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THE GOVERNMENT LAWYER AS ACTIVIST: A LEGAL ETHICS ANALYSIS

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INTRODUCTION

Can a lawyer represent the government and be an activist at the same time? That is, can a lawyer and government employee represent the government in her professional life while being an activist in her personal life? There is a striking and seemingly irreducible clash, at least at the intuitive and visceral level, between the two roles—between representing the government on the one hand while at the same time lobbying it or litigating against it on the other. Government lawyers are nonetheless some of the more successful activists in recent Canadian history.

Consider, for example, David Lepofsky. Lepofsky is perhaps Canada's leading activist for the rights of persons with disabilities. He has lobbied and litigated to great effect, and his impact on Canadian law and policy at all levels of government is undeniable. While he was accomplishing these things, he spent most of his professional career as a constitutional and criminal appellate litigator for the Government of Ontario. The question that appears to have gone unasked, much less answered, is whether it was legitimate for Lepofsky to pursue these two very different streams at the same time. That is to say, is this duality problematic from a legal ethics perspective? Does it matter what kind of practice a lawyer like Lepofsky has or what cause or kind of activism she pursues?

In this article, I propose answers to these difficult questions. My purpose is to better understand Lepofsky's legitimacy and legacy and to provide guidance to those who might follow his example. Indeed, my goal is twofold: to tell the stories of leading activists and government lawyers, and to use those

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stories to answer necessary and unavoidable, albeit uncomfortable, legal ethics questions.

My focus is not on partisan political activity, but what might be described as activism (or 'cause activism') or non-partisan political activity—activity in support not of a political party or candidate, but of an issue or cause. Nonetheless, I use partisan political activity as a helpful contrast and springboard. I have argued elsewhere that while most government lawyers are precluded from political activity at the same level of government by their duty of loyalty as lawyers, legislation allowing political activity by public servants constitutes a waiver of the duty of loyalty in that respect.[1] In contrast, I argued that Crown prosecutors and judicial lawyers—including judicial law clerks, staff lawyers, and executive legal officers—should avoid all political activity and that governments cannot waive the underlying obligations.[2] I argue here that the answers are neither the same nor as simple for activism as for political activity. (I do note that legislation regulating public servants is much less explicit about non-partisan political activity than it is about partisan political activity.[3])

This article is organized in five parts. In Part I, I identify and describe the activism and practice of the three government lawyers who will anchor my analysis: disability rights activist David Lepofsky, LGBTQ activist Michael Leshner, and rule-of-law activist or whistleblower Edgar Schmidt. While my focus is on Lepofsky and Leshner, Schmidt provides an important counterpoint. In Part II, I canvass the relevant professional and public service duties of government lawyers, before turning to a further assessment of the impacts of the duties of loyalty in Part III. Then, in Part IV, I consider whether recusal or waiver is sufficient to resolve any issues, and whether the *Canadian Charter of*

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[1] Andrew Flavelle Martin, "Legal Ethics and the Political Activity of Government Lawyers" (2018) 49:2 Ottawa L Rev 263 at 287–88 [Martin, "Political Activity of Government Lawyers"].

[2] *Ibid* at 288–92.

[3] See e.g. *Public Service of Ontario Act, 2006*, Part V, ss 72–107 [*PSOA*], being Schedule A to the *Public Service of Ontario Statute Law Amendment Act, 2006*, SO 2006, c 35.

Rights and Freedoms limits the government's ability as client to deny waiver.[4] Finally, in Part V, I reflect on the implications of my analysis.

At the outset, a note about terminology is appropriate. I use the terms "activism" and "activist"—instead of "advocacy" and "advocate"—for the extraprofessional activity in order to avoid confusion with the role as lawyer. While I do use the term "lobbying", I avoid the term "lobbyist" because it connotes a person who lobbies as a professional career.

I. CASE STUDIES: DAVID LEPOFSKY, MICHAEL LESHNER, AND EDGAR SCHMIDT

In this Part, I identify and describe the activism and practice of the three lawyers who will anchor my analysis. The first, David Lepofsky, is the noted activist for the rights of persons with disabilities. The second, Michael Leshner, is an LGBTQ activist. The third, Edgar Schmidt, is a controversial figure who might be described as a *Charter* or rule-of-law activist, or a whistleblower.

a. David Lepofsky, Activist

Lepofsky's activism predates his call to the bar. While still a law student, Lepofsky was one author of the Canadian National Institute for the Blind's *Vision and Equality: Blindness Law Reform Project*.[5] The report made recommendations on topics ranging from building codes to election participation and jury service,[6] garnering media attention.[7] Lepofsky's first major objective, and perhaps his greatest achievement, was the addition of

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

[5] David Lepofsky et al, *Vision and Equality: Blindness Law Reform Project* (Toronto: Canadian National Institute for the Blind, 1977-1978) [Lepofsky et al].

[6] *Ibid* at 90–1 (amending the prohibition against blind persons as jurors), 207–29 ("architectural barriers"), 255–7 (elections legislation).

[7] See e.g. "Law Excluding Blind Jurors Called Offensive by CNIB", *The Globe and Mail* (30 March 1979) 4, online: 1979 WLNR 184670; Barbara Yaffe, "Help for Nearly Blind Urged, Not Free Rides or Other Handouts", *The Globe and Mail* (18 May 1979) 4, online: 1979 WLNR 187128.

disability to section 15 of the then-draft *Charter*.[8] Consider this description by Adam Dodek:

> Perhaps no one debunked the fallacy that one person cannot make a difference in public life more than David Lepofsky. In the fall of 1980, the blind Lepofsky had recently graduated from law school and was studying for the bar exam. He appeared before the Joint Committee [on the Constitution, 1980-1981] on behalf of the Canadian National Institute for the Blind, passionately and persuasively advocating for the inclusion of disability in section 15. He so impressed the committee that they encouraged him to run for political office. Lepofsky did not take that advice but became one of the country's most prolific and effective disability rights advocates.[9]

This effusive praise is not unusual for Lepofsky.

While his activism generally related to all kinds of disabilities, Lepofsky promoted rights for blind persons most prominently. He is perhaps best known for a series of human rights complaints against the Toronto Transit Commission for failing to announce stops on subways, streetcars, and buses,[10] for which he marshalled considerable media attention.[11] He represented himself in these

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[8] See e.g. "Handicapped Require Help, Hearing Told", *The Globe and Mail* (13 December 1980) 12, online: 1980 WLNR 371407; Patricia Horsford, "Disabled Would Get Protection", *The Globe and Mail* (30 January 1981) N9, online: 1981 WLNR 377326.

[9] Adam Dodek, *The Charter Debates: The Special Joint Committee on the Constitution, 1980-1981, and the Making of the Canadian Charter of Rights and Freedoms* (Toronto: University of Toronto Press, 2018) at 47.

[10] Subways: *Lepofsky v Toronto Transit Commission*, 2005 HRTO 20 (interim order pending reasons); *Lepofsky v Toronto Transit Commission*, 2005 HRTO 21 (appointing a monitor); *Lepofsky v Toronto Transit Commission*, 2005 HRTO 36 (reasons). Streetcars and buses: *Lepofsky v TTC*, 2007 HRTO 23 (interim order pending reasons); *Lepofsky v Toronto Transit Commission*, 2007 HRTO 41 (reasons).

[11] See e.g. Bruce DeMara, "What if TTC Riders Were Told to Guess?", *The Toronto Star* (23 March 2005) A20, online: 2005 WLNR 4526595; Anthony Reinhardt, "Blind Lawyer Pushes TTC to See the Light; Prominent Attorney Says Transit System Still Isn't Calling Subway Stops Clearly, 10 Years After It Agreed It Would", *The Globe and Mail* (29 June 2005) A3, online: 2005 WLNR 12650441; Sikander Z Hashmi, "Blind Advocate Takes TTC Battle to Tribunal", *The Toronto Star* (29 June 2005) B5, online: 2005 WLNR 10203931; Oliver Moore, "Blind Rider Celebrates Victory Over TTC", *The Globe and Mail* (30 June 2005) A15, online: 2005 WLNR 12645930; Jen Gerson, "TTC Ordered to Hire Subway-Announcement Enforcer", *The Globe and Mail* (11 July 2005) A8, online: 2005 WLNR 12652743; Jen Gerson, "Blind Lawyer Wants Bus Stops Announced", *The Globe and Mail*

matters, with the assistance of other counsel. He then used these precedents to promote public transit accessibility in other cities.[12] He also founded the Canadian Association of Visually Impaired Lawyers in 1993.[13]

Lepofsky gave an important speech on the accessibility of legal education for persons with disabilities to the Council of Canadian Law Deans in November of 1990,[14] in which he struck a hopeful tone:

> A law school's desire to effectively accommodate disabled students need not solely be motivated by the duty to accommodate, enshrined in human rights legislation, or by the Supreme Court's important recognition of equality of access to the legal profession as a Charter-protected value. It is tied as well to a fundamental commitment to simple fairness and equity.[15]

In an observation applicable to much of his activism, he reflected that "the greatest barrier to reasonable accommodation of disabled persons is neither financial nor technological. … [but] attitudinal. Most barriers confronting disabled persons can be readily eradicated if sufficient attention and imagination is applied to the problem."[16]

Years later, Lepofsky would write a haunting response to public debates over Robert Latimer's conviction for the murder of his disabled daughter:

> The oft-repeated media reports on public opinion on this issue merit a sober second thought, as does much of the rhetoric advanced in opposition to the Supreme Court of Canada's final *Latimer* ruling

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(18 August 2005) A13, online: 2005 WLNR 12976865; "TTC User Wants it Known: The Bus Stops Here", *The Toronto Star* (14 November 2005) B2, online: 2005 WLNR 18365021.

[12] See e.g. David Lepofsky, "A Matter of Human Rights" (20 November 2007) A9, online: 2007 WLNR 28641822 (Lepofsky demands the same of Transit Windsor).

[13] See e.g. Stephen Bindman, "New Light Cast on Legal Work: Blind Lawyer Launches Lobby to Scale Barriers", *Vancouver Sun* (7 September 1993) A6, online: 1993 WLNR 2915211; "Laurels, No Darts", Editorial, *The Toronto Star* (5 October 1993) A22.

[14] David Lepofsky, "Disabled Persons and Canadian Law Schools: The Right to Equal Benefit of the Law School" (1991) 36:2 McGill LJ 636 [Lepofsky, "Law Schools"]; see also Allan McChesney, *Promoting Disability Accommodation in Legal Education and Training: The Continuing Relevance of the 1990 Lepofsky Recommendations* (Ottawa: Reach Canada, 2013).

[15] Lepofsky, "Law Schools", *supra* note 14 at 638.

[16] *Ibid* at 639.

> released in 2001. To legalize the conduct for which Latimer was convicted, to reduce his level of criminal culpability, or to reduce his sentence would inevitably and improperly signal to Canadians with disabilities that they are second class citizens whose lives and safety do not merit the full protection of Canadian law. If the media's predominant view of public opinion is correct, this shows that people with disabilities need the full protection of the criminal law more than ever, and that the Supreme Court's ruling against Latimer's claims was urgently required.[17]

Again, in language applicable to all of his activism, Lepofsky concluded that "[w]e must re double our efforts at ensuring for all people with disabilities a full place in our society."[18]

Lepofsky is perhaps best known in government circles for lobbying for legislation on accessibility for persons with disabilities, primarily at the provincial level in Ontario[19] but also, more recently, in his retirement from practice at the federal level.[20] This specific lobbying dates back at least to 1994,[21] and was first referred to in the Ontario legislative debates in 1997,[22] although Lepofsky was first identified by name in the Ontario legislature as a

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[17] M David Lepofsky, "The Latimer Case: Murder is Still Murder When the Victim is a Child with a Disability" (2001) 27:1 Queen's LJ 319 at 321 [Lepofsky, "Murder"].
[18] *Ibid* at 359.
[19] See Laurie Monsebraaten, "NDP Urged to Act on Disabled Rights", *The Toronto Star* (14 May 1995) A10 [Monsebraaten, "NDP Urged"] (Monsebraaten provides the earliest mention of this work in the media); See M David Lepofsky, "The Long, Arduous Road to a Barrier-Free Ontario for People with Disabilities: The History of the *Ontarians with Disabilities Act* — The First Chapter" (2004) 15 NJCL 125 [Lepofsky, "History"] (Lepofsky shares his first-hand account including, among other things, details of his successful media strategy on the 1995 Ontario election campaign at 168–71).
[20] See e.g. David Lepofsky, "What Should Canada's Promised New National Accessibility Law Include? A Discussion Paper" (2018) 38 NJCL 169; David Lepofsky, "Liberals Failing to Strengthen Disability Laws as Promised", *The Toronto Star* (29 April 2019), online: <www.thestar.com/opinion/contributors/2019/04/29/liberals-failing-to-strengthen-disability-laws-as-promised.html>; Michelle McQuigge, "Accessibility Bill Will Be Amended to Address Concerns: Minister", *The Globe and Mail* (24 May 2019) A5.
[21] See Monsebraaten, "NDP Urged", *supra* note 19 (the first media coverage of this lobbying at A10); See Lepofsky, "History", *supra* note 19 at 158–59 (Lepofsky traces the movement and campaign, as well as his involvement in it, back to November 1994).
[22] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 36-1, No L192 (15 May 1997) at 14:00 (Hon Michael Harris), online: <hansardindex.ontla.on.ca/handsardeissue/36-1/192.htm>.

disability rights activist in 1981.[23] In the course of this activism, he often targeted specific Ontario political parties and politicians for inaction, particularly the Mike Harris and Bob Rae governments,[24] as well as for weak enforcement of the legislation once enacted.[25] Lepofsky also promoted accessibility in more specific ways, such as publicizing barriers to voting[26] and participation in the justice system.[27] Among other things, Lepofsky was also a strong critic of 2008 changes to the Ontario human rights apparatus.[28]

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[23] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 32-1, No L115 (1 December 1981) at 17:40 (Sheila Copps), online: <hansardindex.ontla.on.ca/hansardeissue/32-1/l115.htm> ("David Lepofsky and other lawyers who advocate on behalf of the disabled").

[24] See e.g. Laurie Monsebraaten, "Disabled Demand Action on Access", *The Toronto Star* (16 May 1997) A10: "Mr. Harris is afraid to talk to people with disabilities"; Bruce Demara, "Voters Accuse Bassett of Failing Disabled", *The Toronto Star* (20 May 1999) ("Mike Harris promised in writing that if elected, he would, in his first term of office, enact a disability act to get rid of barriers. Four years later, an election is called, and there's no law. … The minister responsible is Isabel Bassett. Will you tell these voters, of all parties, didn't you break your promise to us?"); Laurie Monsebraaten, "Rae Administration Disappoints the Disabled", *The Toronto Star* (29 May 1995) A10; see also Lepofsky, "History", *supra* note 19 ("The ODA movement wrestled from a recalcitrant Conservative Government the most that it could, and more than that Government wanted to give, even if it is far less than the disability community needed and deserved" at 331) and Lepofsky, "History", *supra* note 19 ("The movement got the most it could from a Government that clearly wanted to give it nothing at all" at 130).

