejected in an arbitration was the interpretation that, to the extent that the wording of the oath references God, conscience or God constitutes “due authorization” under the Alberta version of the oath — in other words, that “[the] oath dictated that he act strictly in accordance with his own conscience and as he interpreted the law.”⁹⁶ For my purposes, I emphasize that while “due authority” presumably includes a legal *requirement*, it is not necessarily met when a disclosure is merely authorized — but not *required* — by law. I would suggest that, at least at the provincial level, a requirement in legislation should constitute “due authority,” regardless of whether that legislated requirement does not prevail over the oath provision as a matter of statutory interpretation.⁹⁷

As for the “authorized or required by law” jurisdictions, Justice Epstein (as she then was) in *George v. Harris* held that “the entity that may legally authorize a civil servant to disclose information is the entity to whom the oath is given, being Her Majesty the Queen in Right of Ontario.”⁹⁸ While Justice Epstein did not explicitly state that the Crown is the *only* entity that can authorize a disclosure, and the holding in the case was that the Court could not authorize such disclosures by civil servants to plaintiffs’ counsel,⁹⁹ that appears to be her meaning. This apparent meaning is reinforced by her observation that “[a]bolition of the oath of secrecy would open the way for civil servants to disclose matters — beyond those governed by freedom of information legislation — without the authorization of ministers.”¹⁰⁰

⁹⁴ See above notes 37 and 38 and accompanying text.

⁹⁵ *R v Lines* (1985), 22 CCC (3d) 230 at 236–37 (NWT Sup Ct), aff’d on other grounds (1986), 27 CCC (3d) 377 (NWT CA).

⁹⁶ *Alberta and AUPE (Lee), Re* (1990), 17 CLAS 43 at paras 308, 396 (Public Service Employee Relations Board).

⁹⁷ See also *Ontario Public Service Employees Union (Pozderka) and Ontario (Ministry of Transportation)* (2016), GSB # 2014-4973 (ON GSB) at para 14, discussing a confidentiality agreement imposed in addition to the statutory duty of confidentiality: “In my view, a condition that an employee can disclose confidential information if required to do so by law has to be an implicit term of the Agreement.”

⁹⁸ *George*, supra note 36 at para 31 (later Epstein JA of the Court of Appeal for Ontario).

⁹⁹ *Ibid*: “The difficulty with the plaintiffs’ argument is that nothing in the language of the *PSA* [*Public Service Act*, RSO 1990, c P.47] suggests that the court has the jurisdiction to authorize a civil servant to communicate without limitation (and privately) with opposing counsel in circumstances such as exist here.” Contrast with the broader statement at para 32: “The court has no jurisdiction to authorize a civil servant to do anything.”

¹⁰⁰ *George*, *ibid* at para 29.

Thus, *George* can be read as suggesting that only legislation *requiring* disclosure, not authorizing disclosure, overcomes the oath of secrecy.

With great respect, there are at least two potential weaknesses in the interpretation in *George*. The first is that the analysis of the oath of secrecy in *George* has been questioned and criticized as “one-dimensional” by Sossin, given its focus on bureaucratic responsibilities to Cabinet ministers as opposed to the interplay with bureaucratic independence from those ministers.¹⁰¹ The second potential weakness is that the interpretation would mean that, since whistle-blowing statutes authorize but do not require disclosure, those statutes do not constitute “due authority” and thus whistle-blowing would seem to violate the oath of secrecy.¹⁰² At the same time, perhaps that is one explanation for why whistle-blowing legislation typically specifies that it prevails over other legislation. Thus, again with great respect, I argue that despite *George*, provincial government lawyers in Ontario and British Columbia — the “authorized or required” jurisdictions — can use the lawyers’ exceptions without violating their oaths of secrecy as public servants.¹⁰³

How then should “due authority” be interpreted? While I respectfully disagree with the interpretation of the Ontario “required or authorized by law” oath provision by Justice Epstein in *George*, her reasons provide a solid basis for the interpretation of the “due authority” oath provisions. Indeed, although her conclusion about the Ontario oath provision has apparent weaknesses, that conclusion is convincing as applied to the “due authority” oath provisions. Justice Epstein in *George* adopted the following definitions from *Black’s Law Dictionary*:

“authority”: “the right or permission to act legally on another’s behalf; the power delegated by a principal to an agent.”

“actual authority”: “Authority that a principal intentionally confers on an agent, including the authority that the agent reasonably believes he or she has as a result of the agent’s dealings with the principal.”¹⁰⁴

The current edition has a slightly different definition of authority:

“authority”: “The *official* right or permission to act, esp. to act legally on another’s behalf; esp., the power of one person to affect another’s legal relations by acts done in accordance with the other’s manifestations of assent; the power delegated by a principal to an agent.”¹⁰⁵

¹⁰¹ Sossin, *supra* note 43 at 24.

¹⁰² I note here that, given the separation of powers, even if whistle-blowing legislation constitutes advance consent from the legislature, that is not the same thing as the consent of the executive as a client. See above notes 61–63 and accompanying text.

¹⁰³ See above note 37 and accompanying text.

¹⁰⁴ *George*, *supra* note 36 at para 31. While Justice Epstein (as she then was) quoted from Bryan A Garner, ed, *Black’s Law Dictionary*, 7th ed (St Paul, Minn: West Group, 1999) at 127, the definitions remain almost entirely unchanged in the current edition: Bryan A Garner, ed, *Black’s Law Dictionary*, 11th ed (St Paul, Minn: Thomson Reuters, 2019) at 163–64 [Garner, *Black’s* 11th ed].

¹⁰⁵ Garner, *Black’s* 11th ed, *ibid* at 163 [emphasis added].

The current edition also gives “real authority” as a synonym for “actual authority.”¹⁰⁶ Presumably “due authority” means something different than “authority,” or else the qualifying word “due” in the oath would be superfluous. “Due authority” on its face seems similar to “actual authority” or “real authority” both of which refer to delegation by a principal, as does one of the definitions of “authority.” These definitions thus suggest that “due authority” oaths recognize at most legislative requirements and do not recognize legislative discretion.

A purposive analysis suggests a similar result. The Federal Court has held that the purpose of the federal *Public Service Employment Act* is “to effectively manage the public service and protect its integrity”¹⁰⁷ and, “to protect the integrity of the Public Service and ensure application of the merit principle.”¹⁰⁸ More specifically, Justice Epstein in *George* held that the primary purpose of the Ontario “authorized and required by law” oath provision (set out in what was then section 10 of the *Public Service Act*)¹⁰⁹ was to ensure ministerial trust in the civil service, and thus political neutrality of the civil service and even the success of responsible government itself, by limiting the ability of civil servants to disclose information without direction from ministers:

The *PSA* provides the legislative framework for the administration of the public service in a manner that protects the merit principle and its non-partisan nature. Section 10(1) of the *PSA* is essential to the functioning of the public service in serving the elected government. This is because democratic government requires that ministers have effective control of the civil service and be responsible for holding civil servants accountable. Civil servants are properly bound by oaths of secrecy that reflect the importance of a trusting relationship between ministers and officials. Abolition of the oath of secrecy would open the way for civil servants to disclose matters — beyond those governed by freedom of information legislation — without the authorization of ministers. This would be detrimental to ministerial responsibility and the political neutrality of the civil service, which would have far-reaching consequences for the viability of our system of democratic government. This system depends on a close working relationship between ministers, who have the constitutional duty to decide, and civil servants, on whom ministers rely for confidential advice and loyal administration, and whose discretion is essential to the proper working of responsible government.¹¹⁰

Justice Epstein also identified a secondary purpose as ensuring public confidence in the bureaucracy’s protection of sensitive information in the public interest.¹¹¹

The purpose of the oath provisions, including the “due authority” oath provisions, is thus to minimize the disclosure of information by the public service. However, insofar as *George* suggests that the purpose is to allow disclosure only with express ministerial consent, that

¹⁰⁶ *Ibid* at 164.

