Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law

Adam M. Dodek

University of Ottawa

Follow this and additional works at: https://digitalcommons.schulichlaw.dal.ca/dlj

Part of the Administrative Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.
Government lawyers are significant actors in the Canadian legal profession, yet they are largely ignored by regulators and by academic scholarship. The dominant view of lawyering fails to adequately capture the unique role of government lawyers. Government lawyers are different from other lawyers by virtue of their role in creating and upholding the rule of law. Most accounts of government lawyers separate public law duties of government from ethical duties of lawyers; for example, acknowledging the "public interest" role of government lawyers but asserting that this has no impact on their ethical duties as lawyers. Instead of this compartmentalized approach, this article advocates a unified vision of the roles and responsibilities of government lawyers. Examining the role of government lawyers should start by recognizing that they operate at the intersection of public law and legal ethics. Government lawyers are not simply lawyers working in the public sector. Nor are they simply public servants who happen to be lawyers. They are both lawyers and public servants at the same time. This creates unique tensions, problems and responsibilities for government lawyers. Government lawyers do owe a higher ethical duty than other lawyers which is explained through the concept of government lawyers as custodians of the rule of law. Existing forms of regulation are adequate for public protection but insufficient in public law terms to address concerns regarding the exercise of public power. Additional forms of accountability should be created including the development of specific codes of conduct for government lawyers, proactive disclosure and the creation of an Office of Professional Responsibility within federal and provincial departments of justice.

* Associate Professor, Faculty of Law, University of Ottawa, Common Law Section. The author can be contacted at adodek@uottawa.ca. This article is dedicated to the lawyers at the Ontario Ministry of the Attorney General with whom I had the privilege of working between 2003-06. Their high levels of professionalism and expertise are woefully underappreciated by members of the legal community and by the public.

** This paper is an outgrowth of the F.B. Wickwire Lecture in Professional Responsibility and Legal Ethics delivered by the author at Schulich School of Law, Dalhousie University in March 2010. The author wishes to express his gratitude to the family of Ted Wickwire and the Nova Scotia Barristers' Society for their support of this Lecture. I would like to thank then Dean Philip Saunders for inviting me to give the Wickwire Lecture in 2010 and Professor Richard Devlin for his support and encouragement. My thoughts on this subject greatly benefitted from discussions with numerous judges and government lawyers and especially from my experience working with the men and women of Ontario's Ministry of the Attorney General between 2003 and 2006. Thanks to Trevor Farrow, Leslie Hardy, Mark Leach, Henry Molot, Elizabeth Sanderson, Murray Segal, Cameron Siles, John Sims, David Tanovich, Alice Woolley and Ellen Zweibel for reading earlier drafts of this article and providing helpful comments. Thank you also to Flora Stikker J.D. 2011 (Ottawa) for providing research assistance.
Les avocats salariés de l'État sont des acteurs importants de la profession juridique canadienne, et pourtant ils sont largement laissés pour compte par les instances réglementaires et les chercheurs universitaires. Le point de vue prédominant sur la profession ne prend pas adéquatement en considération le rôle unique des avocats salariés de l'État. Ces derniers se différencient des autres avocats par la nature même de leur rôle qui est d'établir et de faire respecter la primauté du droit.

La plupart des récits par des avocats salariés de l'État distinguent les obligations du gouvernement selon le droit public des fonctions éthiques des avocats; par exemple, ils soulignent le volet « intérêt public » des avocats salariés de l'État tout en affirmant que cela n'a aucune incidence sur l'exercice de leurs fonctions éthiques en tant qu'avocats. L'auteur propose, au lieu de cette approche axée sur le cloisonnement des rôles, une vision unifiée des rôles et des responsabilités des avocats salariés de l'État. Une analyse du rôle de ces avocats doit commencer par la reconnaissance du fait qu'ils exercent leur profession là où le droit public et la déontologie juridique se croisent. Les avocats salariés de l'État ne sont pas simplement des avocats qui travaillent dans le secteur public, pas plus qu'ils ne sont uniquement des fonctionnaires qui se trouvent être avocats. Ils sont à la fois avocats et fonctionnaires. Cela crée pour eux des tensions, des problèmes et des responsabilités uniques. Les avocats salariés de l'État ont un devoir déontologique plus élevé que celui des autres avocats, ce qui s'explique par le concept qu'ils sont les gardiens de la règle de droit. Les règlements existants sont adéquats pour la protection du public, mais sur le plan du droit public, ils sont insuffisants pour répondre aux préoccupations concernant l'exercice du pouvoir public. Il y aurait lieu de créer de nouvelles formes d'obligation de rendre des comptes, notamment des codes de conduite particuliers à l'intention des avocats salariés de l'État, des mesures sur la divulgation proactive et la mise sur pied d'un bureau de la responsabilité professionnelle au sein des ministères fédéral et provinciaux de la Justice.

Introduction

I. Government lawyers are different

II. Lawyering at the intersection of public law and legal ethics
   1. The case for a higher duty
   2. The nature of the Crown’s higher duty as custodian of the rule of law

III. Accountability and the regulation of government lawyers
   1. Existing forms of accountability
      a. Law society regulation
      b. Tort and insurance
      c. Judicial oversight
      d. Legislative oversight
      e. Internal regulation
Lawyering at the Intersection of Public Law and Legal Ethics: 3
Government Lawyers as Custodians of the Rule of Law

2. **Additional accountability mechanisms**
   a. **Specialized rules for government lawyers**
   b. **Increased transparency: policy publication and proactive disclosure**

3. **An office of professional responsibility for government lawyers**

*Conclusion*

*Introduction*

We are familiar with the dominant model of the lawyer in Canada: the advocate, zealously representing his (and now her) client’s rights against the state or another adversary.¹ We have raised generations of lawyers on the inspirational words of Lord Brougham in his defence of Queen Caroline that an advocate “knows but one person in all the world, and that person is his client” and “[t]o save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.”²

The dominant model rests on the twin notions of moral non-accountability by lawyers for the acts of their clients and zealous advocacy, i.e., that the lawyer must do everything possible within the bounds of law to assist the client to prevail. These are the foundations of our adversarial system of justice.³ This standard conception continues to dominate our codes of conduct, lawyers’ practice, legal education and depictions of lawyers in the media and popular culture.⁴ This dominant view “is everywhere in

---

⁴ Farrow, supra note 1.
Canadian law. However, there is growing recognition that this view is flawed both on a descriptive and a normative level.

This dominant view of what it means to be a lawyer in Canada may be particularly problematic when it comes to an increasingly large and important subset of Canadian lawyers: those who work in the public sector. Canada’s largest law entity is actually the federal Department of Justice and not one of the national law firms. It employs over 5,200 persons, more than half of whom are lawyers. With over 2,700 lawyers, it is more than twice the size of the largest law firm. It has offices in seventeen cities across Canada and it has forty-two practice groups specializing in tax, Aboriginal law, transportation, immigration, civil litigation, terrorism, international law and many other areas. It is the most frequent litigator in the Supreme Court of Canada and it advises cabinet ministers and government agencies.

Lawyers working in the federal Department of Justice and its provincial counterparts are significant actors in the Canadian legal profession, both in terms of sheer numbers of lawyers and the substance of their work. Yet government lawyers and the work that they do are largely ignored. They are barely acknowledged in codes of conduct, underrepresented

7. These figures are current as of March 31, 2010. See Canada, Department of Justice, Workforce Representation and Availability as of March 31, 2010 (Ottawa: Department of Justice, 2010) (on file with author). One year prior to this, there were a total of 3,032 lawyers working throughout the federal government which would include lawyers in the Department of Justice, prosecutors with the Public Prosecution Service of Canada and an estimated 150 to 175 lawyers working for other federal government agencies and Crown corporations. See Government of Canada, Treasury Board Secretariat, Table 3, Distribution of Public Service of Canada Employees by Designated Group According to Occupational Category and Group FAA, schedules I and IV Indeterminates, Terms of Three Months or More, and Seasonal Employees, as at March 31, 2009, online: <http://www.tbs-sct.gc.ca/reports-rapports/ec/2008-2009/ee-eng.pdf>.
8. See Canada, Department of Justice, Canada’s Department of Justice, online: <http://canada.justice.gc.ca/eng/dept-min/pub/about-aprop/>. The Department of Justice has a budget of $900 million. It has seventeen Regional Offices and sub-offices and forty-two Departmental Legal Services Units co-located with client department and agencies. See Canada, Department of Justice, Report on Plans and Priorities 2009-10, online: <http://www.tbs-sct.gc.ca/rpp/2009-2010/inst/jus/jus00-eng.asp>.
in many law societies and undertheorized in academic scholarship. In discussions about legal ethics or the regulation of the legal profession they are often invisible. For these reasons, Allan Hutchinson rightly called government lawyers “the orphans of legal ethics” because so “little energy has been directed towards defining and defending the role and duties of government lawyers.” This sharply contrasts with the strong and robust scholarship that exists regarding the top government lawyer, the Attorney
General. In this article, I expend some energy in defining and defending government lawyers’ ethical obligations arising from their role and duties with reference to the special responsibilities of the Attorney General as guardian of the rule of law.

My thesis is superficially simple yet likely controversial: government lawyers are different from other lawyers by virtue of their role in creating and upholding the rule of law. Most accounts of government lawyers separate public law duties of government from ethical duties of lawyers; for example, acknowledging the “public interest” role of government lawyers but asserting that this has no impact on their ethical duties as lawyers. Instead of this compartmentalized approach, I advocate a unified vision of the roles and responsibilities of government lawyers. Examining the role of government lawyers should start by recognizing that they operate at the intersection of public law and legal ethics. Government lawyers are not simply lawyers working in the public sector. Nor are they simply public servants who happen to be lawyers. They are both lawyers and public servants at the same time. This creates unique tensions, problems

and responsibilities for government lawyers. One example as follows will demonstrate this point.

The tension between government lawyers' roles as public servants and as lawyers is seen in the issue of whistleblowing. The duty of confidentiality as lawyers is "all information concerning the business and affairs of a client." Each law society has a limited public safety exception which permits or requires lawyers to disclose confidential information in certain circumstances. For example, Nova Scotia's exception provides:

A lawyer has a duty to disclose information necessary to prevent a crime where

(a) the lawyer has reasonable grounds for believing that the crime is likely to be committed; and

(b) the anticipated crime involves violence.

This regulatory imperative for Nova Scotia lawyers does not necessarily accord with federal public servants' whistleblowing provisions.

Under the Public Servants Disclosure Protection Act, a public servant may make a public disclosure if there is not sufficient time to make a report to the relevant official and

the public servant believes on reasonable grounds that the subject-matter of the disclosure is an act or omission that

(a) constitutes a serious offence under an Act of Parliament or of the legislature of a province; or

(b) constitutes an imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment.

11. For other discussions of whistleblowing by government lawyers see Gavin MacKenzie, Lawyers and Ethics: Professional Responsibility and Discipline, 4th ed. (Toronto: Carswell, 2006) 21-4 to 21-5; and MacNair, “In the Service of the Crown,” supra note 9 at 529 (noting that the lawyer’s ethical duty of confidentiality being different from the duty to keep governmental information confidential and it is not clear when one duty trumps another).