[25] See Laurie Monsebraaten, "Ontario to Ease Crackdown on Accessibility Law; Fewer Businesses Will Face Inspection Despite Report Urging More Action", *The Toronto Star* (25 February 2015) A8, online: 2015 WLNR 5671451.

[26] See e.g. Caroline Mallan, "Group Seeks Barrier-Free Election Polls", *The Toronto Star* (15 April 1999); Kerry Gillespie, "Probe Sought into Poll Chaos; McGuinty Says Election Chief Should Resign", *The Toronto Star* (5 June 1999); "Disabled Voters Snubbed", Editorial, *The Toronto Star* (12 April 2010) A16, online: 2010 WLNR 7526212; Sabrina Nanji, "Can New Voters Be Taught to Pop Up?", *The Toronto Star* (6 May 2018) A15, online: 2018 WLNR 14480735 (after Lepofsky's retirement from practice).

[27] See M David Lepofsky, "Equal Access to Canada's Judicial System for Persons with Disabilities: A Time for Reform" (1995) 5 NJCL 183.

[28] See e.g. Robert Benzie, "Reforms to Rights Agency Opposed", *The Toronto Star* (17 March 2006) A10, online: 2006 WLNR 4444161 and David Lepofsky, "Human Rights Reforms Could Trigger Unfair Proceedings; New Tribunal Has Been Given Sweeping Power to Make Rules That Override Legal Safeguards", *The Toronto Star* (8 May 2008) AA6, online: 2008 WLNR 8578361.

Lepofsky is a member of both the Orders of Canada and Ontario, respectively. His Order of Canada citation identifies him as a lawyer but focuses on his activism:

> He is a highly-regarded constitutional lawyer who, by his own example, is an inspiration to persons with disabilities. Founder of the Canadian Association of Visually Impaired Lawyers, he has used his professional knowledge to work tirelessly to protect the rights of disabled people. He has helped to educate and sensitize the general public and legislators to the obstacles faced each day by disabled persons.[29]

The news release accompanying his 2007 induction to the Order of Ontario citation emphasizes the activism component and does not mention that he is a lawyer, much less one for the provincial government: "M. David Lepofsky - for his work on behalf of people with disabilities in Ontario which helped lead to Ontarians with Disabilities Act 2001 and the Accessibility for Ontarians with Disabilities Act 2005."[30] Lepofsky was named by *Canadian Lawyer* as one of the Top 25 Most Influential Lawyers in 2010.[31] While acknowledging that he was "one of Canada's most well-known and respected lawyers," the profile focused on his activism.

b. David Lepofsky, Lawyer

Lepofsky spent virtually his entire professional career as a lawyer for the Government of Ontario from 1982 to 2015. He served first in the Crown Law Office (Civil), from 1988 to 1993 in the Constitutional Law and Policy

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[29] "Order of Canada[:] M. David Lepofsky, C.M., O. Ont., LL.M." (last modified 26 March 2018), online: *Governor General of Canada* <archive.gg.ca/honours/search-recherche/honours-desc.asp?lang=e&TypeID=orc&id=3375>.

[30] "Order of Ontario Recipients Announced" (19 December 2007), online: *Government of Ontario* <news.ontario.ca/archive/en/2007/12/19/Order-Of-Ontario-Recipients-Announced.html>; see also "The Order of Ontario" (accessed 10 May 2019), online: *Government of Ontario* <www.ontario.ca/page/order-ontario#section-6>.

[31] Gail J Cohen, "The Top 25 Most Influential 2010" (3 August 2010), online: *Canadian Lawyer* <www.canadianlawyermag.com/author/gail-j-cohen/the-top-25-most-influential-915/>.

Division, and spent the remainder of his time in the Crown Law Office (Criminal).[32] In this section, I canvass his constitutional cases as well as his approaches to freedom of expression both within and outside of his practice before considering his criminal cases. I then conclude by considering his views on how his activism related to his practice as a lawyer.

Lepofsky appeared in some foundational *Charter* appeals before the Supreme Court of Canada, namely *Reference re Motor Vehicle Act (British Columbia)*,[33] on section 7 of the *Charter*, and *Andrews v Law Society of British Columbia*[34] in relation to section 15 of the *Charter.* He also argued *Law Society of Upper Canada v Skapinker*, in which the Supreme Court of Canada rejected the argument that a citizenship requirement to become a lawyer violated the mobility rights in section 6(2) of the *Charter*.[35]

In his capacity as a government lawyer, Lepofsky was closely identified with opposition to cameras in courtrooms and legislatures, and scepticism of the public interest claims of the media more generally. He represented Ontario in cases involving an unsuccessful CBC challenge to a prohibition on filming inside courthouses,[36] a ban on media cameras in the Nova Scotia legislature,[37] publication bans in matrimonial proceedings[38] and bail proceedings,[39] the name of the accused in criminal proceedings,[40] the identity of the complainant in sexual assault proceedings,[41] the identity of a child in a child protection

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[32] "David Lepofsky" (accessed 10 May 2019), online: *University of Toronto Faculty of Law* <www.law.utoronto.ca/faculty-staff/adjunct-visiting-faculty/david-lepofsky>.
[33] *Reference re s 94(2) Motor Vehicle Act (British Columbia)*, [1985] 2 SCR 486, 24 DLR (4th) 536.
[34] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 536.
[35] *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357, 9 DLR (4th) 161.
[36] *R v Squires* (1992), 11 OR (3d) 385, 78 CCC (3d) 97 (CA), leave to appeal to SCC refused, [1993] SCCA No 57. For media coverage, see Canadian Press, "Ontario's Camera Ban in Courts Ruled Legal", *The Toronto Star* (13 February 1986) C6 and Thomas Claridge, "Ban on Picture-Taking Outside Courts Upheld; CBC Reporter's Appeal Rejected", *The Globe and Mail* (23 December 1992) A8, online: 1992 WLNR 5234232.
[37] *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319, 100 DLR (4th) 212.
[38] *Edmonton Journal v Alberta (AG)*, [1989] 2 SCR 1326, 64 DLR (4th) 577.
[39] *Toronto Star Newspapers Ltd v Canada*, 2010 SCC 21.
[40] *R v D(G)(CA)* (1991), 2 OR (3d) 498, 63 CCC (3d) 134 (CA) [*R v D(G)(CA)*].
[41] *Canadian Newspapers Co v Canada (AG)*, [1988] 2 SCR 122, 52 DLR (4th) 690.

proceeding,[42] the exclusion of the media from sentencing proceedings,[43] and journalistic privilege.[44] He also intervened in an application for a prohibition against the CBC airing the film "The Boys of St. Vincent" pending trial[45] and opposed CBC's motion to broadcast the trial of Paul Bernardo.[46]

Lepofsky also took strong positions on the media in his writing and public remarks as a lawyer outside of his official role as government counsel. In his book *Open Justice*, he highlighted the importance of limitations on the press, observing that "it should not be inferred … that in a policy debate about solutions to problems posed by speech about courts, activities of the press should always be given paramount consideration, while nothing ought to be done to protect values such as fair trial, privacy protection, and winning the war on crime."[47] While recognizing the importance of freedom of expression under section 2(b) of the *Charter*, and the media's role with respect to that freedom, he was heavily critical of the public-serving characterization of the media:

> The *Charter* should not be construed based on some romantic or fictional characterization of newspapers and broadcast networks…. Journalist litigants often portray themselves and news outlets as an important watchdog on government affairs. It is fair to ask who will watch the watchdogs. … Many members of the public may well not agree with the position purportedly being advanced in their name. … [I]f a news outlet or reporter is the "agent of the public", it is only a self-appointed agent, over which the public has no effective control.[48]

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[42] *R v Davies* (1991), 87 DLR (4th) 527, 1991 CarswellOnt 1074 (WL Can) (Prov Div).
[43] *Canadian Broadcasting Corp v New Brunswick (AG)*, [1996] 3 SCR 480, 139 DLR (4th) 385.
[44] *Moysa v Alberta (Labour Relations Board)*, [1989] 1 SCR 1572, 60 DLR (4th) 1.
[45] *Monaghan v Canadian Broadcasting Corp*, 110 DLR (4th) 39, 1993 CanLII 5566 (Ont Gen Div).
[46] *R v Canadian Broadcasting Corp*, 1995 CarswellOnt 2487 (WL Can), [1995] OJ No 585 (QL) (Gen Div); see e.g. Thomas Claridge, "Television Bid Would Delay Bernardo Trail, Lawyer Argues; Judge Reserves Decision on Whether to Hear Arguments", *The Globe and Mail* (4 March 1995) A9.
[47] M David Lepofsky, *Open Justice: The Constitutional Right to Attend and Speak About Criminal Proceedings* (Toronto: Butterworths, 1985) at 323.
[48] M David Lepofsky, "The Role of 'The Press' in Freedom of the Press", in Frank E McArdle, ed, *The Cambridge Lectures 1991* (Cowansville, PQ: Les Editions Yvon Blais, 1993) 83 at 100–1, 103.

Around the same time, he wrote that "[t]he public's representative is not the media. It is the government, which the public has elected, and which is constitutionally accountable to the public through the checks and balances of democracy. Indeed, unlike the government, the media lacks any constitutional mechanisms for democratic accountability to the public." [49] He expressed the nuanced view that "[t]he media serves in practice as the lifeline of an open justice system. … However, this lifeline must be understood as a limited one, an imperfect one, and one whose effectiveness and objectives should not be exaggerated."[50] Similarly, in 1994 he stated of the media that "[t]hey say they represent the public, but the public never chose them. … We usually pick our representatives, we usually pick our agents and we can fire them. … I think it would be helpful to tone down that role somewhat."[51]

Similarly, Lepofsky was sceptical of media arguments about the chilling effect of libel laws, instead emphasizing the need for accountability: "objections by journalists to being subject to current libel laws might well be characterized as being simple opposition to being accountable in law for their conduct. … Freedom of the press is thereby characterized as freedom from legal responsibility."[52] He concluded by observing that "it is important to take into account not only the enormous capacity of the media to effectively contribute to the search for truth, but as well its unparalleled ability to irreparably undermine the capacity of an individual to successfully function in a community."[53]

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[49] M David Lepofsky, "Open Justice 1990: The Constitutional Right to Attend and Report on Court Proceedings in Canada" in David Schneiderman, ed, *Freedom of Expression and the Charter* (Scarborough: Thomson Professional Publishing Canada, 1991) 3 ("perhaps the single, indirect and, at best, tenuous, exception of the Crown-owned C.B.C." at 80) [Lepofsky, "Open Justice 1990"].
[50] *Ibid* at 83.
[51] Tracey Tyler, "Appeal Court Justices Set to Hear Crown, Media Argue over Homolka Ban", *The Toronto Star* (30 January 1994) A1; see also Murray Campbell & Oliver Moore, "Panel Recommends Allowing Cameras into Selected Ontario Courtrooms", *The Globe and Mail* (25 August 2006) A4, online: 2006 WLNR 14725334.
[52] M David Lepofsky, "Making Sense of the Libel Chill Debate: Do Libel Laws 'Chill' the Exercise of Freedom of Expression?" (1994) 4 NJCL 169 at 180 [Lepofsky, "Libel Chill"].
[53] *Ibid* at 206.

Some of Lepofsky's sharpest public comments came in relation to cameras in courtrooms. A few years after the unsuccessful CBC challenge to prohibitions on filming inside courthouses in *R v Squires*, he wrote that televising court proceedings "does not constitute a form of progress. Rather, it poses a serious threat to the proper administration of justice and offers little if anything in the way of benefits."[54] Many years later, in 2010, he remained glibly yet eloquently dismissive of media arguments for televised court proceedings:

> Camera advocates argue that filming in court is a necessary precursor to broadcasting TV reports on courts, and, so, is protected by s. 2(b). They argue that courtroom video footage is essential for effective TV coverage of courts, because, without courtroom action video, the TV audience can't understand the report. This wrongly assumes that a TV audience so lacks intelligence that they must see a witness say something in court rather than being told the witness said it, before they can comprehend it. The *Charter* is not founded on such condescending disrespect for Canadians' intelligence. A claim that one must see the courtroom to understand what happens there is disproved by the experience of blind lawyers who practice in court, such as I have for over a quarter century.[55]

He concluded that "[s]ection 2(b) seeks to promote the search for truth, self-government, and individual self-fulfilment. It doesn't guarantee that audiences will find media programming maximally interesting."[56]

In his published work, Lepofsky was also highly critical of early 2(b) jurisprudence, particularly *Irwin Toy v Quebec (Attorney General)* and *R v Zundel*.[57] Other freedom of expression matters in which Lepofsky represented

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[54] M David Lepofsky, "Cameras in the Courtroom – Not Without My Consent" (1996) 6 NJCL 161 at 162–3 ("Freedom of expression, including freedom of the press, does not confer on the media the right to do whatever they want in pursuit of news" at 220).
[55] M David Lepofsky, "Cameras in the Courtroom — Don't Make a Constitutional Wrong into a Constitutional Right" (2010) 26 NJCL 293 at 297 [Lepofsky, "Cameras"].
[56] *Ibid*.
[57] On *Irwin Toy v Quebec (AG)*, [1989] 1 SCR 927, 58 DLR (4th) 577, see M David Lepofsky, "The Supreme Court's Approach to Freedom of Expression – *Irwin Toy v. Quebec (Attorney General)* – And the Illusion of Section 2(b) Liberalism" (1993) 3 NJCL 37. On *R v Zundel*, [1992] 2 SCR 731, 95 DLR (4th) 202, see Lepofsky, "Libel Chill", *supra* note 52 at 192–96.

the government of Ontario included challenges to prohibitions on the distribution of pamphlets in airports,[58] to the criminal offence of defamatory libel,[59] to restrictions on the use of the title "doctor",[60] to prohibitions on the colouring of margarine,[61] and to prohibitions on keeping exotic animals.[62]

Lepofsky also represented Ontario in a range of cases on section 15 of the *Charter* before and after *Andrews.* These involved patrols and frisk searches of male inmates by female guards (in which the ground argued was sex),[63] admission to and funding of medical internships (in which the ground argued is unclear but appears to be national origin),[64] prohibitions on teachers' eligibility to be elected to a school board (in which no enumerated or analogous ground applied),[65] and prohibitions on municipal employees keeping their jobs once elected as councillors (again in which no enumerated or analogous ground applied).[66] In *York Condominium Corporation No. 216 v Dudnik*, Lepofsky successfully argued that a condominium's prohibition of children (based on age) was properly decided under human rights law and so section 15 should not be considered.[67] He also represented Ontario on three cases involving jurors and race: *R v Laws*, holding that the citizenship requirement for jurors does not

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[58] *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139, 77 DLR (4th) 385.
[59] *R v Lucas*, [1998] 1 SCR 439, 157 DLR (4th) 423.
[60] *College of Physicians and Surgeons of Ont v Larsen* (1987), 45 DLR (4th) 700, 62 OR (2d) 545 (H Ct J).
[61] *Institute of Edible Oil Foods v Ontario* (1989), 71 OR (2d) 158, 64 DLR (4th) 380 (CA), leave to appeal to SCC refused, [1990] SCCA No 76, 21818 (6 September 1990); *UL Canada Inc v Quebec (AG)*, 2005 SCC 10.
[62] *Stadium Corp of Ontario v Toronto (City)* (1993), 12 OR (3d) 646, 101 DLR (4th) 614 (CA).
[63] *Weatherall v Canada (AG)*, [1993] 2 SCR 872, 105 DLR (4th) 210.
[64] *Jamorski v Ontario (AG)* (1988), 64 OR (2d) 161, 49 DLR (4th) 426 (CA); see also Thomas Claridge, "Polish Medical Graduates Challenge Intern Program", *The Globe and Mail* (3 September 1986) A14.
[65] *Sacco v Ontario (AG)*, 77 DLR (4th) 764, 1991 CarswellOnt 882 (WL Can) (Gen Div).
[66] *Jones v Ontario (AG); Rheaume v Ontario (AG)* (1992), 7 OR (3d) 22, 89 DLR (4th) 11 (CA); see also Thomas Claridge, "Pair Hopes to Keep Jobs if Elected[;] Court to Rule on Conflict Law", *The Globe and Mail* (19 October 1991) A8, online: 1991 WLNR 4820280.
[67] *York Condominium Corporation No 216 v Dudnik* (1991), 3 OR (3d) 360, 79 DLR (4th) 161 (Div Ct); see Susan Ellis, "'Adults-Only' Condo Illegal, But Ont. Mum's Award Cut", *Lawyers Weekly* 11:5 (31 May 1991). I note also that *R v D(G)(CA)*, *supra* note 40, was argued but not decided on section 15 grounds.

discriminate against black defendants;[68] *R v Lines*, in which the court refused to restrict peremptory challenges against jurors;[69] and *R v Nahdee*, on the selection of jurors from Indigenous reserves, in which the defendant alleged bias in the composition of the jury panel.[70] Although Lepofsky appeared as counsel for the Ontario Human Rights Commission in various cases concerning discrimination on the ground of disability,[71] he appears to never have acted as counsel in a reported decision on disability under section 15 of the *Charter*.