¹⁰⁷ *Harquail v Canada (Public Service Commission)*, 2004 FC 1549 at para 29.

¹⁰⁸ *Hiseler v Canada (Attorney General)*, 2004 FC 614 at para 19.

¹⁰⁹ RSO 1990, c P.47, s 10(1): “I will faithfully discharge my duties as a civil servant and will observe and comply with the laws of Canada and Ontario, and, except as I may be legally authorized or required, I will not disclose or give to any person any information or document that comes to my knowledge or possession by reason of my being a civil servant.”

¹¹⁰ *George*, *supra* note 36 at para 29. On political neutrality, see Sanderson, *supra* note 1 at 44–48; on responsible government, see Sanderson, *ibid* at 16–17, 236–37.

¹¹¹ *George*, *ibid* at para 30: “In addition to the requirements for confidential advice to ministers, the public expects its servants to keep secret a wide range of personal, commercially confidential, and security-related information, as well as information the release of which could prejudice the public interest.”

position was rejected in *R. v. Lines*.¹¹² The absolute minimum — disclosure only where required by law, not authorized by law — would best fulfill this purpose, albeit at the expense of the goals of other legislation that authorized disclosure. The idea that public servants should breach the law to protect secrecy is anathema to the rule of law, but the idea that they should release information only when legally required and not merely authorized is consistent with the rule of law. In particular, there would be no potential for civil servants' political views to inform the exercise of their discretion to disclose information, and thus no suspicion by the elected government of a breach of political neutrality. It would thus seem that the “due authority” oath provisions themselves should be interpreted strictly, allowing only mandatory disclosures. Discretionary disclosures would be allowed only insofar as such provisions prevail over the oath provisions, whether by explicit language or otherwise — as do, for example, whistle-blowing statutes.¹¹³ Any statute specifically aimed at the public service would arguably be an implicit exception to the oath provision and prevail over that provision even without explicit statutory language — otherwise, any such statute would be meaningless.

If the discretionary exceptions to confidentiality in the rules of professional conduct do not constitute “due authority,” then there is again a contradiction: the lawyers' exceptions permit what the statutory or regulatory public service oath provisions prohibit. Unlike the whistle-blowing context, there do not appear to be relevant statutory provisions providing that one provision prevails over the other. However, like the whistle-blowing context, the lawyers' exceptions found in the rules of professional conduct are made pursuant to delegated authority in statutes on the legal profession. Thus, the statutory or regulatory oath provisions would prevail over the lawyers' exceptions.

Unlike the whistle-blowing context, however, the lawyers' exceptions would appear to be specific whereas the oath provisions would appear to be general — suggesting that the lawyers' exceptions constitute implied exceptions to the oath of secrecy. Nonetheless, there is no basis to argue that the law societies, via their delegated statutory authority granted by provincial statute, can make exceptions to statutory oath provisions enacted by the legislature. For those jurisdictions where the oath is set out in regulation, not statute, it would be likewise difficult to argue that law societies can make exceptions to regulatory oath provisions adopted by Cabinet.

In Newfoundland and Labrador, the one jurisdiction where the oath is imposed by Treasury Board outside of statute or regulation, it is less clear whether substatutory requirements adopted by Treasury Board prevail over substatutory requirements adopted by the law society. Given the case law on the impact of oaths,¹¹⁴ the oath of secrecy would have to be compared with the oath sworn upon the call to the bar.¹¹⁵ Insofar as the solicitors' oath

¹¹² See above note 95 and corresponding text.

¹¹³ See above note 68 and corresponding text.

¹¹⁴ *McAteer v Canada (Attorney General)*, 2014 ONCA 578 at para 53, leave to appeal to SCC refused, 36120 (26 February 2015), citing *Roach v Canada (Minister of State for Multiculturalism and Citizenship (CA))*, [1994] 2 FC 406 (CA) at 22: “Through an oath or affirmation, a person attests that he or she is bound in conscience to perform an act or to hold to an ideal faithfully and truly.”

¹¹⁵ Law Society of Newfoundland and Labrador, “Barristers' Roll,” online: <snl.ca/publications-and-forms/publications/project-daisy/barristers-roll/>.

does not refer to the lawyers' exceptions to confidentiality,¹¹⁶ I would argue that the public service oath of secrecy prevails.

For these reasons, provincial government lawyers — at least in the “due authority” provinces — who exercise the lawyers' exceptions to confidentiality would appear to be violating their oaths of secrecy.

At the federal level, the answer becomes more complicated because constitutional issues of federalism again arise. Can the rules of professional conduct, made under delegated authority of the provincial legislatures, narrow a duty of secrecy imposed by Parliament? The answer would parallel the discussion of whistle-blowing legislation above.¹¹⁷ On the one hand, federal legislation imposing an obligation of secrecy on federal public servants would appear to prevail via paramountcy over provincial law society rules permitting an exception to such secrecy.¹¹⁸ Again, the discretionary law society exceptions would appear to frustrate the purpose of the duty of secrecy, insofar as the proper interpretation of “due authority” does not include those discretionary law society exceptions. Even more so than the federal *PSDPA*, the oath provisions in the federal *Public Service Employment Act* clearly fall within the authority of Parliament under section 91(8) of the *Constitution Act, 1867*.¹¹⁹ On the other hand, by requiring government lawyers to belong to a provincial or territorial law society as a condition of employment, arguably the federal government accepts the consequences of their lawyers submitting to provincial law society jurisdiction — which, as the client, would include the ability of their lawyers to breach secrecy to seek legal or ethical advice.¹²⁰ Again, however, federal statute would presumably still prevail where there is an explicit conflict — and, on balance, it would be even more incongruous if law societies cannot create exceptions to statutory oath provisions enacted by the provincial legislature but can create exceptions to a statutory oath provision enacted by Parliament. Thus, for federal government lawyers, the public service duty of secrecy prevails over the lawyers' exceptions.

E. THE SIMPLE SOLUTION UNDER CURRENT LAW IS UNDESIRABLE AND FRUSTRATES POLICY GOALS

Because these exceptions are discretionary, the easy solution to the dilemma in the face of legal uncertainty — and in at least one sense, the safest solution — is for the government lawyer to decline to exercise these exceptions. This solution is problematic because it is contrary to the intention of the exceptions and detracts from the policy goals they were intended to further — unlike, for example, complying with the stricter of two regimes on conflicts of interest. Returning to Scenario 1, Government Lawyer Q can simply choose not to act as a whistle-blower. But this renders the whistle-blowing legislation less effective in achieving its purpose. And under Scenario 2, Government Lawyer X can forego seeking legal and ethical advice that is permitted to them as a lawyer but not as a public servant. But X is now more likely to make the wrong decision about how to proceed in the litigation. The presumed purpose of the exception — to promote and facilitate ethical conduct by lawyers

¹¹⁶ The oath reads as follows: “I... do swear that I will truly and honestly conduct myself in the practice of a solicitor according to the best of my knowledge and ability” [on file with author].

¹¹⁷ See above note 75 and accompanying text.

¹¹⁸ Martin, “Federalism,” *supra* note 75 at 380.

¹¹⁹ *Public Service Employment Act*, *supra* note 38; *Constitution Act, 1867*, *supra* note 77.

¹²⁰ Martin, “Federalism,” *supra* note 75 at 384–85.

— has been frustrated. Moreover, the lawyer is at an increased risk of regulatory action insofar as a lawyer’s efforts to seek ethical advice may weigh against a finding of misconduct or may be a mitigating factor as to penalty where there has been misconduct.¹²¹ More effective solutions are necessary.