14. Public Servants Disclosure Protection Act, R.S.C. 2005, c. 46, s. 16(1).
There are a number of notable differences between the two provisions. To begin, the federal law is broader than the Nova Scotia Barristers’ Society’s provision. The duty of disclosure for Nova Scotia lawyers extends only to anticipated crimes involving violence. The federal law speaks of serious offences without referencing violence and provides alternative grounds for public disclosure that do not necessarily involve violation of a law. The Nova Scotia provision is mandatory whereas the federal law is permissive. These discrepancies raise a variety of questions.

If a Nova Scotia lawyer working for the federal government exercised her whistleblowing rights as a public servant, would she be violating her ethical duties under law society codes of conduct? Could a federal justice lawyer be disciplined by a law society for breaching her duty of confidentiality in such circumstances? Conversely, if a Nova Scotia lawyer complied with the ethical duty of disclosure under law society rules, would she be violating her oath of confidentiality as a public servant and be subject to discipline by her government employers?

The point is that the answers to these questions are not clear. This is true of many questions in legal ethics. However, existing legal ethics doctrine does not have a framework for considering questions like these, which lie at the intersection of public law and legal ethics. A need exists for both theoretical exploration and practical mechanisms to address such questions for government lawyers. I attempt to provide a theoretical and practical framework for such questions in this paper. This paper proceeds in three parts. First, I will analyze how government lawyers are different from other lawyers. This is the necessary foundation for proceeding with the following parts of the analysis. Second, I will address the question of whether government lawyers owe different or higher ethical duties than do other lawyers. I argue that contrary to the prevailing belief, government lawyers do owe a higher ethical duty than other lawyers, which I explain through the concept of government lawyers as custodians of the rule of law. Finally, I will address the question of accountability and regulation of government lawyers. Specifically, I will examine how government lawyers are regulated and whether they are over- or under-regulated. I conclude

---

15. A more general problem exists regarding the law of confidentiality and the law of privilege, which at times intersect, at times diverge and are often confused by lawyers and judges. See Adam M. Dodek, “Reconceiving Solicitor-Client Privilege” (2010) 35 Queen’s L.J. 493 at 505 [Dodek, “Reconceiving Solicitor-Client Privilege”]. See generally Alice C. Woolley, Understanding Lawyers’ Ethics in Canada (Toronto: LexisNexis, forthcoming) chapter on confidentiality (draft on file with author). There are other instances where the legal obligations to disclose information (such as evidence of a crime or of fraud) clash with the legal obligations of confidentiality. There is no clear rubric for evaluating these sorts of conflicts either.
that existing forms of regulation are adequate for public protection but insufficient in public law terms to address concerns regarding the exercise of public power. To this end, I propose several added forms of accountability including the development of specific codes of conduct for government lawyers, proactive disclosure and the creation of an office of professional responsibility within federal and provincial departments of justice.

I. Government lawyers are different

Government lawyers are different and belong in a category of their own. Instead, they are largely lumped in with other lawyers generally or with lawyers for an organization. This depiction of government lawyers is inaccurate and misleading and has created a host of conceptual problems in thinking about government lawyers and the work that they do. This failure to recognize the uniqueness of government lawyering has negative consequences for legal ethics and for public law.

To begin, we must recognize the rise over the past half-century of the public sector lawyer as a distinct and significant subgroup of lawyers. Public sector lawyers are lawyers who work for a public entity such as the federal government, the Government of Nova Scotia, the City of Halifax or Glace Bay, Crown Corporations, public utilities, public regulators such as the Nova Scotia Securities Commission, agencies, boards and commissions. In 1961, 6.7% of all Canadian lawyers worked in the public sector. By 1986, that figure had increased to 10.8% and by 2008/09, an estimated 15-25% of Canadian lawyers worked in the public sector, depending on the jurisdiction.

Government lawyers constitute a subset of these public sector lawyers. By government lawyers, I mean lawyers working for the executive branch, be it on the federal or provincial level. Some 2,700 lawyers work for the federal Department of Justice, more than the number of lawyers who

16. As discussed infra, it has long been recognized that prosecutors are a distinct type of lawyer with different ethical responsibilities.
17. For a recognition of government lawyers as a distinct occupational subgroup within the Canadian legal profession, see David A. A. Stager with Harry W. Arthurs, Lawyers in Canada (Toronto: University of Toronto Press, 1990) c. 12 (“Lawyers in the Public Sector”).
18. Ibid. at 158 (Table 6.12).
19. There are no available comprehensive figures but the range of 15-25% is taken from statistics from the individual law societies.
20. Stager and Arthurs used a slightly different definition. They preferred the term “lawyers in public administration” as a subject of “lawyers in the public sector.” Lawyers in public administration, according to the authors, include lawyers practicing law in federal, provincial, and local government and closely-related public agencies such as legal aid centres and community legal clinics. As they note, this definition of public administration differs from that used by Statistics Canada, which only includes government departments; Stager & Arthurs, supra note 17 at 279. The category of “government lawyers” as I define it, is more restrictive.
work in each of Manitoba, Saskatchewan, New Brunswick, Prince Edward Island, Newfoundland and Labrador or the three territories.\textsuperscript{21} Some 1,800 lawyers work for the Ontario Ministry of the Attorney General, making it the second largest law firm in Canada. More lawyers work for the Ontario Ministry of the Attorney General than the total lawyers who are members of the bar in each of New Brunswick, Prince Edward Island, Newfoundland and Labrador and the three territories.\textsuperscript{22}

The regulation of lawyers operates under a presumption of homogeneity.\textsuperscript{23} As a general matter, we tend to treat the ethical responsibilities of all lawyers as being the same. The codes of conduct are drafted with a paradigmatic lawyer in mind and that lawyer is in private practice.\textsuperscript{24} We do have specialized rules for the criminal context but not much else. However, the reality is that in Canada we have a fragmented legal profession and we have had one for some time.\textsuperscript{25} Yet when we examine the codes of conduct for lawyers in this country or the judicial pronouncements about them, we find a vast oversimplification. Under the prevailing belief, there are two types of government lawyers: Crown counsel and all others. Crown prosecutors owe special, higher duties,\textsuperscript{26} whereas all other government lawyers are treated like private sector lawyers except that they are “lawyers for an organization.” This is both a gross oversimplification and a misrepresentation of government lawyers.

Government lawyers share some characteristics with private sector lawyers but there are also critical distinctions between them,\textsuperscript{27} which are developed in more detail below. Like corporate counsel, government lawyers are salaried lawyers for an organization, but for government lawyers, their organization is “the government.”\textsuperscript{28} Like lawyers for an organization, government lawyers’ client is also their employer; however,


\textsuperscript{22} See Federation of Law Societies of Canada, 2007 Law Society Statistics, Total Membership as at December 31, 2007, online: <http://www.flsc.ca/en/lawSocieties/statisticsLinks.asp>. Department of Justice lawyers must be members of a provincial law society, although not necessarily of the law society in which they are working.

\textsuperscript{23} See MacNair, “In the Service of the Crown,” supra note 9 at 501.


\textsuperscript{27} On some of the characteristics of government lawyers, see MacNair, “The Role of the Public Sector Lawyer,” supra note 9 at 128-29.

\textsuperscript{28} See MacNair, “The Role of the Federal Public Sector Lawyer,” supra note 9 at 128-29.
Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law

unlike working for a corporation, the government lawyer’s client-employer is not in the business of making money. Government is supposed to be in the business of advancing the “public interest,” no matter how unclear that term may be. This is the first distinguishing point about government lawyers: they do not face a clash between professionalism and commercialism the way private sector lawyers do. It is an obvious and important point, but government lawyers do not have to worry about marketing, advertising, or solicitation. They do not need to worry about attracting and retaining clients because the state is the most reliable client. They do not need to worry about fees or billing their client and they do not need to worry about handling client money or trust accounts. Unless they move between government and the private sector, they do not need to address conflicts of interest between clients. As a result, whole chapters in the applicable codes of conduct are absolutely irrelevant to government lawyers. As we will see later, these distinctions are critical when it comes to law society regulation of government lawyers.

The defining characteristic of government lawyers is their one and only client: the Crown. Thus, it is both insightful and misleading to treat government lawyers as lawyers for an organization in the manner in which most law society codes do. While having the Crown as a client raises some issues in common with having a corporation for a client, in many ways it raises very dissimilar ones. This is because the Crown is a very different type of client from any other organization.

29. Cf. ibid. at 129.

30. In some governments, lawyers do complete dockets and may charge back client ministries or departments for work done on matters. However, this is a wholly internal process which is not accompanied by the financial and ethical pressures that is associated with billing in the private sector. I am not aware of any circumstances where a government lawyer’s remuneration or promotion is tied to such billing practices. On the ethical problems of the billable hour in Canada, see Alice C. Woolley, “Evaluating Value: A Historical Case Study of the Capacity of Alternative Billing Methods to Reform Unethical Hourly Billing” (2005) 12:3 International Journal of the Legal Profession 339 and Alice C. Woolley, “Time for Change: Unethical Hourly Billing in the Canadian Profession and What Should Be Done About It” (2004) 83:3 Canadian Bar Review 859.


32. MacNair, “In the Service of the Crown,” supra note 9 at 506-07; and MacNair, “The Role of the Federal Public Sector Lawyer,” supra note 9 at 132.

33. MacNair, “In the Service of the Crown” ibid. at 516.

34. However, the Supreme Court of Canada has generally treated the Crown as equivalent to other organizational clients, at least respecting solicitor-client privilege. See Pritchard v. Ontario (Human Rights Commission), 2004 SCC 31, [2004] 1 S.C.R. 809; and R. v. Campbell, [1999] 1 S.C.R. 565. For my critique of this see Dodek, “Reconceiving Solicitor-Client Privilege,” supra note 15 at 533. Thanks to Trevor Farrow for pointing this out to me.
The Crown is a social construct, albeit a very difficult one. One of the greatest Canadian scholars in this field dubbed the Crown “an elusive phenomenon and a practical institution of government.” He compared the Crown to “an old family ghost that has lingered for centuries doing little but making its presence felt.” The Crown “is the supreme executive power of the state, above the structure of government in the state, and designed as a point in the constitution from which other powers are created, measured, and controlled.” Peter Hogg explains that the Crown is used “as convenient symbol for the state” and “we commonly speak of the Crown expropriating a house, of the Crown being sued for breach of contract, of the Crown being bound by a statute.” In short, the Crown is a symbol of governmental power and the client of government lawyers.

The idea of the Crown qua client is highly problematic from a legal ethics perspective. How does a lawyer take instructions from a symbol? Of course, one does not receive a phone call or an e-mail from the Crown. The Crown will not argue about a lawyer’s bill or threaten to sue for malpractice. The Crown is unlikely to complain to the law society about the conduct of a government lawyer. These concerns exist for lawyers for corporations as well, but having the Crown as a client raises unique issues and problems which are addressed below.