The bulk of reported cases in which Lepofsky appeared as counsel are criminal appeals, primarily before the Court of Appeal for Ontario. These span an extensive array of matters, including jury instructions (generally[72] and with

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[68] *R v Laws* (1998), 41 OR (3d) 499, 165 DLR (4th) 301 (CA) (*Laws* is infamous for the trial judge's selective approach to freedom of religion and headgear in the courtroom. "There was no basis on which the trial judge could distinguish between a requirement of a particular faith and a chosen religious practice. Freedom of religion under the *Charter* surely extends beyond obligatory doctrine. The trial judge further erred in suggesting that only certain communities are clearly within the purview of the *Charter*. No individuals or religious communities enjoy any less *Charter* protection than the major and recognizable religions" at paras 23–4).

[69] *R v Lines*, [1993] OJ No 3284 (QL), 1 PLR 1 (Gen Div); see also Tracey Tyler, "Province Considering Appeal of Police Officer's Acquittal", *The Toronto Star* (21 May 1993) A28.

[70] *R v Nahdee*, [1994] 4 CNLR 158, 21 CRR (2d) 81 (Ont Gen Div) (*Nahdee* was argued on several grounds, including but not limited to race).

[71] See e.g. *Battlefords and District Co-operative Ltd v Gibbs*, [1996] 3 SCR 566, 140 DLR (4th) 1; *Ontario (Human Rights Commission) v Ford Motor Co of Canada* (2002), 164 OAC 252, 21 CCEL (3d) 112 (Div Ct); *Cameron v Nel-Gor Castle Nursing Home* (1984), 5 CHRR D/2170, 84 CLLC 17008 (Ont B Inquiry).

[72] See e.g. *R v Radman*, [1994] OJ No 2736 (QL), 1994 CarswellOnt 3105 (WL Can) (CA); *R v Thiffault*, 77 OAC 231, [1995] OJ No 196 (QL) (CA); *R v Gibbs*, [1996] OJ No 1982 (QL), 1996 CanLII 618 (CA); *R v McGivern*, [1996] OJ No 1973 (QL), 1996 CarswellOnt 1909 (WL Can) (CA); *R v ZM*, 97 OAC 312, [1997] OJ No 647 (QL) (CA); *R v Payan*, 104 OAC 73, [1997] OJ No 4184 (QL) (CA); *R v Desforges*, [1997] OJ No 4441 (QL), 1997 CarswellOnt 4521 (WL Can) (CA); *R v Duguay*, 113 OAC 384, [1998] OJ No 277 (QL) (CA) [*Duguay*]; *R v Boyer*, [1998] OJ No 1501 (QL), 1998 CarswellOnt 1735 (WL Can) (CA); *R v GDD*, [1998] OJ No 4846 (QL), 1998 CarswellOnt 4549 (WL Can) (CA) [*GDD*]; *R v Gagne*, [1999] OJ No 3151 (QL), 1999 CarswellOnt 2605 (WL Can) (CA); *R v CN* (1999), 126 OAC 344, [1999] OJ No 4379 (QL) (CA); *R v Prevost*, 127 OAC 256, 1999 CarswellOnt 4212 (WL Can) (CA); *R v Brennan*, [2000] OJ No 3537 (QL), 2000 CarswellOnt 3398 (WL Can) (CA); *R v Andrews*, [2000] OJ No 4800 (QL), 2000 CarswellOnt 4834 (WL Can) (CA); *R v JPS*, [2001] OJ No 1890 (QL), 2001 CarswellOnt 1794 (WL Can) (CA) [*JPS*]; *R v Cuming* (2001), 158 CCC (3d) 433, 149 OAC 282 (CA) [*Cuming*]; *R v Babb*, 158 OAC 377, [2002] OJ No 1507 (QL) (CA) [*Babb*]; *R v Kember*, 185 CCC (3d) 83, [2004] OJ No 1463 (QL) (CA); *R v Poirier* (2005), 193 CCC (3d) 303, 195 OAC 301 (CA); *R v Jensen* (2005), 74 OR (3d) 561,

respect to *Vetrovec*[73] and *W(D)*[74]); *Charter* issues (such as alleged infringements of the right to counsel under section 10(b) of the *Charter*[75] and exclusion of evidence under section 24(2) of the *Charter*[76]); evidentiary issues (including admissibility generally,[77] similar fact evidence,[78] expert evidence,[79]

195 CCC (3d) 14 (CA) [*Jensen*]; *R v Flegel* (2005), 196 CCC (3d) 146, 197 OAC 57 (CA); *R v Ramkissoon*, 216 OAC 388, [2006] OJ No 4099 (QL) (CA) [*Ramkissoon*], leave to appeal to SCC refused, [2007] SCCA No 210, 31770 (5 July 2007); *R v Talbot*, 2007 ONCA 81; *R v Belance*, 2007 ONCA 123; *R v Brown*, 2007 ONCA 554 [*Brown*]; *R v Gomez*, 2007 ONCA 696; *R v Chandrakumar*, 2007 ONCA 798; *R v Azzam*, 2008 ONCA 467 [*Azzam*]; *R v Vipond*, 2008 ONCA 653; *R v Woods*, 2008 ONCA 713 [*Woods*]; *R v Thrasher*, 2008 ONCA 777; *R v MacDonald*, 2008 ONCA 778; *R v Gould*, 2008 ONCA 855; *R v Gordon*, 2009 ONCA 170, leave to appeal to SCC refused, [2009] SCCA No 177, 33137 (9 July 2009); *R v Szanyi*, 2010 ONCA 316; *R v Roncaioli*, 2011 ONCA 378 [*Roncaioli*]; *R v James*, 2011 ONCA 839 [*James*]; *R v Dahr*, 2012 ONCA 433 [*Dahr*]; *R v McDonald*, 2013 ONCA 442 [sentence appeal at 2014 ONCA 512] [*McDonald*]; *R v Parris*, 2013 ONCA 515; *R v McCracken*, 2016 ONCA 228 [*McCracken*].

[73] See e.g. *GDD*, *supra* note 72; *Babb*, *supra* note 72; *R v Armstrong* (2003), 179 CCC (3d) 37, 176 OAC 319 (CA), leave to appeal to SCC refused, [2003] SCCA No 554, 30105 (18 March 2004); and *Brown*, *supra* note 72.

[74] See e.g. *Jensen*, *supra* note 72; *Azzam*, *supra* note 72; and *McCracken*, *supra* note 72.

[75] See e.g. *R v Morgan*, [1992] OJ No 3653 (QL) (CA); *R v DeAbreu*, [1994] OJ No 2735 (QL), 1994 CarswellOnt 3430 (WL Can) (CA); *R v Nagy* (1997), 115 CCC (3d) 473, 99 OAC 120 (CA); *Duguay*, *supra* note 72; *R v Little*, [1998] OJ No 649 (QL) (CA); *R v McCallen* (1999), 43 OR (3d) 56, 131 CCC (3d) 518 (CA); and *Azzam*, *supra* note 72.

[76] See e.g. *R v Campbell*, 2012 ONCA 394; *R v Buoc*, 2015 ONCA 341.

[77] See e.g. *R v Wright*, 73 OAC 158, [1994] OJ No 1839 (QL) (CA); *R v Witter* (1996), 27 OR (3d) 579, 105 CCC (3d) 44 (CA); *R v McBride* (1999), 133 CCC (3d) 527, 118 OAC 139 (CA); *Ramkissoon*, *supra* note 72; *Woods*, *supra* note 72; *James*, *supra* note 72; and *R v Jackson*, 2013 ONCA 632, aff'd 2014 SCC 30.

[78] See e.g. *R v Dussiaume* (1995), 98 CCC (3d) 217, 80 OAC 115 (CA), leave to appeal to SCC refused, [1995] 4 SCR vi; *R v Kowall* (1996), 108 CCC (3d) 481, 92 OAC 82 (CA), leave to appeal to SCC refused, [1996] 1 SCCA No 487; *R v Mancia*, [1996] OJ No 3440 (QL), 1996 CarswellOnt 3664 (WL Can) (CA).

[79] See e.g. *R v McCarthy* (1997), 35 OR (3d) 97, 117 CCC (3d) 385 (CA), leave to appeal to SCC refused, [1997] SCCA No 610, 26344 (19 March 1998); *R v DD* (1998), 129 CCC (3d) 506, 113 OAC 179 (CA), aff'd 2000 SCC 43; *JPS*, *supra* note 72; and *R v Coultice*, [2004] OJ No 2092 (QL) (CA), leave to appeal to SCC refused, [2004] SCCA No 353, 30459 (20 January 2005).

and hearsay[80]); and sentence appeals.[81] Other *Charter* matters he appeared in included whether: an appellate court's power to substitute a guilty verdict for an acquittal at trial infringes section 7;[82] the right against self-incrimination under section 13 was infringed by the use of the defendant's statements from a previous trial;[83] the retrospective repeal of parole provisions in the *Criminal Code* constituted dual punishment under section 11(h);[84] and the close-in-age provisions for sexual offences under the *Criminal Code* infringe section 7.[85] Important non-*Charter* matters which Lepofsky appeared in included the acceptable limits of cross-examination of an accused[86] and the sufficiency of a trial judge's reasons.[87] In the midst of these criminal appeals, Lepofsky intervened on behalf of Ontario in *Cojocaru v British Columbia Women's Hospital and Health Centre*, a case which addressed the impact of a judge excessively incorporating a party's submissions into his reasons.[88]

Lepofsky appears to have viewed his activism as being completely separate and severable from his practice, observing in a 2007 interview that it was on his "own time": "I've got a full-time heavy caseload, and I do this on my own time and its something I love doing and I've spent a lot of time doing,

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[80] See e.g. *R v Rockey* (1995), 23 OR (3d) 641, 82 OAC 1 (CA), aff'd [1996] 3 SCR 829, 140 DLR (4th) 503; *R v Baxter*, [1996] OJ No 1687 (QL), 1996 CanLII 1378 (CA); and *Cuming*, *supra* note 72.

[81] See e.g. *R v MG*, [1993] OJ No 4010 (QL), 1993 CarswellOnt 2573 (WL Can) (CA); *R v Herrell* (1994), 69 OAC 394, 88 CCC (3d) 412 (CA); *R v Lamondin*, [1995] OJ No 345 (QL), 1995 CarswellOnt 3956 (WL Can) (CA); *R v White*, [1995] OJ No 3320 (QL) (CA); *R v Phillip*, [1995] OJ No 3373 (QL) (CA); *R v Mommo*, [1996] OJ No 1992 (QL) (CA); *R v Eason*, [1997] OJ No 3220 (QL), 1997 CarswellOnt 2657 (CA); *R v DK* (2003), 169 OAC 97, [2003] OJ No 562 (QL) (CA); *R v Rowlee*, [2003] OJ No 3928 (QL), 2003 CarswellOnt 3878 (WL Can) (CA); *R v Grove*, [2004] OJ No 727 (QL), 2004 CarswellOnt 812 (WL Can) (CA); *R v Taipow*, 203 OAC 219, [2005] OJ No 4643 (QL) (CA); *R v EL*, 210 OAC 124, [2006] OJ No 1517 (QL) (CA); *R v Sookdeo*, 215 OAC 94, [2006] OJ No 3691 (QL) (CA); *R v Sipos*, 2008 ONCA 325, aff'd 2014 SCC 47; *Roncaioli*, *supra* note 72; *Dahr*, *supra* note 72; and *McDonald*, *supra* note 72.

[82] *R v Skalbania*, [1997] 3 SCR 995, 220 NR 349.

[83] *R v Henry*, 2005 SCC 76.

[84] *Canada (AG) v Whaling*, 2014 SCC 20.

[85] *R v AB*, 2015 ONCA 803.

[86] *R v Hurd*, 2014 ONCA 554.

[87] See *R v REM*, 2008 SCC 51; *R v Walker*, 2008 SCC 34.