F. LONG-TERM SOLUTIONS

As for whistle-blowing, any solutions first require determining whether legislators intended whistle-blowing provisions to prevail over the lawyer’s professional duty of confidentiality and, if so, whether law societies would agree and recognize a corresponding exception to that duty. A standard statutory interpretation analysis of the current legislation suggests that, in explicitly maintaining privilege while not explicitly maintaining confidentiality, legislators intended whistle-blowing legislation to prevail over confidentiality.¹²² With great respect, however, given that the legal distinction between solicitor-client privilege and the lawyer’s professional duty of confidentiality is one that often flummoxes lawyers,¹²³ it would seem quite possible that legislators did not then, and do not now, necessarily appreciate that distinction and its implications — and thus, that they did not intend whistle-blowing legislation to apply to information subject to solicitor-client privilege or information subject only to the lawyer’s duty of confidentiality.

Moreover, law societies may well believe that whistle-blowing would not be an appropriate exception to the professional duty of confidentiality, assuming there was no current risk falling within the future harm exception. For example, Eric Pierre Boucher argues that such an exception would cause undue damage to the lawyer-client relationship and indeed the rule of law:

Even if whistleblowing legislation and the Code of Conduct allowed for it, I think that breaching the duty of confidentiality can only serve to erode the relationship of confidence between Crown and lawyer, which can only serve to diminish the role of the Attorney General and, ultimately, the profession itself. I feel that the preservation of lawyer-client confidentiality is an essential part of the rule of law which trumps ... whatever democratic benefit the public may have in knowing the inner workings of government legal affairs.¹²⁴

¹²¹ See e.g. *Law Society of Alberta v Herrington*, 2021 ABLS 9 at para 27: “Ms. Herrington ... consulted other lawyers in her office for their advice and made this decision to proceed. This does not leave Ms. Herrington blameless but goes to show this was not a simple situation.” See also *Law Society of Ontario v Hamilton*, 2020 ONLSTH 137 at para 22: “Mr. Hamilton was acting under the advice of LawPRO counsel when he signed the release containing the term for which he was prosecuted for misconduct. We note his counsel faced no sanction for including the term and can’t justify unequal treatment of Mr. Hamilton for the same misconduct.” Conversely, failure to seek or follow such advice may be an aggravating factor. See e.g. *Law Society of Upper Canada v Carey*, 2017 ONLSTH 25 (“He acknowledges that he ought to have consulted colleagues or senior members of the bar for advice” at para 57); *Sager (Re)*, 2019 LSBC 22 at para 148: “[W]hile the Respondent discussed the conflict of interest issue with another lawyer, that other lawyer ... was a very junior associate who reported directly to the Respondent. The Respondent did not consult with the senior counsel at Sager LLP who was particularly experienced in estate matters, or with any other senior lawyer in the firm. Nor did he seek advice from a Law Society practice advisor, a bencher or a senior and respected colleague from another firm”; *Rai (Re)*, 2011 LSBC 2 at para 72, interpreting the reasons in *Nielsen (Re)*, 2009 LSBC 8: “Mr. Nielsen turned his mind to some of the red flags present and made inquiries with a Law Society Practice Advisor yet failed to act on the advice given.”

¹²² See above note 64 and accompanying text.

¹²³ See e.g. Dodek, “Government Lawyers,” *supra* note 1 at 8, n 15.

¹²⁴ Boucher, *supra* note 3 at 486.

I share Boucher’s concerns. Like him, I also respectfully disagree with Allan Hutchinson’s argument that confidentiality is less important in the context of government lawyers than in the context of lawyers in private practice and perhaps should be merely “a rebuttable presumption.”¹²⁵

The larger policy question, however, is not for me to decide here. Instead, I focus on how the relevant legislation and rules of professional conduct could be amended to confirm or implement the answer to that policy question.

One solution would be to amend the rules of professional conduct to recognize and allow whistle-blowing by government lawyers. Such amendments have been proposed in the United States literature,¹²⁶ though the very different US context makes the specific proposed mechanisms inappropriate in the Canadian context. I recommend an amendment that would specifically provide an exception to the professional duty of confidentiality where a disclosure is authorized, even if not required, by applicable whistle-blowing legislation. Governments should of course be consulted before such an amendment were made, but ultimately the responsibility is that of each law society. If a law society made or declined to make such an amendment, and the corresponding provincial or territorial legislature, or Parliament, disagreed with that decision then it could legislate otherwise, whether at the proposal of the government or otherwise.

In the meantime, whether to change current law or merely for greater certainty, Parliament and the legislatures could proactively amend whistle-blowing legislation to explicitly state whether it is intended to apply to information subject to a lawyer’s duty of confidentiality.¹²⁷ Such amendments, moreover, could at the provincial level explicitly prevail over legislation on the legal profession and would at the federal level prevail via paramourty.

While in this respect the US literature is not particularly helpful, it does give cause for some clarifications. The commentary to the *Model Rules of Professional Conduct* of the American Bar Association (ABA) provides that:

[W]hen the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority.¹²⁸

Charles Duskow has asserted that “th[is] comment clearly implies that for government attorneys, the rule should be subject to whistleblower statutes.”¹²⁹ With respect to Duskow, that implication is not as clear to me. Duskow in particular appears to rely on a “duty ... to

¹²⁵ *Ibid*; Hutchinson, *supra* note 3 at 124–29 (quotation is from 128).

¹²⁶ See e.g. Kathryn Marshall, “Advancing the Public Interest: Why the Model Rules Should be Amended to Facilitate Federal Government Attorney Whistleblowing” (2018) 31:4 *Geo J Leg Ethics* 747.

¹²⁷ In the provinces where exceptions to whistle-blowing can be prescribed by regulation, this could be done relatively easily and quickly by Cabinet. See e.g. Alberta *PID(WP)A*, *supra* note 56, s 28.1(1)(c).

¹²⁸ American Bar Association, *Model Rules of Professional Conduct* (ABA: 2020), r 1.13, commentary 9, online: <www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_13_organization_as_client/comment_on_rule_1_13/> [*ABA Model Rules*].

¹²⁹ Charles S Duskow, “The Government Attorney and the Right to Blow the Whistle: The Cindy Ossias Case and its Aftermath (A Two-Year Journey to Nowhere)” (2003) 25:1 *Whittier L Rev* 21 at 34.

the public,” which is less clear in Canadian law.¹³⁰ I would also emphasize the distinction between a “leak” — unauthorized by law — and a whistle-blowing disclosure that is authorized, if not required, by law (whether common law or statute).¹³¹ By no means would I suggest government lawyers have a duty or ability to do the former.¹³² If indeed it was, and still is, true that “an attempt from the civil service to let the opposition know what is going on by sending out the traditional brown envelope . . . has always been part of the culture here in Ontario,”¹³³ then absent extraordinary circumstances (triggering both the future harm exception to lawyers’ professional confidentiality and the *Fraser* exception to public servants’ duty of secrecy)¹³⁴ that tradition beyond being unlawful is fundamentally contrary to the duties of lawyers.¹³⁵ Neither do I suggest an exception to solicitor-client privilege,¹³⁶ given its status as a principle of fundamental justice,¹³⁷ as opposed to the government lawyer’s duty of confidentiality.

As for the lawyers’ exceptions, Parliament and the “due authority” provinces and territories should amend their legislation on secrecy oaths to clarify whether the discretionary exceptions to confidentiality in the rules of professional conduct of a provincial or territorial law society constitute due authority. It is difficult to identify a defensible policy reason to prevent government lawyers from seeking legal ethics advice — especially in those jurisdictions that lack dedicated internal frameworks to obtain such advice.¹³⁸ Indeed, if there is such a reason in narrow circumstances, it is incumbent on the government to establish and adequately resource such internal frameworks.

III. NON-DISCRETIONARY ASYMMETRICAL EXCEPTIONS TO CONFIDENTIALITY OR SECRECY: THE GOVERNMENT LAWYER MUST DISCLOSE BUT THE GOVERNMENT LAWYER MUST NOT DISCLOSE

Scenario 3: The Law Society is investigating a complaint against Government Lawyer Y. The Law Society requests all of Y’s files from the past calendar year. As a lawyer, Y is required under the rules of professional conduct and legislation on the legal profession to co-operate with the investigation and provide the files. But the files in question are government records that Y, as a public servant, has no authority to release. What should Y do?