Government lawyers are as a consequence rightly obsessed with the question of who is their client. Deborah MacNair has answered the question by explaining that “[i]n essence, the government counsel’s

35. Admittedly, the corporation is a completely artificial social construct as well. See Joel Bakan, The Corporation: The Pathological Pursuit of Profit and Power (New York: Free Press, 2004). However, the corporate structure is less confusing than government. Corporate counsel may be caught between management, the Board of Directors and shareholders, but these are clear, identifiable, although at times competing, bodies.
37. Ibid. at 15.
39. As Department of Justice lawyer Deborah MacNair has written: “In essence, the government counsel’s ultimate ‘human’ client will be the public official who has the legal authority to decide the Crown’s interest in the matter.” MacNair, “In the Service of the Crown,” supra note 9 at 516. Accord Hutchinson, “In the Public Interest”, supra note 9.
40. By this I mean that the Crown qua client is unlikely to complain to the law society. Representatives of the Crown, specifically, senior government lawyers, are likely to take revelations of misconduct by lawyers under their supervision very seriously and may encourage lawyers to self-report to the law society or failing that, report the lawyer directly to the relevant law society. On internal discipline see infra.
41. The critical difference is that much more discussion and analysis has gone into considering the role of corporate counsel, both in terms of corporate governance and legal ethics.
42. MacKenzie, supra note 24 at 21-1 (“The issue of who is their client perplexes government lawyers continually”).
Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law

ultimate ‘human’ client will be the public official who has the legal authority to decide the Crown’s interest in the matter.”\textsuperscript{43} This is surely correct but it helps little in resolving the tensions that arise in the day-to-day work of government lawyers.\textsuperscript{44} Of course, if the Minister of Transport has the legal authority to determine a particular issue then the Minister is the client. But many decisions in government are taken by consensus or by compromise, without involving the ultimate public official who has the legal authority to decide the issue. Government lawyers operate in an environment where the de facto client is the public department or ministry which is seeking legal advice on the issue.

The manner in which legal advice is provided in government makes the idea of the ultimate decision-maker as client not particularly helpful in theory or in practice. In most cases, legal advice is sought by agents of a minister from agents of the Attorney General. If conflicts rise, then officials with higher seniority may get involved. To further complicate matters, the Privy Council Office or Cabinet Office may become involved. To seriously complicate matters, the Prime Minister’s Office or the premier’s office may become involved and communicate instructions on a file for which, strictly speaking, the Prime Minister or the premier may not be the public official charged with the legal authority to make that decision. In many circumstances, it becomes difficult to designate an official as “the client” with any exactitude.\textsuperscript{45}

The “who is the client” problem for government lawyers is related to the further issue of independence versus client capture. In Canada, unlike in the United Kingdom,\textsuperscript{46} government legal services are centralized; all government lawyers are representatives of the Attorney General.\textsuperscript{47} The goal of such centralization is to provide independent legal advice.\textsuperscript{48} However, there is a tension between this independent role and the reality of dealing with the client agency. Over the past several decades, there has been an

\textsuperscript{43} MacNair, “In the Service of the Crown,” \textit{supra} note 9 at 516. Accord Hutchinson, \textit{supra} note 9.

\textsuperscript{44} For a recent provocative analysis and application of the question of who is the client in the criminal context within government, see \textit{British Columbia (Attorney General) v. Davies}, 2009 BCCA 337.

\textsuperscript{45} This problem is exacerbated by the situation where the individual or group providing instructions to government lawyers on a matter is different from the individual or group of who may make decisions about waiver of solicitor-client privilege on the same matter.

\textsuperscript{46} See Edwards, \textit{The Attorney General, Politics and the Public Interest}, \textit{supra} note 10.


\textsuperscript{48} “The value of a lawyer depends on the preservation of his independence from the operating necessities of his department.” Canada, Royal Commission on Government Organization, Report (Glassco) (Ottawa: Crown, 1962) 419.
increasing emphasis placed on “client service” for government lawyers, with a concomitant risk to the independent exercise of judgment by these lawyers.49

Justice lawyers may be physically located within the client body while still coming under the supervision of the Attorney General. This arrangement creates the advantage of knowledge accumulation and understanding of the client’s business and objectives but also the risk of the lawyers becoming “embedded lawyers” who come to identify too closely with their client and become captured by them.50 On this front, a former Deputy Attorney General of New Brunswick warned of misplaced compassion by civil or criminal legal staff for other bureaucrats in the government, especially those functioning in the Minister of Justice’s fields of responsibility. Advice that is motivated in any degree by a desire to refrain from revealing the faults of other bureaucrats or by an accommodation of the political or policy objectives of other ministries will impair our confidence in the exercise of the Attorney-General’s role if that advice is supposed to be based on the merits of the situation in the assessment of the Attorney-General alone.51

At the other end of the equation is independence without accountability. The government lawyer who sees the Crown in symbolic and not in human terms may risk self-defining the interests of the Crown and not adequately taking into account the interests of the client ministry. In the context of prosecutors, Alice Woolley has expressed concern about accountability for the power that they wield because they lack a “directing ‘client’ from whom they receive instructions.”52

Thus, having the Crown as client is only the beginning of the analysis. It involves a fundamental tension between the two extremes of client

49. See Tait, “The Public Service Lawyer,” supra note 9, especially 542-43.
52. Alice C. Woolley, “Prosecutorial Accountability?” The University of Calgary Faculty of Law Blog on Developments in Alberta Law (12 November 2009), online: <http://ablawg.ca/2009/11/12/prosecutorial-accountability>. Some of these issues exist for lawyers for corporations as well. The difference is that far more scrutiny has been cast on the role of corporate counsel and more analysis and debate of their ethical and regulatory responsibilities, in comparison to those of government lawyers.
Lawyering at the Intersection of Public Law and Legal Ethics:  
Government Lawyers as Custodians of the Rule of Law

capture and independence without accountability. But what does having the Crown as a client mean for the ethical duties of government lawyers?

II. Lawyering at the intersection of public law and legal ethics
The key to analyzing the ethical responsibilities of government lawyers is in recognizing that they operate at the intersection of public law and legal ethics. Within this framework, there is a debate about whether government lawyers owe a higher ethical duty than private lawyers. It is clear that Crown prosecutors do, as has been recognized for decades in the oft-quoted statement of Justice Rand in *Boucher v. The Queen*:

>The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.53

However, the consensus in Canada—as reflected in judicial statements, codes of conduct and by government itself—is that outside of the criminal context, government lawyers do not owe a higher ethical duty than other lawyers.54

Surprisingly, there are few judicial statements on this topic in Canada. In one of the rare discussions of the issue, Justice Borins stated in the 1991 case, *Everingham v. Ontario*, that

>Although the Rules of Professional Conduct of The Law Society of Upper Canada must necessarily apply to all lawyers, it is my view that one who is a lawyer employed by the government must be particularly sensitive to the rules which govern his or her professional conduct. Such a lawyer may be said to have a higher obligation than lawyers generally.55

Justice Borins went on to explain the basis for his decision:

>The government lawyer, to use the expression employed by counsel, is usually one who is a principal legal officer of a department, ministry, agency or other legal entity of the government, or a member of the legal staff of the department, ministry, agency or entity. This lawyer assumes a public trust because the government in all of its parts, is responsible to the people in our democracy with its representative form of government. Each part of the government has the obligation of carrying out, in the public interest, its assigned responsibility in a manner consistent with the applicable laws and regulations and the Charter of Rights. While

54. See MacNair, “In the Service of the Crown,” supra note 9 at 520-22.
the private lawyer represents the client’s personal or private interest, the government lawyer represents the public interest. Although it may not be accurate to suggest the public is the client of the government lawyer as the client concept is generally understood, the government lawyer is required to observe in the performance of his or her professional responsibility the public interest sought to be served by the government department, ministry or agency of which he or she is a part. That is why I believe there is a special responsibility on the part of government lawyers to be particularly sensitive to the rules of professional conduct...

On appeal, the Divisional Court explicitly rejected Justice Borins’ statements regarding the higher duty of Crown solicitors, finding that “[t]here is no basis for this conclusion in the laws or traditions that govern the bar of this province.” In the key paragraph of its ruling on this issue, the Divisional Court stated:

All lawyers in Ontario are subject to the same single high standard of professional conduct. It is not flattering to the lawyers of Ontario to say that most of them are held to a lower standard of professional conduct than government lawyers.

Given the paucity of judicial analysis on the subject, it is important to provide the basis for the court’s decision in full:

The Ministry of the Attorney General Act, R.S.O. 1990, c. M.17, and the Law Society Act, R.S.O. 1990, c. L.8, codify some of the special public obligations of the Attorney General in relation to the public interest in the legal profession and the conduct of government business according to law. The unique obligations of Crown counsel in the conduct of public prosecutions are well known. Because of these public obligations and the traditions associated with the Crown office in this province, the courts have come to expect a particular level of conduct and expertise from Crown counsel in various types of judicial business.

It is one thing to say that a particular branch of the Crown law office or a particular law firm or lawyer has earned a reputation for a high standard of professional conduct. It is quite different to say that any lawyer or group of lawyers is subject to a higher standard of liability than that required of every lawyer under the Rules of Professional Conduct.

In respect of their liability under the Rules of Professional Conduct, as opposed to the public interest duties associated with their office, Crown counsel stand on exactly the same footing as every member of the bar.

56. Ibid. at 359-60.
58. Ibid. at para. 18.
It is therefore an error of law to exact from government lawyers a higher standard under the Rules of Professional Conduct than that required of lawyers in private practice.\textsuperscript{59}

To the extent that commentators have addressed this subject, they are in accord. While acknowledging the public interest obligations of government lawyers, government lawyers Deborah MacNair and John Mark Keyes conclude that these obligations do not translate into higher ethical duties.\textsuperscript{60} MacNair asserted:

There is no doubt that government counsel face different policy and operational concerns, which may give rise to other duties: a duty to use government litigation and other resources efficiently and to avoid waste of public funds; a duty to ensure that their representation before the courts is fair and accurate; a duty to avoid letting personal values and biases override the public policy choices of client officials and the Crown; a duty to respect the public interest role in their work where it is appropriate to do so. None of these, however, can fairly be said, according to the courts or the law societies, to translate into enforceable higher or special ethical duties.\textsuperscript{61}

A 2009 New Brunswick Court of Queen's Bench decision that addressed this issue would seem to have agreed with the position outlined above\textsuperscript{62} while a 2010 Ontario Superior Court decision discussed infra would seem to disagree.\textsuperscript{63} As both MacNair and MacKenzie acknowledge, American courts have been far more willing than their Canadian counterparts to impose higher ethical duties on government lawyers.\textsuperscript{64} Perhaps reflecting an uneasiness with the idea of holding government lawyers to the same rhetorically high but practically modest level of ethical behaviour as other lawyers, MacKenzie concludes that there is a need to increase standards for all lawyers, not just government lawyers.\textsuperscript{65} This is one approach but ultimately, I agree with Justice Borins and believe that he correctly

\textsuperscript{59} Ibid. at paras. 19-22.
\textsuperscript{60} MacNair, "In the Service of the Crown," supra note 9 at 528; and Keyes, supra note 9 at 457.
\textsuperscript{61} MacNair, ibid.
\textsuperscript{64} See, e.g., May Department Stores v. Williamson, 549 F.2d 1147 at 1150 (8th Cir. 1977) per Lay J. concurring cited by MacKenzie, Lawyers and Ethics, supra note 24 at 21-3 and Bulloch v. United States, 763 F.2d 1115 (10th Cir. 1985), cert. denied, 474 U.S. 1086 (1986) (per McKay J., dissenting) (chastising counsel for failing to make full disclosure during discovery); Douglas v. Donovan, 704 F.2d 1276 (D.C. Cir. 1983) (failing to disclose the existence of a settlement on the basis that government counsel or a different or higher duty); Braun v. Harris, (E.D. Wis. 1980) cited by MacNair, "In the Service of the Crown," supra note 9.
\textsuperscript{65} MacKenzie, Lawyers and Ethics, supra note 24 at 21-3.
captured the issue. Government lawyers should owe higher duties than other lawyers.