[88] *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30.

but whether its evenings or weekends or late at night or over lunch or over breakfast or on time away from work, I do them both."[89] Similarly, in his 2004 article on the history of the accessibility movement in Ontario, Lepofsky noted that "[t]otally apart from and unrelated to this volunteer activity, the author is employed as Counsel with the Crown Law Office of the Ontario Ministry of the Attorney General."[90]

c. Michael Leshner, Activist

Leshner is perhaps best known as a groom in Canada's first same-sex marriage,[91] and one of the plaintiffs in the court proceedings that allowed it.[92] He was also among the interveners in the Supreme Court of Canada for its *Reference Re Same-Sex Marriage*.[93] However, long before these cases, he successfully launched a human rights challenge of same-sex partners' ineligibility for spousal pension benefits.[94] Despite that success, he was highly and publicly critical of the Ontario Human Rights Commission: "long before the Board of Inquiry decision in September 1992, I concluded the Ontario Human Rights Commission was not just terminally ill but barely was being kept alive on life support systems … the commissioners were reluctant advocates of gay and lesbian rights."[95]

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[89] Helen Burnett, "Doing Good in His Spare Time", (10 August 2007), online: *Law Times* <www.lawtimesnews.com/article/doing-good-in-his-spare-time-8863/>.
[90] Lepofsky, "History", *supra* note 19 at 125, n 1.
[91] See e.g. Tracey Tyler & Tracy Huffman, "Gays Get Married after Appeal Court Ruling; Couple Celebrates End of 20-Year Fight Judges Rewrite Definition of Marriage", *The Toronto Star* (11 June 2003) A4; Diana Mehta, "Same-Sex Marriage in Canada Marks Its 10th Year", *The [Montreal] Gazette* (10 June 2013) A9, online: 2013 WLNR 14191802; "The 10 Biggest Moments in LGBT Toronto in the Last 50 Years", *Toronto Life* (4 July 2016), online: <torontolife.com/city/life/top-10-moments-in-toronto-lgbt/> ("ten years ago, their unprecedented wedding stood for hope, equality and inclusion". Indeed, in 2016 *Toronto Life* chose the wedding as the "Biggest Momen[t] in LGBT Toronto in the Last Fifty Years").
[92] *Halpern v Toronto (City of)* (2003), 65 OR (3d) 161, 225 DLR (4th) 529 (CA), rev'g in part 60 OR (3d) 321, 215 DLR (4th) 223 (Div Ct).
[93] *Reference Re Same-Sex Marriage*, 2004 SCC 79.
[94] *Leshner v Ontario*, 92 CLLC 17,035, 1992 CarswellOnt 6680 (WL Can) (OHRCBI).
[95] Michael Leshner, "'Achieving Equality' and the Leshner Case: Is Anyone Listening?" (1992) 12 Windsor YB Access Just 398 at 398, 400.

Much of Leshner's activism revolved around publicly lobbying the Ontario government and legislature to support legislative changes affecting the LGBTQ community, including in the form of op-eds. In doing so, Leshner was a vocal critic of politicians; indeed, in January 1994 he was quoted in the *Financial Post* as stating that "[t]he moral centre (of elected politicians) is not unlike that of a bagel."[96] He criticized specific parties and politicians of all stripes, including First Ministers and Attorneys General. Much of this lobbying and criticism was about spousal benefits and invoked language of "bigots" to characterize Ontario politicians:

- "If we can't get justice from the NDP, if the NDP loses its values, where do we go? I don't think Bob Rae is a homophobic bigot … but I'm here to remind the NDP of their values."[97]
- "At least the Tory bigots speak the truth. They tell you exactly what they believe in…. But my anger is most at the NDP because they have power and they always promised it would be exercised on the basis of principle."[98]
- "The Tories believe they can appeal to the worst instincts of the citizens of Ontario."[99]
- "I'm sick and tired of politicians – particularly NDP'ers – acting like Tory bigots."[100]
- "She's [Liberal leader Lyn McLeod has] decided to out-hate Mike Harris…. Instead of her own head served on a platter to her caucus,

[96] Joanne Chianello, "The Struggle for Same Sex Benefits: Gay Activists Make Progress in Court but Get Little Support in Canada's Democratic Arenas", *The Financial Post* (Toronto) (8 January 1994) S8.
[97] Judy Steed, "Gay Lawyer Battling for Job Benefits and Promotion in Ontario Ministry", *The Toronto Star* (17 September 1991) A2.
[98] Bruce DeMara, "Skittish Politicians Avoid Same-sex Benefits Issue: NDP and Liberals Agreed to End Discrimination. Then It Got Controversial", *The Toronto Star* (5 February 1994) B5.
[99] Craig McInnes, "Homosexual Rights, Jobs Main Issues in By-Election: Tories Attack Liberals, NDP Over Same-Sex Spousal Benefits", *The Globe and Mail* (14 March 1994) A3.
[100] Canadian Press, "Same-Sex Benefit Legislation Will Be Late in Coming: Boyd Backbencher Slammed for 'Queer' Remark", *The Hamilton Spectator* (28 April 1994) C5.

she's prepared to offer the heads of gays and lesbians and their children."[101]

- "Shame on [Attorney General] Marion Boyd and shame on Bob Rae and this government. ... If this inept effort to appease the bigots in the NDP caucus doesn't work, what she (Boyd) has done is make sure there is no difference between Bob Rae, (Liberal Leader) Lyn McLeod or (Progressive Conservative leader) Mike Harris."[102]
- "I've got a message for the attorney general and all politicians. We're here to kick political butt … We're here to kick Lyn McLeod's butt from one end of the province to the other."[103]
- "I am no Dr. King but I believe he would urge me on when I call [Premier Bob] Rae a hypocrite, manipulator and insincere. When you claim the moral high ground, Mr. Premier, watch out. Your actions, judged by your own standards may swallow you up whole in moral quicksand."[104]

Leshner was specifically critical of Rae's Attorney General, Marion Boyd.[105] He strongly condemned the Rae government for allowing a free vote on its spousal legislation, stating that "[h]uman rights should not be up for sale in a popularity contest" and referring to "protec[ting] the minority from the tyranny of the majority."[106] Around this time, Leshner also publicly alleged that the failure of the Ontario public service to promote him was discrimination on the ground of sexual orientation.[107] He was successful in having employee

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[101] Craig McInnes, "Liberals Hasten to Define Same-Sex Stand: NDP Cabinet Member Charges McLeod with Contradicting Herself in Opposing Bill", *The Globe and Mail* (21 May 1994) A7; see also Leslie Papp, "Opponents Set to Kill Same-sex Rights Bill: Solid Majority Forming Against Ontario Reforms", *The Toronto Star* (23 May 1994) A1.
[102] William Walker & Leslie Papp, "NDP Alters Same-Sex Bill: Last-Ditch Bid Made to Save It", *The Toronto Star* (9 June 1994) A1.
[103] Moira Welsh, "Protesters Demand Gay Rights: 'This Is My Life That We're Talking About'", *The Toronto Star* (12 June 1994) A6.
[104] Michael Leshner, "Rae Lost in Moral Quicksand", *The Toronto Star* (30 January 1995) A17.
[105] See e.g. Michael Leshner, "Attorneys-General are Not Above the Law", *The Toronto Star* (10 March 1994) A25.
[106] Martin Mittelstaedt, "Ontario to Allow Free Vote on Gays: Spousal Rights Volatile Issue", *The Globe and Mail* (11 May 1994) A1.
[107] Steed, *supra* note 97.

disciplinary proceedings against him quashed for this public criticism of the Ministry of the Attorney General.[108]

In a 1995 op-ed, Leshner called out leading politicians directly for inaction on, and indeed promotion of, hate against LGBTQ parents and their children:

> I accuse Jean Chretien, Prime Minister of Canada.
> I accuse Bob Rae, Premier of Ontario.
> I accuse Lyn McLeod, leader of the Ontario Liberal party.
> I accuse Mike Harris, leader of the Progressive Conservative party.
> There is hate in the land.
> There is hate in Ontario, in us.
> ...
> Stop the politicians.
> Stop the hate.
> Do not allow Jean Chretien to say this hate is a provincial responsibility.
> Do not allow Bob Rae to remain a coward.
> Do not allow Lyn McLeod and Mike Harris to wage war against mothers, fathers and children.[109]

As I discuss below, this op-ed followed soon after sentencing for a hate crime prosecuted by Leshner.[110]

Leshner's criticism sometimes involved provincial legislation and the legal positions taken by the province in litigation. He once observed, on the subject of adoption by same-sex couples, that "[t]his case illustrates the hideousness of the current legislation in Ontario."[111] In a 1996 op-ed criticizing the position taken by Ontario as an intervenor at the Court of Appeal for Ontario in *M v H*,[112] Leshner wrote that "[h]omophobia has again reared its ugly head

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[108] *Leshner v Ontario (Deputy AG)* (1992), 10 OR (3d) 732, 96 DLR (4th) 41 (Div Ct).
[109] Michael Leshner, "Let's End the Hate Against Gay, Lesbian Parents", *The Toronto Star* (23 May 1995) A25 [Leshner, "Let's End the Hate"].
[110] See Part D, *below*, for more on this topic.
[111] Daniel Girard, "Lesbian Couples Can Adopt: Judge[;] Ruling is Called Precedent-Setting", *The Toronto Star* (11 May 1995) A1; *K (Re)* (1995), 23 OR (3d) 679, 125 DLR (4th) 653 (Prov Ct); *Child and Family Services Act*, RSO 1990, c C.11.
[112] *M v H* (1996), 31 OR (3d) 417, 142 DLR (4th) 1 (CA), aff'd [1999] 2 SCR 3, 171 DLR (4th) 577.

at Ontario's Ministry of the attorney general."[113] Leshner was also critical of the judiciary. He filed a complaint with the Canadian Judicial Council over homophobic remarks made by Justice Ian Binnie.[114] He later excoriated the Council for its rapid dismissal of the complaint.[115]

In the early 2000s, Leshner was likewise critical of Parliament and Prime Minister Jean Chretien for their approach to same-sex marriage: "First, they needed judicial guidance, now they need public guidance. … Are these people brain-dead? Can they not think for themselves? Can nobody just get up in the House of Commons and make a statement on a fundamental issue of human rights?"[116] In 2004, Leshner singled out then-Leader of the Official Opposition Stephen Harper for criticism: "Harper, while dull and inoffensive in personality, is truly frightening to gay Canadians."[117] In the wake of the *Reference re Same-Sex Marriage*, he roundly mocked Alberta Premier Ralph Klein: "Today was a day when effete gay men whomped Ralph Klein. He got hit with a legal two-by-four…. He's been checkmated. There's nothing he can do. If Ralph doesn't believe me, his lawyer can call my lawyers."[118]

Roughly a decade ago, in what can be characterized as a separate instance of activism regarding a controversial issue in the LGBTQ community, Leshner took a strong stand against non-disclosure of HIV status, stating that

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[113] Michael Leshner, "Testing the Value of Ontario's Same-Sex Families", *The Toronto Star* (31 July 1996) A17.
[114] Kirk Makin, "Binnie's Remarks Draw Activist Fire; Supreme Court Judge's 'Hateful' Comment about Gays Prompts Complaint to Judicial Council", *The Globe and Mail* (14 March 1998) A6, online: 1998 WLNR 6268606.
[115] See "Inaction on Anti-Gay Slur Criticized", *The Toronto Star* (17 March 1998) A6 and Kirk Makin, "Binnie Complaint Sails Right Out the Window; Antigay Remark by Supreme Court's Newest Judge Dismissed by Judicial Council After One Day", *The Globe and Mail* (18 March 1998) A4, online: 1998 WLNR 6273573.
[116] Tim Harper, "PM Seeks Debate on Same-Sex Marriages", *The Toronto Star* (8 August 2002) A3.
[117] Michael Leshner, "Why Gays Find Harper Scary", *The Toronto Star* (10 June 2004) A27, online: 2004 WLNR 6198519.
[118] James Cowan, "Tories 'Whomped,' Gay Advocate Says: Toronto Celebrants Call Harper a 'Girly Man' for Opposition to Gay Marriage", *The National Post* (10 December 2004) A4, online: 2004 WLNR 13804517.

"[t]he true victimization is by people who say that gay men with HIV do not have an absolute obligation to disclose. It's putting us back in time."[119]

d. Michael Leshner, Lawyer

Leshner's reported cases and media coverage span from February 1985 to April 2009.[120] Leshner appeared as counsel in far fewer reported decisions than Lepofsky, which is not surprising given that Leshner was primarily a trial Crown attorney. Over his career, Leshner prosecuted a range of routine criminal offences, including impaired driving,[121] assaults,[122] and sexual assaults.[123] These included some unusual thefts, such as a funeral director who stole a $5000 watch from a corpse[124] as well as stolen art and museum artifacts.[125] He also frequently appeared before the Ontario Review Board regarding

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[119] Margaret Wente, "To Tell or Not to Tell[:] The HIV Dilemma", *The Globe and Mail* (11 April 2009) A1, online: 2009 WLNR 6792571.
[120] For first media mention, see "Crown Considers Appeal of 1 1/2-Year Term in Killing", *The Globe and Mail* (15 February 1985) M1, online: 1985 WLNR 1380076; for first reported decision, see *R v Canas-Hueso*, 1991 CarswellOnt 2337 (WL Can) (Ct J (Gen Div)) [*Canas-Hueso*]; for last media mention, see Kirk Makin, "Judge Rules Man Can't Contact Politicians", *The Globe and Mail* (19 April 2005) A15, online: 2005 WLNR 11915046; for last reported decision, see *Zhang (Re)*, [2009] ORBD No 647 (QL) [*Zhang*].
[121] See *R v Mickel*, 1995 CarswellOnt 4476 (WL Can), [1995] OJ No 1984 (QL) (Ct J (Prov Div)) [*Mickel*]; *R v Mohabir*, 1996 CarswellOnt 960 (WL Can), [1996] OJ No 1105 (QL) (Ct J (Prov Div)).
[122] See *R v Gray*, 1992 CarswellOnt 1930 (WL Can), [1992] OJ No 1623 (QL) (Ct J (Gen Div)); *R v Hoolans*, [1994] OJ No 591 (QL), 1994 CarswellOnt 4128 (WL Can) (Ct J (Gen Div)); *R v Coelho*, [1999] OJ No 2255 (QL), 1999 CarswellOnt 1876 (WL Can) (Sup Ct J).
[123] See *Canas-Hueso*, *supra* note 120; *R v Tremblay*, 1992 CarswellOnt 5177 (WL Can), [1992] OJ No 792 (QL) (Ct J (Prov Div)); *R v Filey*, 1993 CarswellOnt 5467 (WL Can) (Ct J (Prov Div)); *R v Motsewetsho*, 2003 CarswellOnt 7144 (WL Can) (Sup Ct J).
[124] "Ex-Funeral Director Jailed, Fined in Theft", *The Toronto Star* (17 March 1992) A9.
[125] Gary Oakes, "Host Jailed After Guests Spot Stolen Art – Theirs", *The Toronto Star* (27 April 1996) A25.

dispositions of not criminally responsible accuseds.[126] However, he rarely argued *Charter* questions, at least in reported cases.[127]

Among Leshner's high-profile cases were some that were presumably of particular relevance for the LGBTQ community. In 1990, he prosecuted a Don Jail inmate for forcing a gay inmate to have sex with him under threat of revealing his homosexuality to other inmates.[128] Years later, he prosecuted a high-profile homophobic assault against two gay men, telling the press that "No matter if you are gay, black, Jewish, hate is hate. We must find what the courts can do about homophobia. Hate is a learned experience."[129] He later recommended that the Crown appeal from the sentence.[130] Indeed, it was less than two weeks after the sentencing that he wrote his op-ed "accusing" politicians of not doing enough about hate.[131] Perhaps most importantly, Leshner was the trial Crown in *R v Genereux*, in which the defendant physician pled guilty to assisted suicide involving fatal medication prescribed to two HIV-positive patients—becoming the first Canadian physician convicted of assisted suicide.[132] While Leshner recommended the Crown appeal against the

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[126] See *Borowy (Re)*, [2001] ORBD No 1284 (QL); *Jackson (Re)*, [2001] ORBD No 1283 (QL); *Jones (Re)*, [2001] ORBD No 1285 (QL); *Pryce (Re)*, [2006] ORBD No 446 (QL); *Tessema (Re)*, [2006] ORBD No 434 (QL); *Knight (Re)*, [2006] ORBD No 604 (QL); *Kumar (Re)*, [2006] ORBD No 634 (QL); *JB (Re)*, [2006] ORBD No 930 (QL); *Douglas (Re)*, [2007] ORBD No 274 (QL); *Ing (Re)*, [2007] ORBD No 995 (QL); *Thomas (Re)*, [2007] ORBD No 987 (QL); *Bodnar (Re)*, [2007] ORBD No 1098 (QL); *Hewitt (Re)*, [2007] ORBD No 1092 (QL); *Thurston (Re)*, [2007] ORBD No 1110 (QL); *Abdikarim (Re)*, [2007] ORBD No 1670 (QL); *Crago (Re)*, [2007] ORBD No 1666 (QL); *Flamminio (Re)*, [2007] ORBD No 1651 (QL); *Marchese (Re)*, [2007] ORBD No 1680 (QL); *Burwell (Re)*, [2007] ORBD No 2288 (QL); *Perry (Re)*, [2007] ORBD No 2286 (QL); *Reichmann (Re)*, [2007] ORBD No 2273 (QL); *Abeje (Re)*, [2008] ORBD No 420 (QL); *Dyer (Re)*, [2009] ORBD No 639 (QL); *McNevin (Re)*, [2009] ORBD No 635 (QL); *Zhang*, *supra* note 120.