¹³⁰ *Ibid.*

¹³¹ But see in the US context Marshall, *supra* note 126 at 749, asserting that “the distinction between legitimate whistleblowing and leaks is not always clear” [citation omitted].

¹³² Kristina Hammond, “Plugging the Leaks: Applying the *Model Rules* to Leaks Made by Government Lawyers” (2005) 18:3 *Geo J Leg Ethics* 783. See especially 793, considering the position which I by no means endorse, “[t]he public as client.”

¹³³ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 35th Parl, 3rd Sess, No 84 (18 November 1993) at 1700 (Hon Elinor Caplan), online: <www.ola.org/en/legislative-business/house-documents/parliament-35/session-3/1993-11-18/hansard>.

¹³⁴ *Fraser*, *supra* note 42 at 470; *FLSC Model Code*, *supra* note 9, r 3.3-3. See MacKenzie, *supra* note 3 at ch 21, § 21.4: “In most cases actual disclosure is unlikely to be necessary; the threat of disclosure is almost certain to put an end to an unlawful scheme.”

¹³⁵ For such a breach by a non-lawyer (leaking information to a legislator), see *Re Treasury Board (Employment & Immigration) and Quigley* (1987), 31 LAC (3d) 156.

¹³⁶ See in the US context e.g. Jessica Wang, “Protecting Government Attorney Whistleblowers: Why We Need an Exception to Government Attorney-Client Privilege” (2013) 26:4 *Geo J Leg Ethics* 1063.

¹³⁷ *R v McClure*, 2001 SCC 14 at 453–60.

¹³⁸ Insofar as many law societies provide free practice management to lawyers, seeking such advice would not necessarily involve the expenditure of public funds.

A more difficult situation arises for the government lawyer where they are *required* by one regime to make a disclosure that is not authorized by the other regime. I refer to these as “non-discretionary asymmetrical exceptions.”

Here, I focus on the professional duty of lawyers to co-operate with an investigation by the law society, including the duty to disclose information or records.¹³⁹ On one level, this situation would seem simpler for the government lawyer because the disclosure is required by law. Thus, in the jurisdictions with “authorized or required by law” secrecy oaths,¹⁴⁰ and likely in the “due authority” jurisdictions (with the possible exception of the federal secrecy oath due to federalism considerations),¹⁴¹ compliance does not breach the public service oath of secrecy. But while answering questions may not breach the government lawyer’s duty of secrecy as a public servant, providing files or access to files is different. The records of a government lawyer do not belong to them, but to the government. Outside of access to information legislation, there is no statutory legal mechanism for the lawyer to provide such records to the law society;¹⁴² indeed, such legislation is sometimes described as a “complete code” on access to government records.¹⁴³ This overlap is what Sullivan refers to as a “impossibility of dual compliance: one provision *requires* what the other provision prohibits.”¹⁴⁴ Here the legislation on the legal profession requires the government lawyer to release records to the law society, while the statutes on access to government information prohibit the government lawyer from releasing those records. Because the disclosure is purportedly mandatory, not discretionary, the government lawyer can no longer avoid the dilemma by declining to make the disclosure.

A. THE SOLUTIONS UNDER CURRENT LAW

The leading case on the powers of law societies to demand a lawyer’s files is *Law Society of Saskatchewan v. Merchant*.¹⁴⁵ In that case, the Saskatchewan Court of Appeal held that legislation on the legal profession necessarily authorizes law societies to demand lawyers’ files despite solicitor-client privilege, even absent explicit statutory language.¹⁴⁶ However,

¹³⁹ *FLSC Model Code*, *supra* note 9, r 7.1-1: “A lawyer must reply promptly and completely to any communication from the Society.” See also *Law Society of Ontario v Diamond*, 2021 ONCA 255 at para 2, Fairburn ACJO, referring to the corresponding Ontario rule (which limits the duty to communications “in which a response is requested”): “This rule invokes a lawyer’s duty to cooperate with the Law Society when a response is requested.” See also e.g. *Law Society Act*, RSO 1990, c L.8, s 49.8.

¹⁴⁰ See above note 37 and accompanying text.

¹⁴¹ See above note 38 and accompanying text.

¹⁴² On access to information legislation generally, see Sanderson, *supra* note 1 at 150–51.

¹⁴³ See e.g. *R v Skakun*, 2014 BCCA 223 at para 30: “*FOIPPA* [*Freedom of Information and Protection of Privacy Act*, RSB 1996, c 165] is a complete code for the implementation of its dual objectives of access to information and protection of personal information in the control of public bodies.” See also e.g. *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 [*Canada (IC)*] at para 74: “[T]he *Access to Information Act* [RSC 1985, c A-1 [AIA]] and the *Privacy Act* [RSC 1985, c P-21] are to be read together as a seamless code” [citations added].

¹⁴⁴ Sullivan, *supra* note 18 at 345 [emphasis in original].

¹⁴⁵ 2008 SKCA 128 [*Merchant*], leave to appeal to SCC refused, 32916 (2 April 2009).

¹⁴⁶ *Ibid*, esp at para 48, referring to *The Legal Profession Act, 1990*, SS 1990-91, c L-10.1, s 63(1): “This [demand] provision does not authorize the Law Society, in so many words, to demand privileged documents. However, in my view, an authority to require production of ‘any of the member’s records’, found in the unique context of a statute dealing with the regulation of the legal profession, must be taken as referring to documents subject to solicitor-client privilege” [emphasis in original]. I emphasize here that the interpretive argument in *Merchant* is dependent on the specific statutory context, that is, the relationships among the law society, lawyers, and the statute on the legal profession. No parallel argument can be made about law society access to government records. That is, there is nothing about access to information legislation from which a power for law societies to demand government records necessarily follows.

the Court did not address — and on the facts, had no need to address — what the lawyer is to do where another statute governs access to those records.

The Ontario Law Society Tribunal has asserted that a government lawyer is not relieved of their duty to provide records to the law society merely because of their duties as a public servant: “It is trite law that an in house corporate or government lawyer, or indeed an associate or partner within a private law firm, may have to choose between the direction or policy of the organization and the rules and requirements of the Law Society.”¹⁴⁷ However, while this proposition may be true of a lawyer in private practice, with great respect, I observe that the Tribunal provided no authority applying this holding to a government lawyer. Indeed, and again with great respect, there appears to be no such authority. I would accept that it is trite law that lawyers cannot contract out of their professional obligations, but in my view, that proposition does not resolve the dilemma facing government lawyers.

While in-house counsel may be bound by organizational “direction or policy,”¹⁴⁸ government lawyers are bound by legislation, that is, by law. If the law society were to demand that the government lawyer breach the relevant legislation, it would arguably be requiring unlawful conduct. Such a requirement would be extraordinary. Put another way, for government lawyers the question becomes one of statutory interpretation, one which the Law Society Tribunal cannot resolve merely by declaring that the duties to the law society prevail.

At the provincial level, the current answer to this dilemma depends on whether provincial legislation on the legal profession prevails over provincial legislation on privacy and access to information. Though it is generally true that “the Law Society’s investigative powers are to be interpreted broadly and override any privilege or confidentiality claim”¹⁴⁹ — and the Ontario *Law Society Act*, for example, provides that “[a] person who is required ... to provide information or to produce documents shall comply with the requirement even if the information or documents are privileged or confidential”¹⁵⁰ — it is not necessarily true that, and has yet to be decided, whether those powers prevail over legislation regulating access to government records.

As both provisions are statutory, one basis for resolving conflicts employed above — that a statutory or regulatory provision prevails over a substatory or subregulatory provision — cannot apply.

However, access to information legislation would prevail both because it is quasi-constitutional and because it often contains provisions expressly stating that it prevails over

¹⁴⁷ *Law Society of Ontario v Regan*, 2018 ONLSTH 167 at para 37 [*Regan HP*], aff’d 2021 ONLSTA 6 at paras 117–32 [*Regan AP*].

¹⁴⁸ *Regan HP*, *ibid*.