1. *The case for a higher duty*

As a matter of public law, government lawyers should owe higher ethical duties than private lawyers because they exercise public power. In this section, I will explain why this is the case by reference to the notion of government lawyers as custodians of the rule of law. I will then show how in practice, courts and governments already accept that government lawyers owe higher duties in many contexts.

Normatively, government lawyers should be held to higher ethical standards than other lawyers because they are exercising public power. This is what it means to be lawyers for the Crown because the Crown is the concept that personifies the exercise of state power. As discussed below, government lawyers are not just passive vessels implementing the instructions of their political masters. Government lawyers interpret, advise and advocate on the powers and duties of the Crown. In so doing, government lawyers exercise public power. This exercise of public power is therefore the key distinction between government lawyers and all other lawyers. This is why it is an oversimplification, an understatement and is misleading to characterize government lawyers as lawyers for an organization. The source of this heightened ethical duty is therefore to be found in public law, specifically in the constitutional responsibilities of the Attorney General.

All government lawyers are agents of the Attorney General and under the *Carltona* doctrine, it is recognized that the Attorney General can only fulfill the duties of the office through delegation to his or her agents.66 Government lawyers' higher duty therefore derives from the duties and responsibilities of the Attorney General. That office has a unique constitutional status in Canada. It has been described as "the guardian of the public interest"67 or "the defender of the Rule of Law."68 Despite Kent Roach's assertion that "[t]he case for the Attorney General as defender of

---

66. See *Carltona Ltd. v Commissioner of Works*, [1943] 2 All ER 560 (CA).
Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law

the rule of law is not an easy one,"69 Lori Sterling and Heather Mackay conclude that “[t]here is a clear consensus that the Attorney General should actively promote the rule of law.”70 I build on their work but before I do, I must parenthetically articulate what I mean by the rule of law which is, it must be admitted, often invoked rhetorically but without rigorous attention to what it means.

The rule of law is a foundational concept in Canadian constitutional law. It is also a notoriously elusive concept, often politicized and frequently invoked by aggrieved citizens to challenge any perceived unfairness at the hands of government.71 There is great debate over “thick” and “thin” versions of the rule of law. “Thin” versions of the rule of law focus on its procedural requirements whereas “thick” variants assert that it includes substantive components such as the protection of rights and freedoms.72 For the purposes of this paper, I will invoke the meanings of the rule of law accepted by the highest court in the land: (1) the law is supreme over the acts of government and its officials as well as private persons, i.e., no one is above the law; (2) the rule of law requires the existence and maintenance of a positive legal order which provides and preserves the normative order for our society; and (3) the exercise of all public power must find its ultimate source in some legal rule.73 As the Supreme Court explained in the Secession Reference, the rule of law encompasses

69. Roach, “Not Just the Government’s Lawyer,” ibid. at 600 quoting John Edwards’ statement lamenting “the all-too-common tendency to view the attorney general and his department as no more than the law firm that is always on call to serve the interests of the political party that is in power at the time.” J. Li. J. Edwards, “The Office of Attorney General—New Levels of Public Expectations and Accountability” in Philip C. Stenning, ed., Accountability for Criminal Justice: Selected Essays (Toronto: University of Toronto Press, 1995) 294 at 323.
71. In Singh v. Canada (Attorney General), [2000] 3 F.C. 185 at para. 33 (C.A.), Justice Strayer opined that “[a]dvocates tend to read into the principle of the rule of law anything which supports their particular view of what the law should be,” cited with approval in British Columbia v. Imperial Tobacco Canada Ltd., 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 62 [Imperial Tobacco Canada Ltd.]. See also ibid. at para. 67 (“The rule of law is not an invitation to trivialize or supplant the Constitution’s written terms. Nor is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution’s text, and apply, by whatever its terms, legislation that conforms to that text.”).
‘a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority’. At is most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.74

With this understanding of the rule of law, the case for the Attorney General as its defender becomes more straightforward. The Attorney General has a statutory duty to “see that the administration of public affairs is in accordance with the law.”75 As former Ontario Attorney General Ian Scott explained,

the Attorney General has a positive duty to ensure that the administration of public affairs complies with the law. Any discussion of the Attorney General’s responsibilities must keep this fundamental obligation in mind.76

In the landmark 1968 McRuer Report into Civil Liberties in Ontario, Commissioner McRuer explained that

[t]he duty of the Attorney General to supervise legislation imposes on him a responsibility to the public that transcends his responsibility to his colleagues in the Cabinet. It requires him to exercise constant vigilance to sustain and defend the rule of law against departmental attempts to grasp unhampered arbitrary powers, which may be done in many ways.77

Government lawyers operate within a matrix of a rule of law triangle. Their higher duties are a result of operating at the intersection of three axes: as delegates of the Attorney General, as public servants and as members of the legal profession.

---


75. See, e.g., Ministry of the Attorney General Act, R.S.O. 1990, c. M.17, s. 5(b). Similarly, see Department of Justice Act, R.S.C. 1985, c. J-2, s. 4(a) (“see that the administration of public affairs is in accordance with law”).


The Attorney General has a clear duty to uphold the rule of law. At its most basic level, this requires the Attorney General to ensure that all government action complies with the law. The Attorney General can only fulfill this duty through his or her agents, government lawyers. Government lawyers therefore have a delegated responsibility for fulfilling this public law duty. This is a critical point which distinguishes government lawyers from other lawyers who do not have such an express duty to ensure that their client complies with the law. While ethical codes prohibit lawyers from actively assisting or facilitating their client’s commission of illegal conduct, they do not generally require lawyers to prevent their client from committing illegal acts. See, e.g., Law Society of Upper Canada, Rules of Professional Conduct, Rule 2.02(5) (“When advising a client, a lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct, or instruct the client on how to violate the law and avoid punishment.”). In this respect, the recent movement to make corporate counsel “gatekeepers” is a significant departure from the prevailing ethical status quo. See, e.g., Paul D. Paton, “Corporate counsel as corporate conscience: ethics and integrity in the post-Enron era” (2006) 84:3 Can. Bar Rev. 533; Paul D. Paton, “The Independence of the Bar and the Public Interest Imperative: Lawyers as Gatekeepers, Whistleblowers, or Instruments of State Enforcement?” in Law Society of Upper Canada, Task Force on the Rule of Law and the Independence of the Bar, In the Public Interest: The Report and Research Papers of the Law Society of Upper Canada’s Task Force on the Rule of Law and the Independence of the Bar (Toronto: Irwin Law, 2007) 175. All codes of conduct have limited future harm exceptions. In most cases, these entitle but do not require, lawyers to divulge confidential information to prevent specified types of future harm.
that all actions of government comply with all laws: civil, criminal and administrative. The ramifications of this duty are discussed below.

As public servants, government lawyers also have a duty to uphold the rule of law. As Chair of the Task Force on Public Service Values and Ethics, former Deputy Minister of Justice John Tait, Q.C. explained:

One of the defining features of public service organizations, especially in Canada, is that they are established under law and have as one of their chief roles the administration and upholding of the laws of Canada. In order to do this well, the public service and individual public servants should be animated by an unshakable conviction about the importance and primacy of law, and about the need to uphold it with integrity, impartiality and judgement.79

Elsewhere Tait asserted that public servants must remember some of the basic purposes of government "such as democratic accountability, the rule of law, and fairness and equity."80 In short, all public servants have a duty to uphold the rule of law and government lawyers qua public servants share in this duty.

As lawyers, government lawyers are part of a profession devoted to the rule of law, but the perspectives of the profession and of government are different. As the Law Society of Upper Canada’s Task Force on the Rule of Law and the Independence of the Bar asserted, “[a]n independent Bar works in tandem with an independent judiciary in the implementation of the Rule of Law.”81 The conceptual problem for government lawyers is that at first glance their position as lawyers for the government is inimical to most conceptions of an independent bar. These include the notion that lawyers are able to put their clients’ interest first without fear of constraint especially by the state.82 It also includes the asserted “right of the public who need legal assistance to obtain it from someone who is independent of the state and can thereby provide independent representation.”83 The other element of independence of the bar that is problematic for government

---

80. Tait, “The Public Service Lawyer,” supra note 9 at 547.
83. Ibid.
lawyers is the idea of independence from client control: lawyers “should have autonomy to decide which clients and causes to represent and how to conduct that representation.” As members of the legal profession, government lawyers are part of a profession dedicated to preserving the rule of law; however, in the work that they do as government lawyers, the bar’s conception of independence does not accurately describe their work.

When the three elements of government lawyers’ identity—public servants, lawyers and delegates of the Attorney General—are combined, the unique relationship between government lawyers and the rule of law begins to appear. The core meanings of independence for the bar involve independence from the state, either in terms of interference with the lawyer-client relationship by the state or in terms of regulation by the state. For government lawyers, their client is the state. And as lawyers for the state, government lawyers are not only tasked with ensuring that the state and its officials comply with the law, but they are also involved in creating law in a way that private sector lawyers are not. Government lawyers are involved in protecting the rule of law from the inside. Moreover, what fundamentally distinguishes government lawyers from their non-government counterparts is that they exercise state power.

Government lawyers exercise state power in everything they do. There are some who will challenge this assertion and claim that government lawyers do not exercise state power but rather they represent the interests of those who do. This assertion fails to adequately capture the nature of government lawyers’ work. We no longer live in a legal culture dominated by formalism where we believe that legal reasoning is the process of finding one true “correct” answer. Rather, we have come to acknowledge the indeterminacy of law and to acknowledge that there are subjective influences on legal interpretation. Government lawyers who are advising their clients on the law exercise power given to them under law. In many cases, they exercise significant discretion in providing legal advice. The act of giving legal advice, of interpreting the law, is itself an exercise of power. It can have a broad impact on people’s lives—sometimes equal to or exceeding that of a Crown counsel in a criminal prosecution. Nowhere

85. David Luban has described lawyers as “the primary administrators of the rule of law, the point of contact between citizens and their legal system.” See Luban, Legal Ethics, supra note 3 at 1.
86. See MacNair, “In the Name of the Public Good,” supra note 67 at 184-85 citing the Department of Justice Act, R.S.C. 1985, c.J-2.
is this more the case nor more important than in the areas of human rights and constitutional law.