[127] *Mickel*, *supra* note 121 at 19.

[128] Gary Oakes, "'Human Predator' Gets 5 Years' Prison", *The Toronto Star* (22 June 1990) A30.

[129] See Gary Oakes, "Gay Pair Attacked by 3, Trial Told", *The Toronto Star* (7 March 1995) A22; Wendy Darroch, "2 of 3 Men Convicted in Gay-Bashing Case", *The Toronto Star* (17 March 1995) A5.

[130] "Defence, Crown Plan to Appeal as Pair Sentenced", *The Globe and Mail* (13 May 1995) A6.

[131] Leshner, "Let's End the Hate", *supra* note 109.

[132] See *R v Genereux*, 44 OR (3d) 339, [1999] OJ No 1387 (QL) (CA); Henry Hess, "AIDS Doctor Convicted of Assisted Suicide", *The Globe and Mail* (8 January 1998) A6, online:

sentence,[133] the appeal was dismissed.[134] Years later, during the prosecution of Bruce McArthur for the murder of several gay men in Toronto, Leshner would face criticism for his handling of McArthur's previous prosecutions for assaults against male sex workers.[135]

Apart from his LGBTQ activism, in his capacity as a Crown prosecutor and government employee, Leshner was a vocal critic of the Government of Ontario and the Ministry of the Attorney General.[136] This criticism ranged from its handling of courthouse asbestos as "astounding"[137] to a proposed diversion program for black persons accused of crimes as "human rights gone amok"[138] and "nuts."[139] It seems reasonable that Leshner's work as an activist and his practice as a Crown prosecutor shared common roots. Particularly revealing were his comments to *Globe and Mail* columnist Margaret Wente in 2002 that he became a lawyer because he "wanted to stand up to bullies."[140] As Wente observed, he clearly considered opponents of gay marriage, and LGBTQ rights more broadly, to be bullies.[141]

1998 WLNR 6262630; "MD Admits Aid in Suicide Bids[;] Doctor Faces Up To 14 Years In Jail After Canada's First Conviction", *The Toronto Star* (23 December 1997) A1; Henry Hess, "Doctor Jailed 2 years for Helping Man Kill Himself[;] Patient Depressed After HIV Test Given Lethal Dose of Pills", *The Globe and Mail* (14 May 1998) A1, online: 1998 WLNR 6221612.

[133] *Ibid*.

[134] *Ibid.*

[135] See Jacques Gallant, "Details Emerge in McArthur's Assault Case from 2003", *The Toronto Star* (23 February 2018) A1, online: 2018 WLNR 14465355; Jacques Gallant, "'I'm Sorry for All the Pain and Anger I've Caused'", *The Toronto Star* (24 February 2018) A1, online: 2018 WLNR 14465396.

[136] See Margaret Wente, "From the Closet to the Altar", *The Globe and Mail* (20 July 2002) A15, online: 2002 WLNR 12096358.

[137] See Kirk Makin, "Asbestos Memo Upsets Staff at Downtown Courthouse", *The Globe and Mail* (15 March 2001) A8, online: 2001 WLNR 10175024 ("astounding"); Kirk Makin, "Courthouse Cleanup Delayed Indefinitely", *The Globe and Mail* (17 March 2001) A23, online: 2001 WLNR 10175527.

[138] Sean Fine, "Plan Would Divert Blacks from Court; Ontario Eyes Community Service for Young Who Commit Minor Crimes", *The Globe and Mail* (5 November 1994).

[139] Leslie Papp, "No Separate Black Courts, Ministry Says", *The Toronto Star* (8 November 1994) A24.

[140] Wente, *supra* note 136.

[141] *Ibid*.

e. Edgar Schmidt, Activist and Lawyer

While Leshner and Lepofsky both courted controversy in their activism, it is fair to characterize Edgar Schmidt as far more controversial, albeit likely less publicly well-known. Unlike Leshner and Lepofsky—whose activism was largely separate from their respective practices—Schmidt's activism was directly connected to his government practice. As a lawyer for the Department of Justice, Schmidt advised on the *Charter* compliance of government bills for the purpose of fulfilling the legislated duties of the Minister of Justice.[142] Federal legislation requires the Minister to inform the House of Commons if he "ascertains" that any provisions of any government bills "are inconsistent with the purposes and provisions of" the *Charter* or the *Canadian Bill of Rights*.[143] Schmidt, frustrated for years that the Department and Minister used a very high threshold to trigger reporting to the House of Commons, and having exhausted internal avenues to have the threshold changed,[144] brought an application in Federal Court for a declaration that that interpretation of the legislation was incorrect. He did so without first resigning, although he was immediately suspended.[145] Schmidt was unsuccessful on the application, the appeal from that application, and was refused leave to appeal to the Supreme Court of Canada.

At what point did Schmidt go from being a lawyer encouraging his client to act lawfully to being an activist? For my purposes, it is the act of going public with his concerns—particularly, filing the application in federal court—that is determinative. By doing so, he squarely breached his duty of loyalty, the scope

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[142] *Schmidt v Canada (AG)*, 2018 FCA 55, aff'g 2016 FC 269 [*Schmidt* FCA], leave to appeal to SCC denied, 4 April 2019 (38179). See John Mark Keyes, "Loyalty, Legality and Public Sector Lawyers" (2019) 97:1 Can Bar Rev 129. See also Andrew Flavelle Martin, "Folk Hero or Legal Pariah? A Comment on the Legal Ethics of Edgar Schmidt and *Schmidt v Canada (Attorney General)*" (2020) Man LJ (forthcoming) [Martin, "Folk Hero"].

[143] *Canadian Bill of Rights*, SC 1960, c 44, s 3, reprinted in RSC 1985, Appendix III, No 6; *Department of Justice Act*, RSC 1985, c J-2, s 4.1. Similarly, these provisions and the *Statutory Instruments Act*, RSC 1985, c S-22, s 3, mandate the examination of draft regulations.

[144] Keyes, *supra* note 142 at 150.

[145] See e.g. Bill Curry, "Judge Raps Justice Officials for Treatment of Whistle-Blower", *The Globe and Mail* (16 January 2013) A1, online: 2013 WLNR 1128587.

of which I will discuss below.[146] The fact that he exhausted internal avenues first is commendable but does not change the fact that he breached his duty of loyalty. The breach admittedly would have been worse had he not exhausted internal avenues first—indeed, in that situation he would have also failed to fulfill his duty of candour to the client which, as I will discuss below, is another aspect of the duty of loyalty.[147] Similarly, his choice to proceed with a court application, as opposed to taking his concerns to the media for example, was perhaps more honourable than the alternatives but does change the fact that he breached his duty of loyalty.

Schmidt understood himself to be, and was portrayed in the media as, a brave whistleblower and activist for both the rule of law generally and the *Charter* specifically.[148] His activism was rooted in his Mennonite beliefs:

> There is a valuable role for the state but I think citizens need to be vigilant and be aware that the institutions that they create, particularly the state institutions that they create, sometimes abuse the powers that are entrusted to them….That would be borne out by Mennonite experience. This is part of what has made me perhaps more sensitive to the state's abuse of its power than others might be.[149]

Similarly, he stated elsewhere that "[t]he Anabaptist Mennonite experience teaches that the state is not always benevolent with regard to its citizens, and that their watchfulness is appropriate with regard to the possibility of abuse of power."[150]

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[146] See note 165, *below*, and accompanying text.
[147] See notes 176–78, *below*, and accompanying text.
[148] See e.g. Sean Fine, "Lawyer Takes on Justice Department", *The Globe and Mail* (21 September 2015) A4, online: 2015 WLNR 27996920; "Blowing the Whistle", Editorial, *The Toronto Star* (20 January 2013) A14, online: 2013 WLNR 1511205; Kirk Makin, "On a Crusade to Sustain the Rule of Law", *The Globe and Mail* (23 February 2013) A16, online: 2013 WLNR 4593115.
[149] Roderick MacDonnell, "The whistleblower" (21 November 2013), online: *CBA/ABC National* <www.nationalmagazine.ca/en-ca/articles/law/ethics/2013/the-whistleblower>.
[150] Evelyn Rempel Petkau, "A steep price for following his conscience" (11 March 2015), online: *Canadian Mennonite* <canadianmennonite.org/stories/steep-price-following-his-conscience>.

Unlike Lepofsky and Leshner, the ethics of Schmidt's actions have been the subject of legal commentary. In a thoughtful analysis, John Mark Keyes, former Chief Legislative Counsel for Canada, has argued that Schmidt's actions would be permissible only in "the clearest circumstances of illegality."[151] Keyes concludes that this threshold was not reached in Schmidt's circumstances.[152]

II. THE DUTIES OF GOVERNMENT LAWYERS

In this Part, I canvass the relevant duties of government lawyers, with a focus on duties of loyalty. As Elizabeth Sanderson explains, government lawyers have three kinds of duties, which she terms "layers": "professional duties" as lawyers, "public law duties" as delegates of the Attorney General, and "public service duties" as government employees.[153] The term "layers" may suggest a hierarchy instead of an overlap or interplay, which I think is inaccurate and not necessarily Sanderson's intention.[154] It is important to emphasize here that these three kinds of duties do not interlock neatly—for example, as I have demonstrated elsewhere, with respect to political activity.[155] My primary focus is on the professional duties of government lawyers as lawyers, but I acknowledge the role of public service duties as well. The public law duties, although important, are less relevant for my analysis. As I will return to below,[156] however, all powers of government lawyers, including Crown prosecutors, are delegated powers of the Attorney General.

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[151] Keyes, *supra* note 142 at 156.
[152] *Ibid*.
[153] Elizabeth Sanderson, *Government Lawyering: Duties and Ethical Challenges of Government Lawyers* (Toronto: LexisNexis Canada, 2018) (Sanderson is explicit that there may be additional "layers" at 48); Andrew Flavelle Martin, "Orphans No More: A Review of Elizabeth Sanderson, *Government Lawyering: Duties and Ethical Challenges of Government Lawyers*" (2018) 41:2 Dal LJ 575 (Sanderson's "layers" coincide with the sides of Adam Dodek's "rule of law triangle" at 577) [Martin, "Orphans"].
[154] Martin, "Orphans", *supra* note 153.
[155] See e.g. Martin, "Political Activity of Government Lawyers", *supra* note 1 at 268–69.
[156] See note 189, *below*, and accompanying text.

a. Duties as Lawyers

Government lawyers' professional duties are those of lawyers as members of law societies. There is a rich and divided literature on whether government lawyers have special professional duties or the same professional duties as all other lawyers, though the case law in Ontario is emphatic that it is the latter.[157] In this section, I focus on the implications of government lawyers' professional duties as set out in the rules of professional conduct and the case law.

While the rules of professional conduct on outside interests provide a starting point, they are far from determinative and, indeed, are somewhat limited. The *Model Code of Professional Conduct* ("*Model Code*") of the Federation of Law Societies of Canada provides that "[a] lawyer must not allow involvement in an outside interest to impair the exercise of the lawyer's independent judgment on behalf of a client."[158] The commentary to the rule elaborates:

> When the outside interest is not related to the legal services being performed for clients, ethical considerations will usually not arise unless the lawyer's conduct might bring the lawyer or the profession into disrepute or impair the lawyer's competence, such as if the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation.[159]

The *Model Code* also includes a separate rule that seems to contemplate only paid outside interests, stating that "[a] lawyer who engages in another profession, business or occupation concurrently with the practice of law must not allow such outside interest to jeopardize the lawyer's professional integrity, independence or competence."[160] The limited case law on these rules typically

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[157] See e.g. Andrew Flavelle Martin & Candice Telfer, "The Impact of the Honour of the Crown on the Ethical Obligations of Government Lawyers: A Duty of Honourable Dealing" (2018) 41:2 Dal LJ 443 at 453–59 (literature), 449–51 (Ontario case law).
[158] Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2009, last amended 2019) at r 7.3-2, online: *Federation of Law Societies of Canada* <www.flsc.ca> [*FLSC Model Code*].
[159] *Ibid* at r 7.3-2, commentary 2.
[160] *Ibid* at r 7.3-1.

involves lawyers intermingling their business interests and their practice, for example by lending money to, or borrowing money from, a client.[161] This rule on outside interests connects to the lawyer's duty to encourage respect for the administration of justice.[162] As the corresponding commentary indicates, this duty goes beyond the lawyer's conduct in her professional life.[163] Government lawyers, being more closely identified with the administration of justice than other lawyers, necessarily have a greater opportunity to encourage or discourage respect for that administration through their actions both inside and outside of practice.

As I will discuss below,[164] I assume that a government lawyer's activism does not impair her judgment in her practice except where the particular legal matter on which the lawyer has worked for the government overlaps with the activism. It is unlikely that activism will bring the lawyer or profession into disrepute, unless it is for an especially controversial cause. Thus, for example, disability rights activism would not harm—and indeed would likely improve—public perception of the government lawyer and the legal profession. However, one can imagine a counterexample, such as some civil liberties activism, where public perception may (rightly or wrongly) be negative. Consider, for example, freedom of expression activism for Holocaust deniers.