¹⁴⁹ *Regan AP*, *supra* note 147 at para 124 [citation omitted].

¹⁵⁰ *Law Society Act*, *supra* note 139, s 49.8. I note that a *Charter* challenge to section 49.8 was rejected as premature in *DioGuardi Tax Law v Law Society of Upper Canada*, 2015 ONSC 3430, aff’d 2016 ONCA 531, leave to appeal to SCC refused, 37222 (23 February 2017). A *Charter* challenge to section 49.8 was unsuccessful in *Law Society of Upper Canada v Jodi Lynne Feldman*, 2012 ONLSPH 0168. See also *Wise v LSUC*, 2010 ONSC 1937 (Div Ct) at para 20, quoted e.g. in *Regan AP*, *ibid*: “The duty to cooperate is such an important and clear obligation, that s. 49.8(1) of the [*Law Society Act*] provides that a licensee is required to provide information even if it is privileged or confidential.”

any other statute, whereas legislation on the legal profession lacks such provisions.¹⁵¹ Although the wording of section 49.8 of the Ontario *Law Society Act* provides that it prevails over any confidentiality or privilege, the limited access to government records under the Ontario *Freedom of Information and Protection of Privacy Act* does not constitute confidentiality or privilege. While some statutes lack such provisions, Justice Charron for the majority of the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Minister of National Defence)* held that “the *Access to Information Act* may be considered quasi-constitutional in nature, thus highlighting its important purpose.”¹⁵² This statement suggests that access to information legislation should prevail over legislation on the legal profession, as the latter legislation is not quasi-constitutional.¹⁵³ (While it is not obvious to me that legislation on the legal profession is not quasi-constitutional, given its purpose to protect the public interest and the administration of justice and the role of the legal profession in facilitating essential individual rights,¹⁵⁴ courts have yet to recognize this character. That the government is not a vulnerable client does not vitiate the need to protect the public by regulating government lawyers.)¹⁵⁵ On the other hand, some precedents suggest

¹⁵¹ *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, s 79; *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, s 5; *The Freedom of Information and Protection of Privacy Act*, CCSM c F175, s 5(2); *Right to Information and Protection of Privacy Act*, SNB 2009, c R-10.6, s 5; *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, s 5(2); *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c A-1.2, s 7; *Access to Information and Protection of Privacy Act*, SY 2018, c 9, s 8; *Access to Information and Protection of Privacy Act*, SNWT 1994, c 20, s 4; *Access to Information and Protection of Privacy Act*, SNWT (Nu) 1994, c 20, s 4(2). Narrower prevailing provisions that would not apply to this issue exist in Ontario, Nova Scotia, and Saskatchewan and no such provisions exist federally. For example, while the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s 67(1) [FIPPA] provides that “[t]his Act prevails over a confidentiality provision in any other Act unless subsection (2) or the other Act specifically provides otherwise,” and s 67(2) does not include the *Law Society Act*, section 49.8 is not a confidentiality provision in that sense. Likewise, although the wording of section 49.8 of the Ontario *Law Society Act* provides that it prevails over any confidentiality or privilege, the limited access to government records under the Ontario *Freedom of Information and Protection of Privacy Act* does not constitute confidentiality or privilege.

¹⁵² *Canada (IC)*, *supra* note 143 at para 40. While Charron J went on to state that “this does not alter the general principles of statutory interpretation,” she does not appear to mean that quasi-constitutional legislation does not prevail over ordinary legislation. See e.g. *R v Skakun*, *supra* note 143, at para 28: “Charron J. also cautioned against a court relying on the ‘quasi-constitutional’ nature of the legislation to interpret its provisions without resort to the general principles of statutory interpretation, emphasizing that a court should not rewrite the actual words of the legislation ‘with its own view of how the legislative purpose could be better promoted.’”

¹⁵³ Sullivan, *supra* note 18 at para 11.53.

¹⁵⁴ See e.g. *Law Society Act*, *supra* note 139, ss 4.1 (“It is a function of the Society to ensure that ... all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide”), 4.2 para 3 (“In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles: ... The Society has a duty to protect the public interest.”). See also e.g. *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 36: “Clearly, a major objective of the Act [*Law Society Act, 1996*, SNB 1996, c 89] is to create a self-regulating professional body with the authority to set and maintain professional standards of practice. This, in turn, requires that the Law Society perform its paramount role of protecting the interests of the public.” See also e.g. *Merchant v Law Society (Saskatchewan)*, 2002 SKCA 60 at para 57:

The purpose of the Act [*The Legal Profession Act, 1990*, *supra* note 146] seems obvious to us. Legislation which creates self-governing professions does so in the interests of society as a whole and for the protection of the public. This Act is no exception. It demands that the Law Society regulate the conduct of its members. It assists in the creation of an independent bar as one of the institutions of a democratic society.

¹⁵⁵ See Krieger, *supra* note 13 at para 58 [emphasis added]:

An inquiry by the Attorney General into whether a prosecutor has failed to meet departmental standards and should be removed from a case may involve different considerations, standards and/or procedures than an inquiry by the Law Society into whether that prosecutor has breached the rules of ethics warranting sanction. ... A prosecutor whose conduct so contravenes professional ethical standards that the public would be best served by preventing him or her from practising law in any capacity in the province should not be immune from disbarment. *Only the Law Society can protect the public in this way.*

that it is only the statutory rights of privacy and access within access to information legislation that are quasi-constitutional.¹⁵⁶ Moreover, legislation on the legal profession provides strict protections for the confidentiality and privilege of information disclosed to the law society by a lawyer.¹⁵⁷ While the legislature is free to give greater protections to the records of government lawyers and to the government as a client than are given to the records of lawyers and clients generally, such an intention would be better expressed explicitly. On balance, and particularly because of the quasi-constitutional nature of access to information legislation, at the provincial level, such legislation should prevail over legislation on the legal profession, such that a government lawyer cannot provide records to the law society under the law society's demand power.

If I am mistaken and the quasi-constitutional character of access to information legislation does not mean that it prevails over legislation on the legal profession, the clearest basis to resolve the conflict is that the provision requiring a lawyer to provide documents to the law society is an implied exception (more specific) to the access to information regime (more general).

At the federal level, the answer is complicated by federalism issues parallel to those raised above.¹⁵⁸ Federal legislation on privacy and access to information would prevail via paramountcy over the requirements of provincial law society legislation and rules made pursuant to authority under that legislation by provincial law societies, particularly insofar as access to information legislation purports to be a complete code on disclosure of government records.¹⁵⁹ In the alternative, the quasi-constitutional character of the federal legislation would presumably prevail.

If the law society's demand powers did prevail over access to information legislation, one possible exception would be Cabinet confidences. I would emphasize that government lawyers' files may well include legal or policy advice or recommendations to Cabinet, and that given the absolute (albeit time-limited) protection of Cabinet confidences in law,¹⁶⁰ if nothing else I would be surprised if courts were to allow law societies access to those files during the protected time period. Even if access to information legislation were not quasi-constitutional, records disclosure provisions in legislation on the legal profession would appear not to be an implied exception to the total protection of Cabinet confidences, in that access to information legislation makes clear the intention that there be absolutely no exceptions to Cabinet confidences.¹⁶¹

Before proceeding to long-term solutions, I emphasize that the inability of the government lawyer to provide government records to the law society does not exhaust the duty qua

¹⁵⁶ See e.g. *HJ Heinz Co of Canada Ltd v Canada (Attorney General)*, 2006 SCC 13 at paras 28–31.

¹⁵⁷ See e.g. *Law Society Act*, *supra* note 139, ss 49.8(3), 49.12.

¹⁵⁸ See above notes 75 and 118 and accompanying text.

¹⁵⁹ Martin, "Federalism," *supra* note 75 at 380, 384–85.