The American example of the torture memos is the best example of the powerful impact that legal advice can have on people's lives. The act of legal interpretation can be used to constrain or to authorize power. In this instance, government lawyers used the law not as a constraint on power, but as "the handmaiden of unconscionable abuse." In the words of legal ethicist David Luban, the government lawyers spun their legal advice because they knew that "spun advice" is what their clients wanted. Lawyers in the Office of Legal Counsel in the Department of Justice interpreted law to authorize a host of heightened interrogation methods which most people would identify as torture. Moreover, lawyers in the Office of Legal Counsel used legal interpretation to create an entire category of persons who would not be protected by the rule of law (enemy combatants) and their advice supported the attempt to create a rule of law-free zone (Guantanamo). While this American example may be extreme, an important Canadian example demonstrates how the act of legal interpretation is itself an exercise of state power.

Under the Canadian Bill of Rights, the Minister of Justice is required to examine every draft regulation and every government bill introduced in the House of Commons "in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions" of the Bill of Rights and the Minister "shall report any such inconsistency to the House of Commons at the first convenient opportunity." An analogous provision of the Department of Justice Act requires the Minister to examine every draft regulation and every government bill introduced in the House of Commons in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the Canadian Charter of Rights and Freedoms and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity.

89. Luban, Legal Ethics, supra note 3 at 164.
90. Canadian Bill of Rights, S.C. 1960, c. 44, s. 3.
91. Department of Justice Act, supra note 75, s. 4.1.
Since 1960 when the *Canadian Bill of Rights* was enacted and since 1982 when the *Charter* was enacted, there has never been a single report made to the House of Commons by any Minister of Justice. Some think this is negative while other are less concerned about it. Here my point is that every time a decision is made not to make a report to the House of Commons, there has obviously been an act of interpretation. Indeed, this was made clear when a Department of Justice lawyer disclosed at a house committee that the standard used to trigger the reporting requirement was “manifestly unconstitutional.” This phrase is itself an act of legal interpretation and a highly discretionary one at that. If lawyers in the Department had chosen a standard of “arguably unconstitutional,” it is likely that many more bills would have been reported under these provisions. This could have had a very different effect on legislation and the relationship between the courts, the legislature and the executive, to say the least of the potential impact of such legislation on affected groups.

These arguments for the higher duty of government lawyers as custodians of the rule of law are supported by existing duties of the Crown in other areas, government statements and some judicial pronouncements. In fact, if we examine the conduct expected of government lawyers, we find that they are already subject to a higher duty than private lawyers. The standards of conduct expected of government lawyers in areas outside of criminal law demonstrate that there are a whole host of areas where a higher duty is expected of government lawyers. Outside of criminal law, there are other areas where the Attorney General is expected to act independently, that is without political considerations or involvement. These include public interest injunctions and interventions. Other areas where the Attorney General represents the public interest include *parens patriae* jurisdiction, child protection, expropriation and charities. In

---

92. Compare Huscroft, “Reconciling Duty and Discretion,” *supra* note 10 at 794 (stating that he is “neither surprised nor troubled by the fact that no reports of inconsistency have been made in Canada. After all, the Attorney General is a senior member of Cabinet and will have been privy to the development of government bills from the outset.”) with Roach, “Not Just the Government’s Lawyer,” *supra* note 10 at 626 (expressing regret that the reporting requirement “has withered on the vine”).

93. Hansard, Legislative Committee on Bill C-2, 39th Parliament, 2nd Sess., Evidence, November 15, 2007 (Mr. Rick Dykstra, Chair) at 11 (“This legislation has been examined and would not be in front of you if an opinion had been issued to the effect that the legislation in question was manifestly unconstitutional and could not be defended by credible arguments before a court.”) (Mr. Stanley Cohen, Department of Justice). See also discussion *ibid.* at 12-13, 18-19. See also Hansard, 39th Parl., 2nd Sess, 23 November 2007 at 1278 (Mr. Joe Comartin and Hon. Rob. Nicholson), 1279 (Hon. Robert Thibault).

94. See Sterling & Mackay, *supra* note 10 at 914.
Aboriginal law, the honour of the Crown doctrine requires the Crown to consider Aboriginal interests in dealings with Aboriginal peoples.95

When government lawyers are dealing with vulnerable parties who are represented by counsel, a higher standard of conduct may be expected of them than if the case simply involved two private parties. Thus, in the public inquiry into the wrongful conviction of Donald Marshall, the Commission was critical of how the government handled the negotiations with Mr. Marshall’s counsel regarding compensation. Counsel for Nova Scotia negotiated an objectively good deal for the government which settled Mr. Marshall’s claims for the sum of $270,000. However, the public inquiry did not view it in this manner. The Commissioners did not analyze government counsel’s actions through the traditional paradigm of the adversarial model of litigation. Instead, the Commission stated that the Deputy Attorney General “should have realized that the Donald Marshall, Jr. compensation question was not merely a routine piece of civil litigation and the question of fairness needed to be considered. It was not.”96 No further explanation was given as to why this was not an ordinary piece of civil litigation. If it was because of Crown wrongdoing, then the Commission did not make clear why counsel for the Crown owed a higher duty than in other cases of Crown wrongdoing.

In essence, when we put aside the situations where it is recognized that government lawyers do owe higher duties, we are left with two types of government lawyering activities: civil litigation against a non-vulnerable party and advisory functions, including legislative drafting and policy development. In ordinary civil litigation, government lawyers often do not behave like their private counterparts.97 For example, in the area of costs, the Crown routinely foregoes its right to seek costs against the losing party in litigation or seeks significantly less in indemnification than what a private party would.98

A more recent decision addressing the conduct of government lawyers against a non-vulnerable party is perhaps more illuminating than the statements of the Hickman Inquiry regarding government counsel’s

97. In some areas, it may be perceived that government counsel are as zealous (or overzealous) as private lawyers.
conduct vis-à-vis Donald Marshall. In a decision unsealed in 2010 involving the disclosure of a privileged report, Justice Michael Code of the Ontario Superior Court of Justice made the express connection between counsel’s conduct and the government’s duty under the rule of law.99 According to Justice Code, it is not enough for a public sector lawyer to take an adversarial stance in litigation because opposing counsel’s argument is not well-framed. The government lawyer has a duty to ensure that the government complies with the law: “the importance of the rule of law as constitutional precept in Canada does not permit this approach to public administration at any level of government.”100 Justice Code’s statements involved the conduct of a lawyer for the City of Toronto. They have stronger force in the case of lawyers for the provincial or federal governments because of the constitutional responsibilities of the federal and provincial Attorneys General.

If the statements of Justice Code are representative of a wider judicial attitude towards government lawyers, it is likely that many judges expect more from government counsel—even in ordinary civil litigation cases where the adversary is a well-resourced private lawyer. I would suspect that many government lawyers similarly hold themselves to a higher standard and take very seriously the moniker that they are lawyers for the Crown. In fact, the mandate, mission and values of the Department of Justice provide that its lawyers should “provide high-quality legal services” while “upholding the highest standards of integrity and fairness.”101 Thus, the official policy of the Department of Justice would seem to support the idea of a higher duty.102 In policy and in practice, government lawyers are

99. Alpha Care, supra note 63.
100. Ibid. at para. 39 citing Reference re Remuneration of the Prov. Court of P.E.I., [1977] 3 S.R. 3 at para. 99; Imperial Tobacco Canada Ltd, supra note 71 at paras. 57-58; Re Manitoba Language Rights, [1985] 1 S.C.R. 721 at 748-50. In Alpha Care, Justice Code was critical of the city solicitor for recommending adopting an adversarial approach in litigation when his legal advice was that the application brought by the opposing party likely had merit, on grounds not advanced by the opposing party: Alpha Care, ibid. at para. 37.
101. Canada, Department of Justice, Mandate, Mission and Values (Ottawa: Department of Justice, 2010), online: <http://www.justice.gc.ca/eng/dept-min/mandat.html>.
102. Whether in practice the prevailing ethos in most government lawyers’ offices is to the contrary is uncertain and unknown because of the lack of empirical work in this area. Some lawyers in private practice would certainly complain about the tactics taken by government lawyers in particular cases. Some government lawyers and judges have expressed to me privately their belief that government lawyers do have a higher duty than lawyers in private practice.
committed to a higher duty and not simply to the minimal standards of ethical conduct prescribed in law society rules.\textsuperscript{103}

\textsuperscript{103} In fact, many of the statements contained in \textit{The Federal Prosecution Service Deskbook} support the extension of a higher ethical duty to all government lawyers, not just to prosecutors. The starting point for this assertion lies with statements by government itself. In her foreword to the Federal Prosecution Service Deskbook, then Justice Minister Anne McLellan reminded federal prosecutors (and the public) of their role as representatives of the Attorney General in the courts and exhorted them to "to exemplify ‘the Crown’ as a symbol of integrity and justice." Minister of Justice Anne McLellan, "Foreword" in Canada, Department of Justice, \textit{The Federal Prosecution Service Deskbook} (Ottawa: Federal Prosecution Service, 2000), online: <http://www.ppsc-sppe.gc.ca/eng/fps-sfp/fpd/index.html> [Canada, Deskbook]. While \textit{The Federal Prosecution Service Deskbook} only applies to Crown prosecutors, these exhortations surely apply to all government lawyers. All government lawyers represent the Crown and therefore personify the Crown in their dealings with Canadians. The government should want all of their legal representatives to exemplify the Crown "as a symbol of integrity and justice." Indeed, many of the duties that the Government has articulated for Crown prosecutors would seem to apply to all government counsel. \textit{The Federal Prosecution Service Deskbook} provides that Crown counsel have three overarching duties:

- The duty to ensure that the responsibilities of the office of the Attorney General are carried out with integrity and dignity;
- The duty to preserve judicial independence; and
- The duty to be fair and appear to be fair;

\textit{The Federal Prosecution Service Deskbook}, \textit{ibid.} at § 9.3. In terms of the duty to ensure that the responsibilities of the office of the Attorney General are carried out with integrity and dignity, the Deskbook states that:

Counsel can fulfill this duty:

- by complying with applicable rules of ethics established by their bar association;
- by exercising careful judgment in presenting the case for the Crown, deciding what witnesses to call, and what evidence to tender;
- by acting with moderation, fairness, and impartiality;
- by not discriminating on any basis prohibited by s. 15 of the Charter;
- by adequately preparing for each case;
- by not becoming simply an extension of a client department or investigative agency; and
- by conducting plea and sentence negotiations in a manner consistent with the policy set out in this deskbook.

Certainly, there is unlikely to be any debate about the application of items 1, 4, 5, or 6 to all government counsel. Item 7 can only apply to criminal cases. The real issue is the application of items 2 and 3, which I will return to in a moment. The duty to preserve judicial independence applies \textit{mutatis mutandis} to all government counsel. According to the Deskbook, counsel can fulfill the duty to preserve judicial independence:

- by not discussing matters relating to a case with the presiding judge without the participation of defence counsel;
- by not dealing with matters in chambers that should properly be dealt with in open court;
- by avoiding personal or private discussions with a judge in chambers while presenting a case before that judge; and
- by refraining from appearing before a judge on a contentious matter when a personal friendship exists between Crown counsel and the judge.

\textit{Federal Prosecution Service Deskbook}, \textit{ibid.} at § 9.3.2. These responsibilities apply equally to all government counsel.
2. The nature of the Crown’s higher duty as custodians of the rule of law

It is one thing to argue that the Crown owes a higher ethical duty and it is another to identify the nature of that duty. In this section, I explain what I mean by the higher duty of government lawyers as custodians of the rule of law.