With this rule on outside interests as context, I now turn to the lawyer's duty of loyalty. As indicated by Justice Binnie in *R v Neil*, the lawyer's duty of loyalty includes four component duties: conflicts, commitment, confidentiality, and candour.[165] I will consider each of these in turn. Among these components of the lawyer's duty of loyalty, the most important in this context is likely the duty to avoid conflicts of interest. The *Model Code* defines "conflict of interest" as "the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own

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[161] See e.g. *Duffy (Re)*, 2010 CanLII 66190 (Nfld LS); *Thistle (Re)*, 2016 CanLII 107452 (Nfld LS), aff'd 2017 NLTD(G) 207, 2017 CanLII 86502 (LS); see also *Lim (Re)*, 2019 LSBC 19 (where the lawyer committed conduct unbecoming by lending money at an illegal rate).
[162] *FLSC Model Code*, *supra* note 158 ("A lawyer must encourage public respect for and try to improve the administration of justice" at r 5.6-1).
[163] *Ibid* at r 5.6-1, commentary 1.
[164] See notes 166–67, *below*, and accompanying text.
[165] *R v Neil*, 2002 SCC 70 at para 19 [*Neil*].

interest or the lawyer's duties to another client, a former client, or a third person."[166] Assuming the government lawyer is not providing legal services in the course of her activism,[167] this is not a client-client conflict, and thus most of the case law on conflicts does not apply. Instead, this is a client-lawyer conflict, albeit a unique one. The question then becomes whether the lawyer's interest in pursuing the cause would affect her representation of, or loyalty to, the government as a client.

For most activists—including disability or LGBTQ-rights activists—a conflict of interest arises where the interests of a given activist, or the cause or the community or a subsection of it, are contrary to the legal interests of the government. For instance, the interests of the community of persons with disabilities or LGBTQ persons would be best served by a strong section 15 of the *Charter*, and a correspondingly narrow and weak section 1 of the *Charter*, whereas the government's interests would generally be best served by a narrow and weak section 15 and a broad or strong section 1. The activist government lawyer arguing a section 15 case—for example, Lepofsky appearing in *Andrews*—would thus face a conflict of interest. I will consider below whether recusal or waiver provide appropriate and sufficient resolution of these conflicts.[168]

In the alternative, if the situation of the activist government lawyer does not constitute a conflict of interest, the issue of commitment may nevertheless be present. In a few different ways, Canadian courts have explained what constitutes commitment to the client's cause—including its potential breach—and have linked it to the duty to avoid conflicts of interests. In *Canadian National Railway Co v McKercher LLP*, Chief Justice McLachlin wrote that "[t]he duty of commitment is closely related to the duty to avoid conflicting interests. In fact, the lawyer must avoid conflicting interests precisely so that he can remain committed to the client."[169] At the same time, the Chief Justice also

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[166] *FLSC Model Code*, *supra* note 158 at r 1.1.
[167] I note here that she may well be representing herself in the course of her activism. See Part I, *above* (text accompanying notes 11 and 12), where Lepofsky represented himself, albeit with the assistance of other lawyers, before the Human Rights Tribunal.
[168] See *below* notes 228–29 and accompanying text.
[169] *Canadian National Railway Co v McKercher LLP*, 2013 SCC 39 at para 43 [*McKercher*].

held that "[i]n addition to its duty to avoid conflicts of interest, a law firm is under a duty of commitment to the client's cause which prevents it from summarily and unexpectedly dropping a client in order to circumvent conflict of interest rules."[170] In *Neil*, Justice Binnie identified the relevant aspect of commitment as "ensuring that a divided loyalty does not cause the lawyer to "soft peddle" his or her defence of a client out of concern for another client" and equated it with "zealous representation".[171] Justice Moldaver, writing for the majority in *Groia v Law Society of Upper Canada*, clarified that "resolute advocacy is *a key component* of the lawyer's commitment to the client's cause."[172] Importantly, for my purposes, both actual commitment to the client's cause and the informed reasonable public perception of that commitment are relevant, as Justice Cromwell has written:

> The duty of commitment to the client's cause is thus not only concerned with justice for individual clients but is also deemed essential to maintaining public confidence in the administration of justice. Public confidence depends not only on fact but also on reasonable perception. It follows that we must be concerned not only with whether the duty is in fact interfered with but also with the perception of a reasonable person, fully apprised of the relevant circumstances and having thought the matter through.[173]

Thus, the concern is not just that the activist government lawyer's commitment is not infringed in fact, but also that her commitment is not impugned in the perception of a reasonable and informed member of the public.

Commitment, more than conflicts, would be engaged where an activist has been vocally critical of the government in one respect while in another representing the government as client. Consider here, for instance, the activist government lawyer arguing a federalism case with absolutely no connection to her cause. If that lawyer has, as an activist, been criticizing the same government

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[170] *Ibid* at para 10.
[171] *Neil*, *supra* note 165 at para 19.
[172] *Groia v Law Society of Upper Canada*, 2018 SCC 27 at para 72 [emphasis added, citations omitted].
[173] *Canada (AG) v Federation of Law Societies of Canada*, 2015 SCC 7 at para 97 [*Canada v FLSC*].

in relation to her cause, can the client—and more importantly the public—be confident that that the lawyer is advocating with all possible resoluteness? The answer appears to depend on the vitriol with which the lawyer frames and characterizes and executes her activism. Other than modulating this, there is little the government lawyer—or, as I will return to below,[174] even the government as client—can do to defuse the commitment problem. Returning to, by way of example, Lepofsky's criticism of the Rae and Harris governments for inaction and Leshner's condemnation of Ontario politicians, both potentially present problems of commitment. Schmidt clearly breached commitment by opposing his client's legal interpretation in court.

Confidentiality is fairly straightforward in its application to activist government lawyers. If there were any situation in which the lawyer gained confidential information that would be relevant to her activism, the lawyer must prioritize the lawyer's duty to the client by maintaining confidentiality. That is, the lawyer's duty to the client must trump any 'duty' that the activist owes to the cause. Confidentiality as a matter of legal ethics is often at issue between clients, or between former clients and current clients, where the lawyer has duelling obligations to a client. In the activism context, again assuming the lawyer is not providing legal services to the cause, the lawyer is in the legally clear although potentially uncomfortable situation that she must prioritize the obligation to her client. For his part, Schmidt presents a more direct violation of confidentiality by publicly disclosing both the advice he gave his client (on the interpretation of the relevant statutory provisions) and the fact that his client rejected that advice.[175]

As for candour, the government lawyer must disclose or declare to the government as client that she plans to pursue, or is pursuing, activism in general and specific activities in particular. Without this information, the government as client may not be aware of the lawyer's activities and any perceived or actual

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[174] See note 235, *below*, and accompanying text.

[175] The situation would have been different if the future harm exception to confidentiality had applied. See *FLSC Model Code*, *supra* note 158 at r 3.3-3. See also Keyes, *supra* note 142 at 155 (Schmidt nonetheless followed the spirit of the rules by breaching confidentiality as little as possible, i.e. by not disclosing the specific advice he had given about any particular government bill). See *FLSC Model Code*, *supra* note 158 at r 3.3-4.

interference with the government lawyer's ability to fulfill her obligations as lawyer to the government as client—thus the government as client cannot make an informed choice about the situation. Indeed, this situation is in some respects similar to the firm in *McKercher*, where candour required that the firm inform the client that it was considering retainers to act against the client, and that it was considering dropping the client in order to take those retainers.[176] As Chief Justice McLachlin noted in that case, "[a]t the very least, the existing client may feel that the personal relationship with the lawyer has been damaged and may wish to take its business elsewhere."[177] I consider below whether the government must waive the duty of loyalty in such situations.[178]

Thus, conflicts and commitment are the two most important aspects of the lawyer's duty of loyalty for my purposes. Having considered the professional duties of the government lawyer, particularly the lawyer's duty of loyalty, I now turn to the public services duties, particularly the public service duty of loyalty.

b. Duties as Public Servants

All public servants, including government lawyers, have duties that flow from their status as public servants. For my purposes, the most important public service duty is the duty of loyalty. This public service duty of loyalty has some overlap with, but is not the same as, the lawyer's duty of loyalty.

The lawyer's duty of loyalty is compatible with, if not matches or exceeds, the public service duty of loyalty. The Supreme Court of Canada has long recognized that public servants' duty of loyalty allows only a limited degree of public criticism of government policy, even where that criticism is unrelated to a public servant's specific duties, specifically in its 1985 decision in *Fraser v PSSRB*:

> As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty owed is to the

[176] See e.g. *McKercher*, *supra* note 169 at paras 45–46.
[177] *Ibid* at para 46.
[178] See note 235, *below*, and accompanying text.

> Government of Canada, not the political party in power at any one time. A public servant need not vote for the governing party. Nor need he or she publicly espouse its policies. And indeed, in some circumstances a public servant may actively and publicly express opposition to the policies of a government. This would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others, or if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability. But, having stated these qualifications…, it is my view that a public servant must not engage … in sustained and highly visible attacks on major Government policies.[179]

These limits are rooted in "the public interest in both the actual, and apparent, impartiality of the public service."[180] While this case predated the *Charter*, the Court was explicit in a later case that the *Charter* did not preclude some limitations on political activity by public servants, which would also apply to criticism of government policy.[181]

This duty of loyalty is reinforced by sub-statutory internal rules and guidelines, most of which are specific to government lawyers—as members of the Ministry or Department of Justice, or as members of the Public Prosecution Service of Canada ("PPSC")—and thus blur to some extent the distinction between duties as public servants and duties as delegates of the Attorney General. For example, the *Public Prosecution Service Code of Conduct* ("*PPSC Code*"), in language that closely tracks *Fraser*, addresses "public criticism of the PPSC, the Office of the [Canada Elections] Commissioner and the Federal Government":

> Public servants' duty of loyalty to the federal government as employer includes a commitment to be discreet and to refrain from public statements critical of the federal government. Employees must avoid making, through a public medium such as radio, television, blog or social networking sites (such as Facebook or Twitter), and either directly or through a third party, any public pronouncement critical of

[179] *Fraser v PSSRB*, [1985] 2 SCR 455 at 470, 23 DLR (4th) 122 [*Fraser*].
[180] *Ibid*.
[181] *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69, 82 DLR (4th) 321 [*Osborne*].

> the federal government's policies, programs, or officials, or on matters of current political controversy, where the statement or actions may give the appearance of a conflict with the employee's position and duties.[182]

Similarly, the *Values and Ethics Code of the Department of Justice* ("*DOJ Code*") emphasizes that public servants' duties include "[m]aintaining the impartiality of the public service and not engaging in any outside or political activities that impair or could be seen to impair their ability to perform their duties in an objective or impartial manner."[183] To similar effect is the Ontario *Crown Prosecutor Manual*, which states that:

> Public statements by Prosecutors must not compromise their ability to function effectively as public servants nor diminish the public perception of impartiality necessary to fulfill a Prosecutor's quasi-judicial responsibilities. … In their personal capacity Prosecutors must not make public statements that would:
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> - compromise their ability to function as a minister of justice by commenting publicly on the wisdom of a particular offence or specific law, a government policy, position or proposal
> - discourage public respect for the administration of justice or weaken the public's confidence in legal institutions
> - contravene professional codes of conduct or
> - lecture on matters of public interest where their opinion is sought because they are a representative of the Crown.[184]

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[182] "PPSC Code of Conduct" (last modified 18 August 2016) at 8.16, online: *Public Prosecution Service of Canada* <www.ppsc-sppc.gc.ca/eng/bas/cc.html> [*PPSC Code*].
[183] "Values and Ethics Code of the Department of Justice[,] Chapter II: Conflict of Interest and Post-employment" (last modified 28 November 2016), online: *Department of Justice Canada* <www.justice.gc.ca/eng/rp-pr/cp-pm/vec-cve/c2.html#Chapter2.4.1> at heading 1(g) [*DOJ Code*].
[184] "Crown Prosecution Manual" (last modified 1 November 2018), online: *Ontario Ministry of the Attorney General* <www.ontario.ca/document/crown-prosecution-manual> at D.6 [*Crown Prosecution Manual*].

The *Crown Prosecutor Manual* also states that "[p]rosecutors must not undertake any actions that would reasonably appear to be inconsistent with their professional obligations or the exercise of their prosecutorial discretion."[185]

These policy documents also deal with conflicts of interest in a manner similar to the rules of professional conduct.[186] (Ontario government lawyers are bound by the conflict of interest rules prescribed under the *Public Service of Ontario Act*.[187]) While these internal policies and rules are binding as a matter of labour and employment law, from a doctrinal perspective they are less meaningful than the duties of loyalty—as lawyer and public servant—set out in the case law and rules of professional conduct. While the internal policies and rules could change tomorrow if the government so decided, the case law would not. The legal requirements can inform the policies and rules, less so the converse.

The public servant's duty of loyalty will be most demanding as it relates to criticism connected to the government lawyer's duties and less demanding, but still applicable, as it relates to criticism unconnected to the government lawyer's duties. Activism—including the activism of Lepofsky, Leshner, and unquestionably of Schmidt—would appear to constitute sustained and highly visible attacks on major government policies. For my purposes, the most important part of this public servant's duty of loyalty is largely contiguous with the lawyer's duty of commitment. Both the lawyer's duty of loyalty and the public servant's

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[185] *Ibid* at D.31 See notes 188 and 191, *below*, and accompanying text where I return to the discussion regarding prosecutorial discretion.

[186] See e.g. *PPSC Code*, *supra* note 182 ("[a] real conflict of interest denotes a situation in which a public official has knowledge of a private economic interest that is sufficient to influence the exercise of his or her public duties and responsibilities" at 8.3). Contrast with *DOJ Code*, *supra* note 183 ("[c]onflict of interest: a situation in which the public servant has private interests that could improperly influence the performance of his or her official duties and responsibilities or in which the public servant uses his or her office for personal gain. … Conflict of interest does not relate exclusively to matters concerning financial transactions and the transfer of economic benefit. While financial activity is important, conflicts of interest in any area of activity can have a negative impact on the perceived objectivity of the public service" at Chapter II). See also e.g. *Crown Prosecution Manual*, *supra* note 184 ("[a] conflict of interest may arise in any situation where a Prosecutor's private interests are actually or may be reasonably perceived to be in conflict with her public service responsibilities" at D.31).

[187] *Conflict of Interest Rules for Public Servants (Ministry) and Former Public Servants (Ministry)*, O Reg 381/07.

duty of loyalty are engaged in the government lawyer's criticism (or lobbying or litigation) of government policies unrelated to her duties. This is a challenge for both Lepofsky and Leshner. For an activist lawyer more in the Schmidt mold, the relevant part of this public service duty of loyalty is contiguous not only with the lawyer's duty of commitment but also with the lawyer's duty to avoid conflicts of interest. In both respects, loyalty is engaged in the criticism and litigation of government policies directly related to her duties.

c. The Special Duties of Crown Prosecutors

Particular professional obligations apply to Crown prosecutors. The *Model Code* provides that "[w]hen acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect," and the commentary elaborates that "[t]he prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately."[188]

Crown prosecutors, like all government lawyers, exercise the delegated authority of the Attorney General—specifically, to "conduct and regulate all litigation for and against the Crown."[189] Crown prosecutors, in particular, exercise the delegated prosecutorial powers of the Attorney General, as her "agents" and as "local ministers of justice,"[190] and are protected by the delegated prosecutorial independence of the Attorney General that accompanies those powers. The Supreme Court of Canada in *Krieger v Law Society of Alberta* held that "[i]t is a constitutional principle that the Attorneys General of this country must act independently of partisan concerns when exercising their delegated sovereign authority to initiate, continue or terminate prosecutions."[191] As Ontario's *Crown Prosecution Manual* puts it, "[t]he independence of the

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[188] *FLSC Model Code*, *supra* note 158 at r 5.1-3, commentary 1.
[189] *Ministry of the Attorney General Act*, RSO 1990, c M.17, s 5(h).
[190] *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para 37, as quoted e.g. in Sanderson, *supra* note 153 at xxiii. See also e.g. *Crown Attorneys Act*, RSO 1990, c C.49 ("[e]very Crown Attorney and every provincial prosecutor is the agent of the Attorney General for the purposes of the *Criminal Code* (Canada)", s 10) [*Crown Attorneys Act*].
[191] *Krieger v Law Society of Alberta*, 2002 SCC 65 at para 3.