¹⁶⁰ See e.g. *AIA*, *supra* note 143, s 69(1); *Canada Evidence Act*, RSC 1985, c C-5, s 39. See also *PSDPA*, *supra* note 51, s 13(1)(2); *PSOA*, *supra* note 56, s 113(2)(a); *AFDWRPB*, *supra* note 56, s 8; *NS PIDWA*, *supra* note 56, s 11(a); *NB PIDA*, *supra* note 56, s 16(1)(a); *Manitoba PID(WP)A*, *supra* note 56, s 16(1)(a); *PEI PIDWPA*, *supra* note 56, s 9(5)(a); *Saskatchewan PIDA*, *supra* note 56, s 13(1)(a); *Alberta PID(WP)A*, *supra* note 56, s 28.1(1)(a); *NL PIDWPA*, *supra* note 56, s 11(1)(a); *Yukon PIDWA*, *supra* note 56, s 15(1)(a).

¹⁶¹ See e.g. *AIA*, *ibid*; *FIPPA*, *supra* note 151, s 12.

lawyer to co-operate with the law society's investigation. The lawyer must still take all possible steps open to them to assist the law society in obtaining the records and must more generally assist and co-operate.

B. LONG-TERM SOLUTIONS

Provincial legislatures should amend provincial legislation on the legal profession or provincial legislation on privacy and access to information to explicitly specify which statute prevails over the other, either generally or for the specific context of law societies' power to demand the files of a provincial government lawyer. At both the provincial and federal levels, legislation on privacy and access to information *could* be amended to provide that access shall not be declined to professional regulatory bodies. Another option, albeit non-statutory and doctrinally ineffective, would be for the provincial and federal governments to enter into agreements with the corresponding law society (or federally, all law societies) concerning — and perhaps even guaranteeing — the granting of access-to-information requests in the course of regulatory functions.¹⁶²

As for the policy choice to be embodied in those amendments or agreements, my position is that law societies must be able to access lawyers' files, even when those records belong to governments, in order to adequately fulfill their mandates to regulate the legal profession in the public interest.¹⁶³ Any exceptions considered absolutely necessary, such as Cabinet confidences, should be few and narrow.

IV. THE LAWYER'S PROFESSIONAL AND INDIVIDUALIZED DUTY TO REPORT UP

Scenario 4: Government Lawyer Z determines that the government's chosen course of action in a matter is dishonest. As a lawyer for an organizational client, Z is required under the rules of professional conduct to raise their concern with the person from whom they receive instructions — and if that person is not persuaded, Z is required to raise the matter with that person's superiors, and so on progressively until the ultimate decision-making authority for the client, and to withdraw from the matter if that ultimate decision-making authority is not persuaded. But as a public servant, Z operates in a layered hierarchy in which circumventing their supervisor (and the other intervening officials in the hierarchy) is an extraordinary step that may potentially lead to employment discipline. What should Z do?

Unlike the clashes addressed in previous parts, where the law of lawyering conflicts with the law of public servants, I close my analysis with something slightly different: an examination of how a particular rule of professional conduct applies differently — or should apply differently — to government lawyers than to lawyers generally. This rule does not clash with an explicit provision of the law governing public servants, but instead fails to contemplate the deliberate and sophisticated manner in which legal services are structured and delivered in government. The rule I have chosen imposes a duty to report up in the case

¹⁶² I acknowledge the risk that such an agreement would improperly fetter the discretion of decision-makers under legislation on access to information and privacy.

¹⁶³ See above note 154.

of wrongdoing by an organizational client. This rule best demonstrates how the practice setting of government lawyers is fundamentally different than the practice setting of lawyers more generally, and how that difference is not reflected in the current rules of professional conduct and the law of lawyering more broadly.

The rules of professional conduct impose specific obligations on any lawyer representing an organizational client where that lawyer “knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally, or illegally.”¹⁶⁴ The lawyer must first “advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer” against the conduct — and if that conduct does not cease, must so “advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board.”¹⁶⁵ If the organization nonetheless persists, the lawyer must then withdraw.¹⁶⁶

Moreover, the rules of professional conduct apply to every lawyer individually. Every lawyer “has complete professional responsibility” for their practice.¹⁶⁷ There is no mechanism for a supervising lawyer — no matter how sincere and honourably intended — to absolve or relieve a subordinate lawyer of their complete professional responsibility and disciplinary liability to the law society for a failure to follow any of the rules of professional conduct, including this reporting up rule.

A. NO GOOD “SOLUTIONS” UNDER CURRENT LAW

What does this rule, as written, require of a government lawyer? Recall that the client of the government lawyer is the Crown.¹⁶⁸ The chief executive officer is presumably the Premier (or Prime Minister) and the Board is presumably Cabinet. While I recognize a potential argument that, given the roles of the legislature and the judiciary in oversight of executive action, those branches are analogous to an external committee of the Board and so could play a role here,¹⁶⁹ in my view such an analogy is not apt and so such an argument is unpersuasive. On its face, the rule on reporting up requires *any* government lawyer — from an articulated student to the Deputy Attorney General themselves — who has such knowledge to inform and attempt to dissuade not only the person from whom they take instructions, but also the Attorney General themselves as chief legal officer of the Crown. If unsuccessful, that lawyer must proceed as far as the Premier (or Prime Minister) and Cabinet.

The rule on reporting up does not anticipate that the government lawyer works in a hierarchical organization comprising multiple lawyers in multiple layers.¹⁷⁰ Reporting up is

¹⁶⁴ *FLSC Model Code*, *supra* note 9, r 3.2-8. I note that Boucher has proposed that the rules of professional conduct be amended to impose a parallel obligation where action or intended action is contrary to the rule of law: Boucher, *supra* note 3 at 482.

¹⁶⁵ *FLSC Model Code*, *ibid.*, rr 3.2-8(a)–(b).

¹⁶⁶ *Ibid.*, r 3.2-8(c).

¹⁶⁷ *Ibid.*, r 6.1-1.

¹⁶⁸ See above note 62 and accompanying text.

¹⁶⁹ See Andrew Flavelle Martin, “Folk Hero or Legal Pariah? A Comment on the Legal Ethics of Edgar Schmidt and *Schmidt v Canada (Attorney General)*” (2020) 43:2 *Man LJ* 198 at 206.

¹⁷⁰ On this “institutional framework,” see Sanderson, *supra* note 1 at 43.

required by the rule where any individual lawyer believes the rule is triggered, even if other lawyers — including more senior lawyers and the lawyer to whom the individual lawyer reports — disagree. This individualized requirement means that the Attorney General, and the Premier (or Prime Minister) and Cabinet, may get separate and conflicting advice from different individual lawyers at different times — an unhelpful if not bewildering result for any client. Indeed, the rule does not appreciate that the individual lawyer’s duty as a public servant is not only met, but (unless the narrow criteria of whistle-blowing legislation are triggered) is typically limited to, raising the matter with their superior, who if necessary will raise the matter with their superior, and so forth.¹⁷¹ Indeed, even if the lawyer was willing to report up despite a risk of employment consequences, the rule does not account for any intermediate positions more senior than the person from whom the lawyer takes instructions and more junior than the Attorney General.

These rules, as they stand now, put the government lawyer as a public servant in an impossible position, and potentially promote confusion for the client. Nonetheless, under current law, the government lawyer has no choice but to go to the Attorney General and potentially to the Premier (or Prime Minister) and Cabinet.

This rule is doubly problematic for government lawyers because if the lawyer’s persuasive efforts are ineffective and the government as client persists in the problematic course of action, the lawyer must withdraw from the matter.¹⁷² Withdrawal for a government lawyer, unlike a lawyer in private practice, would at least sometimes mean resignation — as the rules of professional conduct explicitly recognize for all lawyers for an organization.¹⁷³ As Deborah MacNair dryly puts it, “[i]n the event of an unresolved disagreement with superiors, the options of resignation, dismissal or going to the media are not the most desirable”.¹⁷⁴ For this reason, Eric Pierre Boucher argues that “withdrawal must not be synonymous with resignation.”¹⁷⁵ Indeed, ideally one would hope that the lawyer’s conscientious decision to withdraw would be protected and thus cause no career consequences.¹⁷⁶ However, the current rules do not relieve government lawyers from the more severe implications of their compliance with the rule: where withdrawal does mean resignation, withdrawal remains obligatory. Jennifer Leitch considers this “untenable”: “Therefore, any development of ‘government-specific’ legal ethics must take account of this specific tension and, in so doing,

¹⁷¹ See e.g. *King v Deputy Head (Canada Border Services Agency)*, 2010 PSLRB 31 (improper correspondence to the Minister, and media, regarding misconduct within the agency).