Some have argued that government lawyers have a duty to act impartially just as Crown prosecutors must. I do not think this is the case. Rather, I think Lorne Sossin was correct when he asserted that there is a spectrum of ethical responsibilities for government lawyers. However, unlike Sossin, I believe that the general ethical duties of government lawyers are not the same as those for private lawyers. Former Saskatchewan Deputy Minister of Justice Brent Cotter has argued that government lawyers owe a duty of “Fair Dealing,” which involves a duty to consider the community of interest in opposition to the government. I agree conceptually with Cotter’s approach, but ultimately I feel that it is too difficult to translate into practical guiding principles for government lawyers, the courts and the public.

It is perhaps surprising that the idea of special duties owed by government lawyers remains contentious in Canada. Over ten years ago, former Deputy Minister of Justice of Canada, John Tait, asserted that government lawyers owed a number of unique duties including being “guardians of the rule of law as it applies within government in a parliamentary democracy.” He asserted that government lawyers have a higher duty to the law and to the Constitution. In practical terms, this means that government lawyers must provide objective and independent advice. Tait explained:

The duty to promote and uphold the rule of law means that there is a quality of objectivity in the interpretation of the law that is important to the public service lawyer. There must be a fair inquiry into what the law actually is. The rule of law is not protected by unduly stretching the interpretation to fit the client’s wishes. And it is not protected by giving one interpretation to one department and another to another department.

105. See ibid. at para. 14.
107. Cotter, supra note 9 at 472.
109. Ibid. at 548.
110. Ibid. at 543-44.
While the ethical precept of providing independent advice applies to all lawyers, it is not infrequently ignored in the private sector under pressure to tailor legal advice to the client’s wishes. Thus, the American legal ethics scholar Brad Wendel has constructed an entire theory of legal ethics on the idea of “fidelity to law”—that all lawyers must treat the law with respect. For government lawyers, this means that they must remember that the law is an end in itself and they must not use the law as a means to achieve an end. “In the case of legal ethics, being a good lawyer means exhibiting fidelity to law, not distorting its meaning to enable the client to do something unlawful.” In advising the Crown, government lawyers must provide a fair interpretation of the law. Moreover, as custodians of the rule of law, they cannot use the law as a sword to batter their opponents, for the rule of law is intended as a shield against arbitrary government action not as a weapon in the government’s arsenal. Thus, unlike private sector lawyers, government lawyers should not exploit loopholes in the law in sanctioning government action or rely on technicalities in litigation.

Being custodians of the rule of law means that government lawyers must also support other institutions which are critical to the protection of the rule of law, specifically an independent bar and an independent judiciary. Government lawyers have a special responsibility to protect the independence of the judiciary which is a vital component to the rule of law. How does the abstract principle translate into concrete practice? For example, in a case where government lawyers have information that could raise a reasonable apprehension of bias against a judge, it should be incumbent upon government lawyers to bring this information to the attention of the court and to the other lawyers in the case, even if the government lawyer concludes that the apprehension of bias is not a reasonable one. In such cases, no ethical rules require lawyers to act in such a way. However, the special responsibilities of government lawyers

114. Ibid. at 264.
to protect the rule of law dictate that they act in a manner to protect the integrity of the courts.  

The higher duty of government lawyers as custodians of the rule of law is more difficult when applied to protecting the independence of the bar, in part due to the contested nature of the term. While self-regulation of the legal profession is entrenched in Canada, especially in comparison to other countries, self-regulation is not coterminous with the independence of the bar as the experience in these other jurisdictions demonstrates. What being custodians of the rule of law means is that government lawyers must be especially vigilant against government attempts to interfere in the lawyer-client relationship. This duty may often overlap with the duty to ensure compliance with the law because few laws authorize such interference. Thus, government lawyers should be concerned about reports which suggest that government agencies are listening in to lawyer-client communications.

III. Accountability and the regulation of government lawyers
When we examine the regulation of Government lawyers, we are struck with a paradox. Despite their high percentage in the Canadian legal profession, it is rare for government lawyers to be subject to law society

There are a number of possible explanations for this. One possibility is that the law society discipline process may be deficient in failing to investigate and sanction misconduct by government lawyers. Alternatively, the ethical conduct of government lawyers may be higher than the general legal population so there is a smaller pool of unethical conduct amongst government lawyers that could come to the attention of the law society. Finally, there may be structural and internal measures in place that prevent government lawyers from committing the sorts of misconduct that would attract law society attention. Each of these three factors likely contributes to the result. The last explanation—internal measures—is the most important one as discussed below but the nature of law society regulation also helps to explain why seemingly few government lawyers are investigated, let alone sanctioned, by law societies.

117. For examples of discipline cases involving government lawyers see Krieger v. Law Society of Alberta (1997) 205 A.R. 243 (Q.B.) [Crown prosecutor fails to disclose DNA test results in murder case in a timely fashion. The Crown lawyer apologized and noted that he had been disciplined for this by his superior. Lawyer argued against being disciplined also by the Law Society as double jeopardy. Law Society asserted that Attorney General does not have power to discipline a lawyer for professional misconduct because this falls under the jurisdiction of the Law Society Bencher]; R. v. Lindskog (1997) 159 Sask. R. 1 (Q.B.) [The Crown prosecutor was in a conflict of interest as he had placed himself in an adversarial position against his former client, in a criminal prosecution, within a short time frame]; Law Society of Alberta v. Elander, [1999] L.S.D.D. No. 70 (Law Society of Alberta Hearing Committee Report) [Lawyer appointed solicitor for a government board, signed an undertaking not to practice outside the scope of his employment with the Board. Three years later he began “consulting” work for two firms, which he continued for three years. His estranged wife reported him to the Crown during their divorce. Lawyer was reprimanded, fined and ordered to pay costs]; Law Society of Saskatchewan v. Kirkham, [1999] L.S.D.D. No. 19 (Law Society of Saskatchewan Discipline Decision) [Crown prosecutor breached his duty to the Court to promptly inform it that the police had been in direct contact with prospective jurors in a murder trial. Acquitted of charges by court, law society disciplined with retroactive suspension]; Law Society of British Columbia v. Kierans, [2001] L.S.D.D. No. 22 (Law Society of British Columbia Discipline Hearing Decision) [Sexual harassment issue arises during employment for the Department of Justice]; Law Society of British Columbia v. Nader, [2001] L.S.D.D. No. 40 (Law Society of British Columbia Discipline Hearing Decision) [Mr. Nader was appointed to the APEC Commission Inquiry by the Government of Canada and inflated his hours in an attempt to seek compensation for work he had already done for his clients previously on a pro bono basis. Lawyer was suspended for 18 months]; Nova Scotia Barristers’ Society v. Murrant, [2004] L.S.D.D. No. 2 (Nova Scotia Barristers’ Society Discipline Decision) [Barristers’ Society disciplines Supreme Court of NS Barrister for professional misconduct. Lawyer refused to pay child support to ex-wife but wanted to pay directly to daughters to ensure they receive a university education, which he believed his ex-wife would not have provided with the support payments. Refusal to pay his ex-wife led the lawyer to a bitter exchange with the Family Div. Supreme Court using shockingly abusive language in many letters]; Law Society of British Columbia v. Suntok, [2005] L.S.D.D. No. 128 (Law Society of British Columbia Discipline Hearing Decision) [Crown counsel commits assault on his girlfriend after she broke off the relationship. Reprimanded, suspended for 90 days, undertakings required: abstain from alcohol consumption, practice standards review, alcohol addiction treatment, pay costs $8,000].
The *raison d'être* for self-regulation of the legal profession is a determination that it is in the public interest.\(^{118}\) Michael Trebilcock has argued that the only defensible reason for regulation generally is consumer protection. On this basis, governments as the consumers of legal services would not appear to be in need of protection.\(^ {119}\) Rather, for government lawyers, the imperative for regulation flows not from consumer protection but from public accountability for the exercise of power. Generally, the public is not in need of protection from incompetent or abusive government lawyers in the same manner as they are in need of protection from lawyers who hold out their services to the public. But the public does have a right to demand that government lawyers be held accountable for the exercise of power entrusted to them. The need for accountability flows from government lawyers’ status as custodians of the rule of law. According to the Chief Justice of Canada, the exercise of power must be both justifiable and justified: “...societies governed by the Rule of Law are marked by a certain *ethos of justification*. In a democratic society, this may well be the general characteristic of the Rule of Law within which the more specific ideals... are subsumed. Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of *rationality and fairness*.\(^{120}\)

An ethos of justification can be effectuated through transparency. In his Report on the Arar Inquiry, Justice Dennis O’Connor wrote that “[o]penness and transparency are hallmarks of legal proceedings in our system of justice. Exposure to public scrutiny is unquestionably the most effective tool in achieving accountability for those whose actions are being examined and in building public confidence in the process and resulting decision.”\(^ {121}\) Justice O’Connor invoked the words of Justice Fish that “[i]n...

---


119. A similar argument would likely apply to other large organizations.


any constitutional climate, the administration of justice thrives on exposure
to light—and withers under a cloud of secrecy."122

On the need for transparency, a former Deputy Attorney General of
New Brunswick has written that media suspicions concerning the exercise
of power by those in government are often based on a lack of information:
"Those on the inside of the wall that surrounds the Attorney-General may
be comfortable in the correctness of their actions, but those on the outside
who lack information and participation are seldom so comfortable. The
public is forced, reluctantly, to rely upon integrity with little information
by which to assess its presence or absence."123

1. Existing forms of accountability
Despite the existence of de jure self-regulation,124 in practice Canadian
lawyers are subject to multiple overlapping forms of regulation. They
are subject to regulation by their respective law societies, to internal
regulation through their firm or organization if they practice in an
organizational setting,125 the oversight of the courts,126 external regulation
by other regulatory bodies such as securities commissions (domestic and

122. Toronto Star Newspapers Ltd. v. Ontario, 2005 SCC 41, 2 S.C.R. 188 at para. 1, quoted in Arar,
ibid.
124. On the regulation of lawyers in Canada see Harry Arthurs, "The Dead Parrot: Does Professional
Self-Regulation Exhibit Vital Signs?" (1995) 33 Alta. L. Rev. 800; W. Hurlburt, supra note 118; Joan
Out" (2004) 19 C.J.L.S. 55; Alice Woolley, "Re-Envisioning Regulation: 'Canadian Lawyers in the
21st Century'" (2008) 45 Alta. L. Rev. 5; Richard F. Devlin & Porter Hefferman, "The End(s) of Self-
125. See, e.g., Ronald Daniels, "Uncharted Frontiers: The Law Firm as an Efficient Community" (1992)
37 McGill L.J. 801; Marc Galanter & Thomas Palay, Tournament of Lawyers: The Transformation of
the Big Law Firm (Chicago & London: University of Chicago, 1991); Marc Galanter & William
L. Rev. 1867; Marc Galanter & Thomas Palay, "The Many Futures of the Big Law Firm" (1994) 45
S.C.L. Rev. 905; and Marc Galanter & Thomas Palay, "Why the Big Get Bigger: the Promotion-to-
Partner Tournament and the Growth of Large Firms" (1990) 76 Va. L. Rev. 747.
126. See, e.g., Alice Woolley, "Judicial Regulation of the Legal Profession: Correspondent's Report
From Canada" (2010) 13 Légal Ethics 104. As Woolley notes, the large body of court decisions on
conflicts of interest should be viewed as strong forms of judicial regulation of the legal profession in
Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law

foreign), government regulation, and tort and insurance. These forms of regulation operate differently in regulating government lawyers. Each is analyzed below.

a. Law society regulation

In principle, all lawyers are subject to law society regulation. However, in practice, there are a number of reasons why government lawyers are unlikely to attract the attention of law societies. To begin, in Canada most law society regulation is complaint-based. Most law society complaints are client-initiated, although complaints may also be received from other lawyers, from judges or members of the public. Law societies have jurisdiction to initiate their own complaints when allegations of lawyer misconduct come to their attention. This power is rarely exercised.