Attorney General advances the public interest by enabling Prosecutors to exercise considerable prosecutorial discretion and properly fulfill their quasi-judicial role as ministers of justice without fear of political influence."[192] This independence is reflected in the oath of office, which requires Crown prosecutors to "truly and faithfully, according to the best of [his/her] skill and ability, execute the duties, powers and trusts of Crown Attorney (*or* assistant Crown Attorney) *without favour or affection to any party.*"[193] As mentioned above, the *Crown Prosecution Manual* also states that "[p]rosecutors must not undertake any actions that would reasonably appear to be inconsistent with their professional obligations or the exercise of their prosecutorial discretion."[194]

To emphasize, this independence flows from the Attorney General, and the Crown prosecutor is not unmoored but works within a hierarchical structure under an array of Directives.[195] As Sanderson notes, "in carrying out their lawyering duties, government counsel are not free agents. … Rather, they act for the Minister within the hierarchy of the departmental organization within government."[196] That is, "the exercise of the public law principle of independence is *institutional* in nature. Government lawyers do not act alone or carry out their public law duties as free agent[s] in private practice."[197] At the same time, the Crown prosecutor is to an extent independent from the Attorney General in the conduct of individual prosecutions, particularly at the trial level: "[i]t is extremely rare for an Attorney General to become involved in decision-making in individual prosecutions. Decisions in individual prosecutions are made by the Prosecutors who act as agents for the Attorney General."[198] However, that is not to say that the Crown prosecutor should be removed from the community she serves. Consider by analogy the Canadian Judicial Council's *Ethical Principles for Judges*, which notes that "[t]he judge administers the law

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[192] *Crown Prosecution Manual*, *supra* note 184 at "Preamble to the Prosecution Manual[:] The role of the Prosecutor".
[193] *Crown Attorneys Act*, *supra* note 190, s 8 [emphasis added].
[194] *Crown Prosecution Manual*, *supra* note 184 at D.31.
[195] See e.g. *Crown Prosecution Manual*, *supra* note 184.
[196] Sanderson, *supra* note 153 at 16.
[197] *Ibid* at 50 [emphasis in original].
[198] *Crown Prosecution Manual*, *supra* note 184 at "Preamble to the Prosecution Manual[:] The role of the Attorney General".

on behalf of the community and therefore unnecessary isolation from the community does not promote wise or just judgments."[199] In the same way, a Crown prosecutor should not be isolated from the community as that isolation would impair her ability to make decisions in the public interest.

III. THE DUTIES OF LOYALTY APPLIED

Having set out the professional duties and public service duties of government lawyers, and particularly the respective duties of loyalty, in this part, I further consider the impact of those duties on government lawyers as activists. I will consider, in turn, the duty of loyalty to the specific government as client, the Crown prosecutor, a potential "own time" exception to loyalty, the role of the *Charter*, and the analogous issue of community involvement by judges.

a. Loyalty and the Specific Government

In the context of activism, it is important to consider to whom these two duties of loyalty—as lawyer and as public servant—are owed. The government lawyer owes a duty of loyalty as lawyer, and as public servant, to the specific government, not to all levels of government or all governments. Thus, for example, a litigator for the government of Ontario owes a duty of loyalty to the Crown in right of Ontario. At first glance, it might appear reasonable to conclude that the government lawyer can direct her activism toward other levels of government, or other governments, just not the specific government for which she works. Indeed, I reached a parallel conclusion in terms of political activity: the duty of loyalty of the government lawyer as lawyer precludes only political activity at the same level of government.[200]

However, I argue that activism at any level of government typically raises loyalty problems and prompts loyalty questions. It is too difficult to

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[199] "Ethical Principles for Judges" (2004) at 34, online (pdf): *Canadian Judicial Council* <cjc-ccm.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf > [*Ethical Principles for Judges*].

[200] Martin, "Political Activity of Government Lawyers", *supra* note 1 at 287–88.

separate activism at one level of government from activism at other levels.[201] While political parties are at least nominally separable or divisible at different levels of government, causes are not. For example, it would be impossible for a hypothetical federal government lawyer to lobby for the addition of gender identity to the Ontario *Human Rights Code* while plausibly maintaining indifference to the addition of the same ground to the *Canadian Human Rights Act*.[202] Moreover, for provincial lawyers, municipalities are creatures of the province and the human rights system itself is a creation of the province.[203] In his proceedings against the Toronto Transit Commission at the Ontario Human Rights Tribunal,[204] for example, Lepofsky was a provincial government lawyer using a provincial apparatus to litigate against a body created under the authority of the province.

While some kinds of activism may appear safely limited to the other level of government, that calculus can change quickly, particularly in an era of disputed cooperative federalism. For example, a provincial government lawyer who advocates for more procedural or substantive rights for refugees may be necessarily restricted if the provincial government cuts legal aid coverage for refugees.[205] Similarly, the convergence between provincial regulatory jurisdiction and federal criminal jurisdiction makes a range of other issues—such as animal cruelty, abortion access, or abortion restrictions—inherently cross-jurisdictional.

The duty of loyalty will clearly and necessarily preclude activism on the same matters for which the government lawyer has provided legal services. Schmidt is thus an important counterexample to Lepofsky and Leshner in that, not only did he breach his duty of loyalty, he did so in such a way that irreversibly damaged the lawyer-client relationship. There is no legal ethics

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[201] There may be rare exceptions. For example, Schmidt's activism was distinctly about compliance with federal legislation that had no provincial counterpart.
[202] *Human Rights Code*, RSO 1990, c H.19; *Canadian Human Rights Act*, RSC 1985, c H-6.
[203] I acknowledge of course the federal human rights system, but its jurisdiction is narrow.
[204] See cases at note 10, *above*, and accompanying text.
[205] See e.g. Kristy Kirkup, "Justice Minister Swats Back at Ontario Attorney General Over Refugee Legal Aid Spending", *The Toronto Star* (23 July 2019), online: <www.thestar.com/news/canada/2019/07/23/david-lametti-swats-back-at-ontario-attorney-general-over-refugee-legal-aid-spending.html>.

argument that permits Schmidt's violation of the duty of loyalty. While one might argue that the duty of loyalty as a matter of legal ethics is overridden and suspended in extreme cases by other duties, that is a different question that is beyond the scope of this article.[206] More fundamentally, Schmidt's actions effectively ended the lawyer-client relationship. It would be unreasonable to expect the government as client, or any client, to maintain confidence in such a lawyer moving forward. My focus is on how contemporaneous activism can be reconciled with the lawyer's ongoing duty of loyalty, primarily as a lawyer but also as a public servant—recall from the outset of this article the question of whether a person can be both a government lawyer and an activist *at the same time.* Schmidt's iteration of activism makes this essentially impossible.

b. Loyalty and the Crown Prosecutor

For the Crown prosecutor, activism is different from partisan political activity. I have argued elsewhere that the Crown prosecutor's duty of non-partisanship should preclude partisan political activity at any level of government.[207] However, activism—even, and especially, activism rooted in the community in which the Crown prosecutor serves—is not *per se* inappropriate for a Crown prosecutor. That is not to say that the activist Crown prosecutor will not face accusations of bias. For example, the uninformed and otherwise thoughtless member of the public might suggest that an LGBTQ-activist Crown prosecutor cannot prosecute an offence against an LGBTQ complainant by a non-LGBTQ accused, or that an LBGTQ-activist Crown prosecutor cannot prosecute—or decline to prosecute—an offence that is controversial within the LGBTQ community, such as sexual assault by non-disclosure of HIV status. What is determinative is the perspective of a reasonably informed—and thoughtful and reasonable—member of the public.[208]

Indeed, because of their independence from the government of the day—albeit delegated independence of the Attorney General—Crown prosecutors arguably enjoy a greater ability than other government lawyers to

[206] See also Martin, "Folk Hero", *supra* note 142.
[207] Martin, "Political Activity of Government Lawyers", *supra* note 1 at 288–91.
[208] See note 173 and accompanying text.

engage in activism, particularly if said activism involves (perhaps vitriolic) criticism. In this respect, for example, Leshner's harsh criticism of the provincial government and provincial politicians was less problematic than it would have been for an appellate *Charter* litigator such as Lepofsky.

c. Loyalty and Own Time, Own Voice

Having considered the various dimensions of the government lawyer's duty of loyalty, I now consider two factors that may mitigate that duty. The first, and weaker, is the "own time" argument. The second, and much stronger, is the government lawyer's fundamental rights and freedoms under the *Charter*.

As described in Part I, one argument for the activist government lawyer is that she can pursue activism on her "own time". Recall here Lepofsky's account of his activism: "I've got a full-time heavy caseload, and *I do this on my own time* and it's something I love doing and I've spent a lot of time doing, but whether its evenings or weekends or late at night or over lunch or over breakfast or on time away from work, I do them both."[209] This argument works for the government lawyer as government employee, at least in some respects. For example, Ontario legislation allows non-management employees to engage in political activity so long as it is outside of the workplace, out of uniform, and does not use government resources.[210] (Following *Fraser*, the same would not apply to criticism of government policies.[211]) However, this argument cannot work for the government lawyer as lawyer insofar as the duties of lawyers, and particularly the duty of loyalty, are engaged. These duties are not limited to work premises or work hours, but instead apply so long as the client is the client (and to a lesser extent to past clients).

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[209] Burnett, *supra* note 89 [emphasis added].
[210] *PSOA*, *supra* note 3 ("[a] public servant shall not, (a) engage in political activity in the workplace; (b) engage in political activity while wearing a uniform associated with a position in the public service of Ontario; (c) use government premises, equipment or supplies when engaging in political activity; or (d) associate his or her position with political activity, except if the public servant is or is seeking to become a candidate in a federal, provincial or municipal election, and then only to the extent necessary to identify the public servant's position and work experience", s 77).
[211] See note 179 and accompanying text.

Similarly, the fact that a given activist government lawyer does not identify as a government lawyer in the course of her activism, or affirms or disclaims that the activism is in a personal capacity,[212] does not resolve the loyalty issue. The loyalty issue arises not because the activist government lawyer is purporting to speak for government in the course of her activism, although that would be unseemly and problematic in its own right for other reasons. Instead, the problem is she may be disloyal to the government as client in the course of practice—in reality or in public perception.

d. Loyalty and the Charter

Thus, it appears that the duty of loyalty of government lawyers as lawyers restricts, if not precludes, activism. A clean, purportedly principled, and deceptively simple approach would be to conclude that prospective activist government lawyers must choose between one of the two roles, both valid and worthwhile, but unavoidably though unfortunately incompatible together. After all, there is no legal right to be a government lawyer—or indeed, to be a lawyer at all. This approach values activism and government lawyering—indeed, it values these roles so strongly that it holds that each requires full fealty to it alone. It is reminiscent of my previous conclusion that Crown prosecutors and judicial lawyers should forego all political activity or forego their roles. The cost is high but grants a kind of nobility.

Yet, this duty of loyalty must be juxtaposed against the *Charter*, and particularly freedom of expression under section 2(b). Granted, lawyers accept limitations on their *Charter* rights that would not be justifiable for the general public.[213] Similarly, government employees accept limitations on their *Charter* rights that would not be justifiable for the general public.[214] Thus, government lawyers accept cumulatively greater constraints on freedom of expression than

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[212] See e.g. Lepofsky, "History", *supra* note 19 ("[t]his account is written in the author's personal capacity, and does not purport to represent the views of Ontario's Attorney General or his Ministry" at 125, n 1).
[213] See e.g. *Histed v Law Society of Manitoba*, 2007 MBCA 150 at para 79; *Doré v Barreau*, 2012 SCC 12 at para 68 [*Doré*]; and *Drolet-Savoie c Tribunal des professions*, 2017 QCCA 842 at para 39, leave to appeal to SCC refused, 37666 (21 December 2017).
[214] See e.g. *Osborne*, *supra* note 181.

the general public. Nonetheless, it is contrary to the notion of a free and democratic society, if not to the *Charter* itself, to prohibit a person from asserting her own legal rights and the legal rights of a group or category of people to which she belongs. In this sense, while political expression is recognized as core expression,[215] activism is more fundamental than partisan political expression and participation. There is something deeply problematic about prohibiting a person from asserting her own civil rights, and it is arbitrary and extremely difficult in practice to purport to allow a person to assert her own civil rights but not the civil rights of others similarly situated. If nothing else, it is difficult to distinguish a person's assertion of her own rights from the assertion of the rights of a group to which she belongs. To prohibit a government lawyer from asserting, even incidentally, the rights of a group to which she belongs would essentially prohibit her from asserting her own rights.

Returning to Lepofsky, it would be problematic to prohibit him from advancing his own rights as a blind person. It would be arbitrary and impractical if not impossible to allow him to advance his own rights but not those of other blind persons, and it would be arbitrary and highly difficult to allow him to advance the rights of blind persons but not, for example, deaf persons. In a similar vein, it would be problematic to prohibit Leshner from pursuing his own rights as a gay man. It would be inconceivable to allow him to advance his own rights over those of other gay men, and inconceivable to allow him to advance the rights of gay men but not, for example, lesbians.

Absent *Charter* considerations, a strict but attractive answer might be that government lawyers owe the government client absolute loyalty and must rely on others outside of government to advance their civil rights. However, under the *Charter*, this standard of loyalty would not be a minimal impairment of government lawyers' freedom of expression;[216] moreover, it would be inconsistent with the lower less-than-absolute standard of loyalty governments

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

[216] See by analogy *Osborne*, *supra* note 181 at 100–01 (an absolute prohibition on political activity by all public servants failed minimal impairment under section 1 of the *Charter*).

tend to apply with respect to political activity among their lawyers.[217] It is possible that, in the absence of Lepofsky and Leshner, other disability rights and LGBTQ rights activists may have emerged and achieved comparatively equal or more success, but that possibility is at best faint solace. To force government lawyers to rely on the possibility—essentially, to wait and hope—is fundamentally disempowering and problematic in a free and democratic society. They may reasonably consider themselves uniquely situated and obliged to pursue their cause. Indeed, Lepofsky might well argue (judging from the title of a speech he gave in 2018)[218] that lawyers have an "ethical obligation" to pursue social justice *because* they are lawyers, and the mere fact that a lawyer happens to represent the government does not absolve her of that obligation.