¹⁷² *FLSC Model Code*, *supra* note 9, r 3.2-8(c).

¹⁷³ Sanderson, *supra* note 1 at 174; see e.g. *FLSC Model Code*, *ibid*, r 3.2-8, commentary 5: “In some but not all cases, withdrawal means resigning from his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter.”

¹⁷⁴ MacNair, *supra* note 34 at 530. See also Boucher, *supra* note 3 at 485 [citation omitted]:

A lawyer in private practice can always part ways with an unscrupulous client and move on to the next one. Civil Crown counsel have but one client. Having been in the public sector for many years, a government lawyer may not have the ability to simply leave his or her job behind and hang a shingle on Main Street. Legislative counsel, for instance, develop skill sets that are crucial to the legal coherence, fairness, logic and consistency of the statute book. It is a difficult craft to master and not just any lawyer can do it. Conversely, it is an expertise that is not easily marketable in the private sector. No one wants to have to decide between resigning with limited prospects and going along with legally suspect instructions while faced with a mortgage, one kid in daycare and another in braces.

¹⁷⁵ Boucher, *ibid*.

¹⁷⁶ Thanks to a reviewer for this point, which reinforces Boucher, *ibid*.

create a space for the government lawyer to adopt an ethical position that is different than her employer.”¹⁷⁷

My own view is that government lawyers who cannot accept the implications of their professional obligations as lawyers should choose a different practice setting. Admittedly, this view is idealistic and arguably simplistic. I thus recognize the practical problem: because the consequences to the government lawyer may be great if the client chooses to persist despite the lawyer’s attempted persuasion,¹⁷⁸ compliance with the rule may decrease.

B. LONG-TERM SOLUTIONS

I now consider how to refine the rule on reporting up to account for the particular hierarchical practice setting of government lawyers — primarily to avoid confusion for the client, but also to narrow the circumstances under which a government lawyer may be forced to resign where the rule requires withdrawal from the matter. Here I develop and assess an option for reform, albeit one that I cannot ultimately recommend.

A potential model to resolve the dilemma comes from the US context. The ABA *Model Rules* specifically contemplate lawyers working in a supervisory and subordinate practice context. Rule 5.2 provides that, though “a lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person ... [a] subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.”¹⁷⁹ Conversely, a supervisory lawyer “shall make reasonable efforts to ensure that the other [subordinate] lawyer conforms to the Rules of Professional Conduct” and will be liable for a subordinate lawyer’s violation if the supervisory lawyer “orders or ... ratifies the conduct” or “knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”¹⁸⁰ The *Model Rules* justify these rules because “[o]therwise a consistent course of action or position could not be taken.”¹⁸¹

It is of course possible to recognize the professional liability of supervisory lawyers for the conduct of their subordinate lawyers without relieving the subordinate lawyers of complete professional responsibility. For example, the Quebec *Code of Professional Conduct of Lawyers* provides that “[a] lawyer who exercises authority over another lawyer must ensure that the framework within which such other lawyer engages in his professional activities allows him to comply with his professional obligations,”¹⁸² but does not specifically

¹⁷⁷ Leitch, *supra* note 3 at 324: “In fact, the only option available to that government lawyer [who determines they must withdraw] may be resignation. However, practically speaking, this seems an untenable position for many government lawyers.” For my critique, see Andrew Flavelle Martin, “Where Are We Going? The Past and Future of Canadian Scholarship on Legal Ethics for Government Lawyers” (2021) 99:2 Can Bar Rev 322 at 341.

¹⁷⁸ See also Leitch, *ibid*.

¹⁷⁹ ABA *Model Rules*, *supra* note 128, r 5.2.

¹⁸⁰ *Ibid*, r 5.1.

¹⁸¹ *Ibid*, r 5.2, commentary 2.

¹⁸² Quebec *Code*, *supra* note 24, s 6. See also s 5: “A lawyer must take reasonable measures to ensure that every person who collaborates with him when he engages in his professional activities and, where applicable, every firm within which he engages in such activities, complies with the Act respecting the Barreau du Québec (chapter B-1), the Professional Code (chapter C-26) and the regulations adopted thereunder.”

address or modify the professional obligations of the lawyers over whom authority is exercised. Outside Quebec it is clear that, at least in the context of an articulated student and principal, ineffective supervision by the principal constitutes misconduct but does not absolve the articulated student of responsibility for their own misconduct.¹⁸³

Would these US rules, if adopted in Canadian jurisdictions, resolve this dilemma? So long as there was credible disagreement over whether the lawyers had *knowledge* that the past or present or future conduct was “dishonest, fraudulent, criminal, or illegal,”¹⁸⁴ and the supervisory lawyer disagreed about the nature of the conduct and the knowledge of the conduct, or both,¹⁸⁵ and thus that the reporting up duty was not triggered, neither lawyer would breach the rules of professional conduct by not reporting up.

However, if the supervisory lawyer agreed that the duty was triggered, both the subordinate lawyer and the supervisory lawyer would have the duty to report up, and the subordinate’s duty would not be met unless they reported up themselves, even if the supervisory lawyer committed to, and did in fact, report up themselves. Most importantly, there is no mechanism for one lawyer to fulfill the duty of another. If the supervisory lawyer committed to report up, but for any reason did not do so, the subordinate lawyer’s inaction would constitute a more serious breach of their personal professional duty.

There is some disagreement among US commentators over the impact and appropriateness of the US rule. For example, Carol Rice has criticized this rule for unduly relieving subordinate lawyers from awareness or application of their own ethical obligations:

[T]he real danger of Rule 5.2(b) is that it sends the wrong message to the lawyers it seeks to protect. At this time of rising concern about professionalism, the rules should inspire every lawyer to stop and consider the propriety of his actions. Rule 5.2(b) does just the opposite. It tells the subordinate lawyer that he may sit back and let his supervisor make the decision on close ethical questions. Because the senior lawyer takes the responsibility for any misjudgment, the junior lawyer has little incentive to even consider tough ethical issues, let alone raise them. In sum, Rule 5.2(b) singles out precisely the issues that need ethical debate—the arguable questions—and chills that debate.¹⁸⁶

On the other hand, Rachel Reiland has emphasized that the rule requires the subordinate “to make the evaluation of whether the supervisor’s resolution may be considered ‘reasonable.’”¹⁸⁷ Likewise, Reiland confirms Rice’s point that in order for the rule to apply, the subordinate must also determine that “question” is an “arguable” one.¹⁸⁸ Reiland, while not directly questioning Rice’s description of the rule as providing a “Nuremberg defense,”¹⁸⁹

¹⁸³ See *Law Society of Ontario v Forte*, 2019 ONLSTH 9 (principal) and *Guo v Law Society of Ontario*, 2019 ONLSTH 46 (good character hearing for articulated student).

¹⁸⁴ *FLSC Model Code*, *supra* note 9, r 3.2-8.

¹⁸⁵ See *ABA Model Rules*, *supra* note 128, r 5.2, commentary 2: “If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action.”

¹⁸⁶ Carol M Rice, “The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers” (1997) 32:3 *Wake Forest L Rev* 887 at 890.

¹⁸⁷ Rachel Reiland, “The Duty to Supervise and Vicarious Liability: Why Law Firms, Supervising Attorneys and Associates Might Want to Take a Closer Look at Model Rules 5.1, 5.2 and 5.3” (2001) 14:4 *Geo J Leg Ethics* 1151 at 1158.