Disgruntled clients are the primary source of complaints to law societies regarding lawyer misconduct. The Crown is the client of government lawyers and it is unlikely to make a complaint to the relevant law society. The government will more likely deal with ethical concerns internally. Opposing counsel and judges may hesitate to make a complaint about a government lawyer to a law society, because such complaints may be perceived to be an extreme act of last resort or a sort of nuclear option in legal warfare.

Moreover, law societies tend to focus on certain types of complaints that are unlikely to involve government lawyers. As Harry Arthurs observed, the “ethical economy” of the legal profession is such that in practice only certain types of ethical misconduct is likely to attract law society attention. According to Arthurs, there are essentially only four reasons why lawyers in Canada are subject to serious discipline: “because they have been guilty of theft, fraud, forgery or some other criminal offence; because they have violated a fiduciary duty imposed on them by law; because they are unable to carry on their practices due to physical or mental disability or serious


addiction; or because they have failed to respond to inquiries from their governing body." It is therefore not surprising that few government lawyers are disciplined by law societies.

b. **Tort and insurance**
The law of malpractice serves an important function in regulating the conduct of lawyers. For government lawyers, the tort of malicious prosecution or abuse of process may be available against the actions of Crown prosecutors or other lawyers who deal directly with the public. In addition to its primary function of compensation, tort law can also serve an educative function, reminding professionals and the public of their duties. Tort law may also function as an ombudsman as Allen Linden has written: "[i]t can be used to apply pressure upon those who wield political, economic, or intellectual power." At present, much of the work of government lawyers lies beyond the reach of tort law for several reasons. First, much of the work of government lawyers occurs outside of public view. As Deborah MacNair has written, "[p]ublic sector lawyers are public servants whose main characteristic is anonymity. Also, public sector lawyers are largely hidden from view except to the extent the public reads about them during a highly publicized trial or commission of inquiry." Second, the person who does have knowledge or would be affected by government lawyer malpractice is the client, that is, the government. The Crown is unlikely to sue its lawyers for malpractice. Third, as a general matter, the courts have been unwilling to extend duties of care in tort to third parties that could be impacted by the actions of government lawyers. For all of these reasons, tort law does not generally factor into the work of most government lawyers, outside of prosecutors.

Similarly, while insurance serves an important regulatory function for Canadian lawyers generally, it is not directly applicable to government lawyers. All Canadian law societies require lawyers in private practice

---

130. *Supra* note 117.
134. MacNair, "The Role of the Federal Public Sector Lawyer," *supra* note 9 at 127.
Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law

to carry malpractice insurance. Consequently, it has developed that in private practice, insurance acts as a powerful regulatory tool. Lawyers are trained to put their insurer on notice at the slightest possibility of a claim. This creates a culture of awareness, attuned to mistakes or ethical missteps. For government lawyers, insurance does not operate as an effective regulatory mechanism. Many government lawyers are simply exempt from insurance. Moreover, government is self-insured and government lawyers are indemnified by their employer, the government. Insurance may have an indirect impact where government counsel is sued and outside counsel is retained through the government’s insurer to defend the action. Outside counsel may provide an independent external assessment of the conduct of the government counsel which may trigger further internal discipline processes.

c. Judicial oversight
The courts play an important but limited role in regulating lawyers. To state the obvious but important point, courts only regulate the conduct of counsel appearing before them. Courts play no role therefore in the oversight of government lawyers outside of litigation. Moreover, while courts possess a broad array of common law powers including contempt, they are only exercised in cases of professional misconduct. A 2008 report of complex criminal cases in Ontario, identified the overlapping regulatory functions of the courts, the Law Society, legal aid and the Attorney General’s office. The report found that as a result of this overlapping jurisdiction, “no one seems to take lead responsibility” and “[a]s a result, there are almost never any serious consequences when professional misconduct occurs in the court room.” Moreover, the problem with judicial regulation is that it

137. See Law Pro, “Insurance for government lawyers, educators and lawyers working in legal aid clinics funded by Legal Aid Ontario,” online: <http://www.lawpro.ca/insurance/Practice_type/government_educators.asp>.
is episodic rather than systematic. Individual judges deal with individual lawyers; there is no cumulative effect on lawyer misbehaviour.\textsuperscript{140}

d. \textit{Legislative oversight}

The Attorney General is accountable to the legislature for all acts taken by his or her agents\textsuperscript{141} but such oversight is infrequently and only lightly exercised. Legislative oversight can take various forms. In the case of the accountability of the Attorney General, oversight occurs only through the requirement to respond to questions in the legislature. Professor John Edwards, the leading Commonwealth expert on the Attorney General concluded in 1988 that “An examination of the proceedings in Parliament and the provincial legislatures during the past quarter of a century will quickly confirm that such occasions of public accountability have been singularly sparse in number.”\textsuperscript{142} Like judicial oversight, legislative oversight is wholly reactive and restricted to matters of public knowledge. However, this need not be.

There are proactive models of legislative accountability. The \textit{Canadian Bill of Rights} and the \textit{Department of Justice Act} require the Attorney General to report to Parliament any inconsistency with the \textit{Canadian Bill of Rights} or the \textit{Charter}. There have been no such reports in Canada. However, in enacting the \textit{New Zealand Bill of Rights Act 1990}, New Zealand adopted a similar provision and the Attorney General of New Zealand has made reports to the New Zealand legislature\textsuperscript{143} and has gone a step further and disclosed the reasons therefore as well as the legal advice as to why a report is or is not required.\textsuperscript{144} In the United States, it has

\textsuperscript{140} Thanks to Alice Woolley for raising this point with me.


\textsuperscript{142} J. L. J. Edwards, “The Attorney-General and the Canadian Charter of Rights” (1988) 14 Commw. L. Bull. 1444 at 1446 (noting further that “It is possible to enumerate with no difficulty at all the few instances in which a full scale attempt has been made to define for the assembled legislators the nature of the office of the Attorney-General and the responsibilities of this important portfolio.” (citing sources)).


been suggested that the Attorney General be required to appear before and report to Congress. In short, legislative oversight of Government lawyers in Canada is limited and wholly reactive.

e. **Internal regulation**

The internal regulation of government lawyers is significant but largely unknown to the public. It is likely the most important explanatory variable for the infrequency of law society discipline actions against government lawyers. Government lawyers are subject to multiple forms of internal regulation and risk management that many of their counterparts in the private sector are not. To begin, government lawyers do not work in isolation. They work in formal practice groups or units. Their work is often subject to multiple levels of approvals which sometimes leads to complaints about drafting "by committee." As public servants, government lawyers are subject to frequent formal performance appraisals. There are government policies and manuals to be followed, such as the Federal Prosecution Service Deskbook.\(^{145}\) As explained in the Deskbook:

> The Department of Justice is organized to foster principled, competent and responsible decision making. One of the goals of the Federal Prosecution Service Deskbook is to assist counsel in making the numerous difficult decisions which arise in criminal litigation. In so doing, it sets objective standards against which prosecutorial conduct may be measured.\(^{146}\)

There are other handbooks and manuals in other areas as well.\(^{147}\)

Lifelong learning has been recognized as a critical tool in many fields to ensure the continued competency of professionals.\(^{148}\) While mandatory continuing legal education is new to the Canadian legal profession,\(^{149}\) it is one of the great strengths of working in the public sector, both in terms of internal continuing education programs and support and opportunities for government lawyers to attend external conferences and workshops. Additionally, while the legal profession frequently bemoans the decline of mentoring, one place where mentoring thrives is in the public sector. Senior counsel are able to formally and informally mentor more junior counsel. All of these activities may be considered proactive forms of regulation.

\(^{145}\) Canada, Deskbook, supra note 103.
\(^{146}\) Ibid. at 8.3 Accountability, online: <http://www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/ch08.html>.
\(^{147}\) The Federal Prosecution Service Deskbook is the only such manual that the federal Department of Justice has made public. This lack of transparency is discussed in part infra.
\(^{149}\) See ibid. and see the articles on lifelong learning contained in the 2010 volume of the Canadian Legal Education Annual Review (CLEAR).
In terms of reactive regulation, there are a number of elements. It is possible for a lawyer, a judge or a member of the public to complain to a government lawyer’s superior about that lawyer’s conduct. Neither the frequency of such complaints nor their disposition is known because there is no public disclosure by government of the existence let alone the disposition of such complaints. Recently, in Ontario, a protocol was created allowing judges to refer lawyers to the Law Society of Upper Canada if the judge finds that the lawyer’s conduct is unacceptable. The Ontario Ministry of the Attorney General is a party to this protocol and complaints regarding provincial government lawyers may be referred to it for mentoring of the lawyer, if appropriate.

While departments of justice have their own discipline and grievance procedures, neither the procedures nor the results are published. This is unfortunate because public service discipline of counsel is likely a significant feature of the regulation of the conduct of government lawyers. It also goes a long way in explaining why law society discipline databases are not filled with reported cases of government lawyers. Senior government lawyers take these issues very seriously and, commensurate with the notion of a higher duty, would likely operate such institutional discipline systems irrespective of law society rules.

2. Additional accountability mechanisms
The above forms of accountability are sufficient in terms of the regulation of the ethical conduct of government lawyers compared to other lawyers. Indeed, they far exceed existing systems of regulation for most lawyers. The creation of multiple, overlapping preventative systems ensures competence and professional development of government lawyers. If we were only concerned with ensuring the minimal ethical conduct of government lawyers, we would conclude that these suffice. But because government lawyers owe a higher duty as custodians of the rule of law and

---

150. One high-profile example of a complaint made against a government lawyer involved the review of the wrongful conviction of David Milgaard. Counsel for Mr. Milgaard alleged that a conflict of interest existed regarding the involvement of former Saskatchewan Crown Counsel who prosecuted the Milgaard case with the federal Department of Justice. Counsel for Mr. Milgaard filed a formal complaint with Minister of Justice Kim Campbell asking her to intervene in the matter. See Commission of Inquiry Into the Wrongful Conviction of David Milgaard, Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard (Hon. Mr. Justice Edward P. MacCallum, Commissioner) (2008) at 199.