What about causes in which a given government lawyer's activism is not to the benefit of the government lawyer personally or to a group to which she belongs—such as, for example, animal rights activism? Restricting this kind of activism is far less problematic than restricting activism like that of Lepofsky or Leshner. A contextual and fact-specific line-drawing exercise is necessary. The further removed the activism is from the government lawyer's personal rights and situation, the less likely it will be acceptable at the same time as government service.

Schmidt provides a counterexample in this respect to Lepofsky and Leshner. All Canadians benefit from—and have a personal interest in (whether they realize it or not)—the rule of law. To characterize Schmidt as a person with

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[217] See e.g. notes 1–3, *above*, and accompanying text (examples of the approach in Ontario); see e.g. *Taman v Canada (AG)*, 2017 FCA 1 (an example of the federal approach); see also Martin, "Political Activity of Government Lawyers", *supra* note 1 at 279.

[218] David Lepofsky, "The Lawyer as Social Justice Advocate – An Ethical Obligation" (delivered at the Robson Hall Faculty of Law, University of Manitoba, Winnipeg, MB, 4 October 2018) [unpublished]; promoted at: The MLSA, "Robson Hall's Distinguished Visitor Lecture series welcomes David Lepofsky tomorrow at noon! He was named one of the most influential people in 2010 and has been awarded the Order of Canada. It is a lecture not to miss!" (4 October 2018 at 12:00), online: *Twitter* <twitter.com/themlsa/status/1047697832444981248>, referred to in Shauna Matthews, "Laws changing too slowly: disability rights advocate David Lepofsky calls out 'lack of leadership' from provincial government" (9 October 2018), online: *The Manitoban* <www.themanitoban.com/2018/10/laws-changing-too-slowly-disability-rights-advocate/35364/>.

an interest in the rule of law who was asserting his own rights alongside the rights of all persons with a similar interest in the rule of law (as it happens, everybody) would be to abandon nuance and explode my analysis. Moreover, the legal interpretation with which Schmidt took issue was a matter of public record that had been raised in Parliament.[219] Essentially, his contribution to public knowledge was that the government had rejected his legal advice on the matter.

As a matter of law, following *Doré v Barreau*, the legal question would be whether a law society, in purporting to discipline a government lawyer for her activism, had adequately balanced *Charter* rights against legitimate regulatory objectives.[220] Besides being fact-specific and reviewable only for reasonableness not correctness, such an inquiry risks missing the larger principles of legal ethics, a richer account of legal ethics in which discipline, or the potential for discipline, is not determinative.

e. Loyalty not Eunuchry: Community Involvement by Judges

Here it is helpful to consider the parallel situation of judges' community involvement. A strict and purportedly principled approach, under which the prospective activist government lawyer must choose one of the two roles, may echo the parallel predicament of the judge. However, even judges are permitted, if not encouraged, to engage in some degree of community involvement. *Ethical Principles for Judges*, while prohibiting partisan political activity by judges,[221] provides that they can be active participants in their communities, albeit with some fairly specific limitations:

> Judges are free to participate in civic, charitable and religious activities subject to the following considerations: (a) Judges should avoid any activity or association that could reflect adversely on their impartiality or interfere with the performance of judicial duties[,] (b) Judges should not solicit funds (except from judicial colleagues or for appropriate judicial purposes) or lend the prestige of judicial office to such

[219] Keyes, *supra* note 142 at 154–5.
[220] *Doré*, *supra* note 213.
[221] *Ethical Principles for Judges*, *supra* note 199 at 28.

> solicitations[,] (c) Judges should avoid involvement in causes or organizations that are likely to be engaged in litigation[, and] (d) Judges should not give legal or investment advice.[222]

The *Ethical Principles for Judges* further state that "[j]udges should refrain from conduct such as membership in groups or organizations or participation in public discussion which, in the mind of a reasonable, fair minded and informed person, would undermine confidence in a judge's impartiality with respect to issues that could come before the courts."[223] The commentary elaborates: "[a] judge is appointed to serve the public. Many persons appointed to the bench have been and wish to continue to be active in other forms of public service. *This is good for the community and for the judge,* but carries certain risks."[224] Indeed, the commentary explicitly recognizes that "[t]he judge administers the law on behalf of the community and therefore unnecessary isolation from the community does not promote wise or just judgments."[225]

I am not suggesting that judges could or should engage in activism to the same or similar extent as government lawyers. After all, in the ongoing aftermath of Justice Patrick Smith's aborted tenure as acting Dean of Law at Lakehead University's Bora Laskin School of Law,[226] judges will without a doubt be exercising more caution in their community involvement. Nonetheless, as judges can and should be engaged in their communities, in a parallel manner and to a greater degree so too should government lawyers (including Crown prosecutors).

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[222] *Ibid*.
[223] *Ibid*.
[224] *Ibid* at 33 [emphasis added].
[225] *Ibid* at 34.
[226] See e.g. Sean Fine, "Judges Association Defends Justice Patrick Smith over Job at Lakehead's Law School", *The Globe and Mail* (3 October 2018), online: <www.theglobeandmail.com/canada/article-judges-association-defends-justice-patrick-smith-over-job-at-lakehead/>. But see *The Honourable Justice Patrick Smith v Canada*, 2020 FC 629.

IV. RECUSAL AND WAIVER

In Parts II and III, I explained why the activist government lawyer faces loyalty issues that must be reconciled with *Charter* rights and freedoms—particularly freedom of expression. In this Part, I consider solutions to these loyalty issues, specifically recusal and waiver. I begin with the conflicts aspect of loyalty and then turn to the commitment aspect of loyalty.

Recusal is a solution, and indeed a necessary solution, to at least some of the conflicts issues but not to the commitment issues. An activist government lawyer should not act where the legal interests of the government are adverse to those of the cause. But how broadly do we draw the adversity and the resultant recusal? For instance, it might be somewhat uncontroversial to suggest that a disability-rights activist government lawyer should not represent the government in an appeal concerning a section 15 claim on the enumerated ground of disability. As an activist, said lawyer would favour a relatively strong or broad section 15 interpretation to advance the cause—yet, given that she works for the government, in this scenario she must pursue the government client's interest in a relatively weak or narrow section 15 interpretation. And what about a section 15 claim on a ground other than disability? The conflict between a strong or broad section 15 and a weak or narrow section 15 persists. More broadly speaking, to the extent that section 1 analyses manifest due to section 15 infringements as well as infringements of other *Charter* rights and freedoms,[227] the activist government lawyer as activist is interested in a weak or narrow section 1 whereas the government is interested in a strong or broad section 1. However, such a broad sweep would virtually preclude activists from *Charter* litigation on behalf of any government. I would argue that it is not objectively reasonable for an activist for a group protected under section 15 to represent a government in any section 15 case.[228] Thus, recusal will be necessary.

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[227] I acknowledge that this may be a controversial claim as a matter of law.

[228] I recognize a possible exception where the government concedes the section 15 infringement. However, the activist government lawyer would not be able to advise the government on whether or not to make this concession.

For example, while Lepofsky was correct to forego litigation involving disability under section 15,[229] I would argue that he should not have argued any section 15 cases, and particularly not *Andrews* as the first major section 15 case. I acknowledge, however, that his work in *Andrews* predated the bulk of his activism and the ethical inquiry should focus on his activism at the time of his work, not afterwards. Given his foundational role in the content of section 15, he might appear to the government as client to be uniquely qualified to argue *Andrews* and other section 15 cases. I presume the government as client implicitly or explicitly waived this conflicts aspect of loyalty in *Andrews* and Lepofsky's other section 15 cases, whether for this reason or for some other reason. I will return to waiver shortly.

However, recusal has practical limitations as a solution to these issues. At a certain point, the frequency of recusal will interfere with the lawyer's ability to fulfill her terms of employment.[230] Thus, the activist government lawyer should choose her area of practice carefully. For example, Lepofsky's transition from civil and *Charter* to criminal litigation reduced if not eliminated his obligation to recuse himself.[231] As for Leshner, his LGBTQ activism posed less of a problem for his practice as a Crown prosecutor than it would have had he been a constitutional litigator like Lepofsky.

While the government as client could waive this conflicts component of the duty of loyalty, waiver will not always be a complete solution. The *Model Code* provides that the lawyer can act with client consent where there is a conflict of interest, but *only* if "the lawyer reasonably believes that he or she is able to represent the client without having a material adverse effect upon the representation of or loyalty to the client or another client."[232] Where the lawyer does not reasonably believe that she can represent the client without a material adverse effect on representation or loyalty, waiver will not be a solution.

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[229] If indeed he did consciously and expressly avoid it.
[230] See by analogy *Ethical Principles for Judges*, *supra* note 199 ("[j]udges should as much as reasonably possible conduct their personal and business affairs so as to minimize the occasions on which it will be necessary to be disqualified from hearing cases" at 27).
[231] I do not speculate here on the reason for his transition. I merely note this one effect of it.
[232] *FLSC Model Code*, *supra* note 158 at r 3.4-2.

Who decides whether to waive the conflicts aspect of the duty of loyalty and on what basis? While it is the government as client who formally provides waiver—that is, the Crown in right of Canada or the province—in practice, the determination will likely be made by the Deputy Attorney General or a designate in management, as with human resources decisions. Presumably this decision would be made with regard to the aforementioned sub-statutory rules.[233] For example, for a Crown prosecutor like Leshner, relevant considerations identified in the *Crown Prosecution Manual* include whether the activism would "compromise their ability to function effectively as public servants [or] diminish the public perception of impartiality necessary to fulfill a Prosecutor's quasi-judicial responsibilities," "compromise their ability to function as a minister of justice," or "discourage public respect for the administration of justice or weaken the public's confidence in legal institutions."[234]

If waiver of the conflict aspect of the duty of loyalty by the government client is indeed sufficient to resolve the issue, *Charter* considerations could conceivably limit the ability of the government as client to deny waiver. The decision to deny waiver would be open to *Charter* challenge as would any other administrative decision: in that, did the government adequately balance the *Charter* rights of the lawyer against the public interest in resolute advocacy on the government's behalf?[235] However, it would be more consistent with the purposes of the *Charter* to apply *Charter* considerations to the law society legislation and rules, and associated law on legal ethics and professionalism, as opposed to the decisions of the government as client. That is, like all other clients, the government as client should have the same entitlement to the loyalty of counsel.

What about the commitment aspect of the duty of loyalty? Recusal does not solve the problem with this aspect of loyalty as I have described it. For this reason, the commitment problem is more intractable than the conflicts problem. To the extent that it exists, waiver is required. However, the government cannot

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[233] See notes 182–85, *above*, and corresponding text.
[234] "Crown Prosecution Manual", *supra* note 184 at D.6; see also note 184, *above*, and corresponding text.
[235] See e.g. *Doré*, *supra* note 213.

simply waive the public perception of a commitment problem. There is a certain degree of vitriol which deems this commitment problem irreconcilable. Leshner's strong "bigotry" language, though fully warranted, perhaps approaches this level. However, the added independence of a Crown prosecutor situated within the community he serves provides some more flexibility and leeway in his case. A clear distinction can be made between the activism of Lepofsky and Leshner, which was arguably separable from their practice, and the activism of Schmidt, which was intimately connected to his practice. Schmidt put himself in an insolvable and unwaivable conflict of interest by litigating against his client on a matter in which he had himself provided advice. Even if such a conflict were curable by waiver, no client—whether government or otherwise—would ever waive such a conflict.

V. REFLECTIONS AND CONCLUSIONS

The ultimate answers to the questions I posed in the Introduction are nuanced. Lawyers and government employees accept limitations on their *Charter* rights and freedoms that would not be acceptable for the general public—and government lawyers doubly so. A simple, and at least superficially more principled, conclusion would be that activist government lawyers must choose one role or the other: their practice or their activism. Yet, it is contrary to *Charter* values, and indeed the notion of a free and democratic society, to prohibit lawyers from advancing their own interests and the interests of a group or category of people to which they belong. Moreover, such a prohibition, forcing such a binary choice, is an undue restraint on the pursuit of a life well lived. To comply with professional obligations as a lawyer to avoid conflicts of interests, the activist government lawyer must merely recuse herself from cases where her interest in the cause conflicts with the government's interests as client. However, there will nonetheless be a point at which the frequency of recusal will interfere with the lawyer's ability to do her job. Indeed, activist government lawyers must be especially alert to the need for recusal or withdrawal. That said, there will be a point of vitriol beyond which the duty of commitment will be breached in the public perception, which is not remediable through waiver by the government as client. The activist government lawyer

should also be able to articulate why her dual role poses no problems for her duties of resolute advocacy and loyalty more broadly.

While there is indeed a striking and seemingly irreducible clash between representing the government on the one hand while at the same time lobbying it or litigating against it on the other, upon further analysis, this apparent clash is not so insurmountable an obstacle. As a constitutional litigator, Lepofsky avoided conflicts problems (intentionally or not) by not arguing section 15 disability cases. Although I would conclude that he should not have argued section 15 cases more generally—particularly *Andrews*—I recognize that the government as client at least implicitly waived this aspect of the duty of loyalty for these cases. Later in his career, Lepofsky avoided conflicts problems (again intentionally or not) by moving to an appellate criminal practice. Lepofsky's activism was measured enough that it did not raise an issue for the commitment aspect of his duty of loyalty. In contrast, Leshner's activism perhaps approached a (warranted) level of vitriol that would raise commitment issues. However, as a Crown prosecutor, Leshner's activism was less problematic for the commitment aspect of his duty of loyalty than it would otherwise have been, not only because of the delegated independence of Crown prosecutors, but also because his activism situated him within the community he served. Indeed, criminal practice—and particularly trial criminal practice—is a good option for the prospective activist government lawyer. Lepofsky and Leshner thus epitomized the government lawyer as activist and demonstrated that one person can potentially be effective in both roles simultaneously, although Leshner perhaps tested the limits of this boundary.

In sharp contrast, the nature of Schmidt's activism—to publicly challenge the government client on a matter in which the lawyer provided legal advice—will never be permissible as a matter of legal ethics.[236] Schmidt provides an example of how the combination of activism with government practice can go dramatically awry. Admittedly, perhaps there is a point at which the breach of *Charter*-compliant legal ethics becomes necessary for the greater good—in this sense, perhaps Schmidt did the right thing despite exceeding the

[236] Unless the future harm exception to confidentiality applies as referred to in note 175.

permissible bounds of activism for a government lawyer.[237] But that is a fundamentally different question than the ones I have addressed here. Moreover, Schmidt's activism effectively ended and repudiated his lawyer-client relationship, whereas I have argued that other kinds of activism are permissible while continuing the lawyer-client relationship. Of course, the simpler answer for the prospective activist government lawyer is to choose one or the other. Moreover, being a lawyer is not necessarily a good choice for activists, as the law of lawyers imposes restrictions on lawyers' conduct that are not imposed on the general public. However, sometimes lawyers make good activists and it would be short-sighted to deprive them of that fulfilling role and to deny society those benefits.

[237] See Martin, "Folk Hero", *supra* note 142; See also David Luban, *Legal Ethics and Human Dignity* (Cambridge: Cambridge University Press, 2007) ("[w]hen serious moral obligation conflicts with professional obligation, the lawyer must become a civil disobedient to professional rules" at 63).