¹⁸⁸ *ABA Model Rules*, *supra* note 128, r 5.2; Reiland, *ibid* at 1159, n 52, citing Rice, *supra* note 186 at 895.

¹⁸⁹ Rice, *ibid* at 889–90.

also emphasizes that “a subordinate attorney may not claim that he or she was merely following directions — more than blind obedience is required.”¹⁹⁰ At the same time, Andrew Perlman argues that junior lawyers will likely interpret “arguable” very broadly.¹⁹¹ There is also an important distinction between the direction of a superior lawyer as a *defence* (as under the *ABA Model Rules*) and that direction as a mitigating factor as to penalty.¹⁹²

Indeed, in my view, articling students and junior lawyers, whether in government or elsewhere, should embrace developing their knowledge and instincts around their professional obligations in order to take professional responsibility for their future decisions, whether that future is in government practice or private practice.

Thus, one option would be to amend the rules of professional conduct to state that a lawyer working under the direct authority of another lawyer satisfies their obligations under the reporting up rule by informing the superior lawyer, in writing, that in the subordinate lawyer’s opinion, the rule has been triggered. The superior lawyer would then have to determine for themselves whether the rule has been triggered, and if they determine that it has, it would then be their choice to notify their superior in writing or to themselves engage in the required dissuasion of the client. The subordinate lawyer and the superior lawyer would both remain liable to professional discipline for a failure to make the determination where they knew or should have known, that the client’s conduct was “dishonest, fraudulent, criminal, or illegal” and acted accordingly.¹⁹³ This approach would provide a principled basis for requiring only the most senior lawyer at the top of the hierarchy to withdraw from the matter, and likely resign. This endpoint would augment the Deputy Attorney General’s current purported obligation to resign where the government rejects advice that a course of action is clearly illegal,¹⁹⁴ imposing on the Deputy Attorney General a professional duty as a lawyer to resign even where the course of action is “merely” dishonest.

Nonetheless, I emphasize that where the subordinate lawyer has committed professional misconduct, direction from a superior lawyer should not be a mitigating factor as to penalty. Such mitigation is directly contrary to the concept of “complete professional responsibility.”¹⁹⁵

While I present this option for consideration, I do not recommend it. There is no instance in which the current rules of professional conduct absolve a subordinate lawyer from their professional obligations or their practical consequences by transplanting those to a supervisory lawyer. The idiosyncrasies of government practice do not justify such a drastic step away from the concept of complete professional responsibility. Moreover, the same or equivalent pressures and implications would apply to in-house counsel to an organizational

¹⁹⁰ *Ibid*; Reiland, *supra* note 187 at 1158–59.

¹⁹¹ Andrew M Perlman, “Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology” (2007) 36:2 Hofstra L Rev 451 at 476.

¹⁹² Rice, *supra* note 186 at 912–14.

¹⁹³ *FLSC Model Code*, *supra* note 9, r 3.2-8.

¹⁹⁴ Sanderson, *supra* note 1 at 222.

¹⁹⁵ *FLSC Model Code*, *supra* note 9, r 6.1-1.

client with a hierarchical structure.¹⁹⁶ From my perspective, there is no principled reason to modify the rules for government lawyers, but not for in-house counsel. While it would appear that law societies have not given sufficient consideration to how the rules of professional conduct apply to government lawyers, they likely have given sufficient consideration to how the rule of professional conduct on lawyers for an organizational client apply to lawyers as in-house counsel. In other words, these pressures for in-house counsel are presumably understood by law societies as being necessary and unavoidable. If not, then much greater reforms are potentially appropriate if not necessary — reforms that include but transcend government lawyers.

Nonetheless, government lawyers would benefit from increased clarity from law societies as regulators as to what roles in government parallel those of the chief executive officer and the board of directors as those terms are used in the rules of professional conduct.

V. CONCLUSIONS AND RECOMMENDATIONS

In this article, I have demonstrated how Dodek's and Sanderson's conceptual models of government lawyers can be applied as well as the complexity involved in the application of those models. While the models themselves are elegant and universal, their application to any given situation is highly dependent on the interpretation of the relevant statutory and substatutory provisions. The situations I have chosen to analyze here are archetypical though not exhaustive. My doctrinal approaches will thus be applicable and transferable to other situations.

In doing so, I have attempted to reduce the uncertainty for government lawyers in situations where their duties as lawyers do not mesh neatly with their duties as public servants. I have also proposed options to amend legislation or the rules of professional conduct, or both, to provide greater clarity for government lawyers in these situations.

While government lawyers, like all lawyers, should have complete professional responsibility for their practices and should be held to the highest standards of professional conduct, it would be unjust and indeed perverse to subject them to professional or employment consequences where there are legitimate gaps and uncertainties in the law. Indeed, given these gaps and uncertainties, and insofar as a lawyer's efforts to seek ethical advice may weigh against a finding of misconduct or may be a mitigating factor as to penalty where there has been misconduct,¹⁹⁷ my recommendations around the lawyers' exceptions to professional confidentiality become particularly important. With great respect to the Law Society Tribunal, it is also insufficient to demand that government lawyers simply choose between their obligations as lawyers and their obligations as public servants.¹⁹⁸

I emphasize that this article does not constitute legal advice. Any lawyer who finds themselves in the sorts of scenarios envisaged here should satisfy themselves as to the

¹⁹⁶ I emphasize however that government lawyers and the legal ethics issues that they face are not always the same as in-house counsel and the legal ethics issues that they face. Thanks to a reviewer on this point.

¹⁹⁷ See above note 121 and accompanying text.

¹⁹⁸ See above note 147 and accompanying text.

relevant and up-to-date law in their jurisdiction and then seek advice from colleagues who understand their specific predicament. My goal and hope is that I have provided a generalized roadmap, or at least a starting point, for that individualized process.

If nothing else, my analysis in this article demonstrates that the eternal and universal policy option of doing nothing is not a viable or appropriate approach here. Action is needed. It is incumbent on governments, legislatures, law societies, and professional associations or unions — potentially with the assistance of the Canadian Bar Association and its branches as well as the academy — to work together to provide greater certainty for government lawyers. Indeed, given the benefits of harmonization across jurisdictions, there may be a special role not only for the Federation of Law Societies of Canada, but also for the Uniform Law Conference of Canada. It is better and fairer for these determinations to be made, and any disagreements resolved, proactively among governments, legislatures, and law societies instead of reactively in legal proceedings concerning professional or employment discipline of specific lawyers. While these doctrinal legal questions can be resolved by amendments to legislation or to the rules of professional conduct, or both, complex policy questions must first be answered in order to determine which amendments should be made. It may be that there are serious disagreements among stakeholders, but it is my hope that such disagreements will be resolvable. If not, individual law societies or legislatures could act unilaterally. Such unilateral action is preferable to complete inaction.

To the extent that my analysis may not reflect the reality on the ground, I offer three responses. The first response is a practical one: I again encourage all government lawyers to find reasonable solutions to these issues by consulting with management wherever possible — and, where that does not produce an acceptable resolution, to activate the tools available to them as employees in a workplace regulated by a collective agreement.

My two remaining responses are substantive ones. I first reiterate the point I made in the introduction, that current law requires what it requires, even if it does not account for the institutional layered hierarchical setting in which government lawyers operate. I next agree wholeheartedly that, by all means, the current mismatch should be reduced or ideally eliminated insofar as possible. However, the larger question is whether that mismatch should be resolved by accommodating the reality on the ground or instead by ensuring that that reality conforms to the law. I myself would not assume that the reality on the ground is the appropriate solution that should be embodied in law going forward.

I hope that my analysis in this article has reduced the uncertainty facing government lawyers and promoted a greater understanding — by law societies as regulators, governments as employers and clients, and legislatures as lawmakers — of the unique challenges facing government lawyers and the need for legislative and regulatory reform. I expect this work will also prompt further academic consideration of the Dodek and Sanderson models and their implications.

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