152. See MacNair, “The Role of the Federal Public Sector Lawyer,” supra note 9 at 140.
because they exercise public power, we must demand more of them. As Deborah MacNair has written, "[p]ublic sector lawyers are public servants whose main characteristic is anonymity. Also, public sector lawyers are largely hidden from view except to the extent the public reads about them during a highly publicized trial or commission of inquiry." Government lawyers exercise power through legal interpretation and again as MacNair has written, "public decision-makers are expected to act responsibly, to be accountable for their actions and to be open to scrutiny." The forms of regulation described above are exemplary in terms of regulation but insufficient in terms of accountability for the exercise of public power. Additional forms of accountability are necessary.

a. Specialized rules for government lawyers
Government lawyers and ministries of justice should develop specialized codes of conduct for government lawyers. I acknowledge the limited efficacy of ethical codes, encapsulated in the image of the Valentine’s Day Card in the operating room. They may be of limited practical use because they often do not provide the answers to some of the most vexing issues that a lawyer may face. When they do address a subject, it may only be in the most general of terms. Thus, Deborah MacNair has written:

Counsel are largely left to their own devices in the exercise of their profession in the interpretation of these codes. This can result in the inadvertent creation of double standards for government and private

157. For example, few Canadian Codes of Conduct provide concrete advice to the situation involving physical evidence of a crime also known as “the Ken Murray problem” (see R. v. Murray (2000), 48 O.R. (3d) 544 (Sup. Ct. J.J.). For a text that does address this issue see Michel Proulx & David Layton, Ethics and Canadian Criminal Law (Toronto: Irwin Law, 2001) at chs. 4, 5.
counsel. Established norms for one may not be the same for the other. One prevailing norm is that all parties come to court with equal bargaining power and resources.\textsuperscript{158}

Even accepting these arguments at their strongest, I still believe that Codes of Conduct serve a valuable symbolic function in articulating the values of the profession.\textsuperscript{159}

However, I believe there is a greater value in the articulation of a specialized code of conduct for government lawyers. The process of creating such a code would force those involved to articulate and address the particular ethical challenges and circumstances that they face.\textsuperscript{160} As former Deputy Minister of Justice and Deputy Attorney General of Canada John Tait recommended: “each department and agency to develop its own ethical guidelines, specifically tailored to meet the particular challenges and circumstances they encounter.”\textsuperscript{161} Certainly, such specialized codes have been developed in other countries.\textsuperscript{162}

b. \textit{Increased transparency: policy publication and proactive disclosure}

Government should increase the transparency of how it uses legal advice to exercise public power. As the former Deputy Attorney General of New Brunswick argued, public confidence in the Attorney-General is improved by a freer flow of information, by greater candour in explaining the reasons behind the decisions. He favoured any step that would reduce suspicion.\textsuperscript{163} There are two transparency aspects that governments should pursue: policy publication and case-by-case disclosure.

Governments frequently publish the policies which serve as the basis for the exercise of power by administrative decision makers. Thus, for

---

\textsuperscript{158} MacNair, “In the Service of the Crown,” supra note 9 at 517.

\textsuperscript{159} For an excellent discussion of this issue and the role of codes of conduct generally see Wilner, supra note 9 at 207-13.

\textsuperscript{160} See Canadian Centre for Management Development, \textit{A Strong Foundation: Report of the Task Force on Public Service Values and Ethics} (Ottawa: Canadian Centre for Management Development, 1996) (Chair, John C. Tait QC) (“The Tait Report”) at 40 (each department should develop its own ethical guidelines, specifically tailored to meet the particular challenges and circumstances they encounter).

\textsuperscript{161} Ibid.


example, there are manuals for the military, the police, the RCMP, immigration officials, Canadian Border Services, and tax officials. Should government lawyers be any different? They should not.

Most governments already publish very detailed manuals containing their prosecution policies. The Federal Prosecution Service Deskbook has been available since at least 2000 and is now posted online on the website of the Public Prosecution Service of Canada. It expressly boasts—deservedly so—of its function in enhancing accountability for prosecutorial discretion: “Accountability is also enhanced because of the availability to the public of the Federal Prosecution Service Deskbook, since the public is able to assess the actions of Crown counsel against the standards set out in the


policies. In Nova Scotia, under the Public Prosecutions Act, general guidelines have to be in writing and published.

Similar policies or manuals likely exist for non-criminal functions by government lawyers and they should also be published. There is no good reason that they are not. Some of these policies likely relate to rather ordinary functions but others relate to how advice is provided by government lawyers on critical issues such as the constitutionality of legislation or the determination of national security confidentiality. Every once in a while the public gets a glimpse of pieces of such policies or guidelines. Their complete contents should be revealed to the public. As the former Deputy Attorney General of New Brunswick noted, such measures are likely to have a positive effect on government, lessening suspicion and increasing public confidence.

Governments do not like to disclose information. But there is no defensible reason not to disclose such policies when they are already disclosing criminal policies. Some government lawyers will raise solicitor-client privilege as a reason to prevent the disclosure of such policies, claiming that they represent legal advice about how legal advice is given. Such protestations may be a valid basis to resist an access to information request under existing law but they are not persuasive as a matter of logic or policy. First, governments have the power to waive their right to solicitor-client privilege and they have done so respecting criminal policy manuals. They can and they should similarly do so with respect to non-criminal policy manuals. Second, as I have argued elsewhere, the entire raison d'être for solicitor-client privilege is highly problematic in the government context. If the dominant rationale for this privilege is to facilitate full and frank communication between lawyer and client, this rationale has far less application in the case of policy formulation than in the case of advice relating to a specific live matter. Government lawyers

170. Canada, Deskbook, supra note 103 at c. 8.3.
171. Public Prosecutions Act, S.N.S. 1990, c. 21, s. 6(a).
172. As in the case where a Department of Justice lawyer testified before a Parliamentary Committee regarding the standard of "manifestly unconstitutional" used by Government lawyers in evaluating draft legislation. See supra note 93.
may be concerned about a chilling effect when their advice is exposed to public view. However, policies and manuals regarding how legal advice should be given are not the works of individual lawyers; rather, they are corporate documents. While governments enjoy secrecy, one must seriously question the value to them in maintaining secrecy over such policies. They appear to be secret for the sake of being secret. They should be disclosed and published because they provide the basis upon which government lawyers *qua* public servants are exercising public power.

Governments should also proactively disclose legal advice in specific matters. This suggestion obviously poses a greater challenge to governments in Canada given their obstinacy in disclosing non-criminal legal policies. However, again the criminal and comparative experiences provide the models and the justification for such practices. The Federal Prosecution Service Deskbook provides that “recognition of the importance of public accountability imposes a duty on Crown counsel in certain circumstances to communicate the reasons for certain decisions to the public through the media.”175 An example of this rationale in action was provided by the independent prosecutor in the prosecution of former Ontario Attorney General Michael Bryant in his filing with the Court and the press the full reasons for his decision to drop all charges against Bryant.176 Along the same lines, in Nova Scotia instructions or guidelines for a particular prosecution have to be in writing and published.177

Governments in Canada steadfastly assert solicitor-client privilege and rarely disclose legal advice. Of course, they can waive the privilege and they should—much more frequently. The governments in other countries routinely disclose legal advice with no demonstrable negative impacts on the operation of government. When New Zealand adopted a statutory Bill of Rights in 1990 (NZBORA), it included a provision modelled after a relatively obscure provision in the *Canadian Bill of Rights* that requires the Attorney General of Canada to certify that every government bill and regulation complies with the *Bill of Rights*. A similar provision exists in respect to the Attorney General of Canada’s duties respecting compliance with the *Charter*. Both lawyers in the New Zealand and Canadian

175. Canada, *Deskbook*, * supra* note 103 at c. 8.3.
177. *Public Prosecutions Act*, S.N.S. 1990, c. 21, s. 6.
departments of justice undertake such legal analysis and provide advice to
their respective Attorneys General. The difference is that the New Zealand
Ministry of Justice posts all of these legal opinions on its website.\textsuperscript{178}

In the United States, the Office of Legal Counsel within the Department
of Justice provides advice to the executive branch of government. It has
become associated with the infamous torture memos, legal opinions
regarding the legality of various forms of coercive interrogation methods.
Many of those legal opinions were published by the Office of Legal Counsel
itself because it routinely discloses such legal opinions on its website
and they are also available in legal databases.\textsuperscript{179} For those concerned
about the alleged chilling effect that proactive disclosure would have on
providing candid legal advice, the torture memos are not a supportive
case. The Office of Legal Counsel had been disclosing legal opinions for
at least three decades when the torture memos were written. All lawyers
in the Office of Legal Counsel must know that their legal advice may be
disclosed. It has not been demonstrated that such proactive disclosure has
had a chilling effect on the legal advice provided by lawyers in that office.
What is surprising when one reads the torture memos is the extent to which
they appear to be written completely oblivious to the possibility of their
future disclosure, let alone likely wide circulation within government. The
lawyers who wrote such memos were recently investigated by an internal

\textsuperscript{178} New Zealand, Ministry of Justice, Advice provided by the Ministry of Justice and the Crown Law
Office to the Attorney-General on the consistency of Bills with the Bill of Rights Act 1990 (Wellington:
legislation/bill-of-rights>. American states also upload various legal opinions of Attorney Generals to
different branches of government. For example, Texas has a comprehensive collection of legal opinions
of the last thirteen Attorney Generals online, dating back to as far as 1939. See U.S. Attorney General
of Texas, Greg Abbott, Index to Opinions (Austin: Office of the Attorney General, 2010), online:
<http://www.oag.state.tx.us/opin/opindextx.shtml>. See also: New York State Attorney General, Andrew
M. Cuomo, Opinions of the Attorney General, 1995-2009 (New York: Office of the Attorney General,
2008), online: <http://www.ag.ny.gov/bureaus/appeals_opinions/opinions/index_op.htmlP>; State of
New Jersey, Paula T. Dow, Attorney General Formal Opinions, 1949-2010 (Trenton: Office of the
Attorney General, 2010), online: <http://www.nj.gov/oag/ag-opinions.htm>; California, Department
of Justice, Edmund G. Brown, Jr., Legal Opinions and Quo Warranto, 1997-2010 (San Francisco:
Office of the Attorney General, 2010), online: <http://ag.ca.gov/opinions.php>; State of Florida,
Bill McCollum, Attorney General's Advisory Legal Opinions, 1972-2010 (Tallahassee: Office of the
to reveal that all fifty states publish some of their legal opinions. For a comprehensive collection of
legal opinions, see Attorney General Opinions, DATABASE (Westlaw, earliest available: 1959). For
U.S. federal Attorney General opinions see United States Attorney General Opinions, DATABASE
(Westlaw, earliest available: 1791).

\textsuperscript{179} United States Department of Justice, Office of Legal Counsel, Memoranda and Opinions, online:
Lawyering at the Intersection of Public Law and Legal Ethics:
Department of Justice professional conduct office. Others had already concluded that the advice contained in those memos was inaccurate if not misleading. The lesson from this American experience was that there was not enough accountability and transparency, rather than too much.

Canadian governments at all levels should institute a similar regime of proactive disclosure of legal advice. Many governments are already doing so respecting the expenditure of public funds on the grounds that the public has a right to know how government officials are spending their money. Similar arguments regarding the chilling effect on the expenditure of public funds on necessary activities might be levelled against this practice. The exercise of public power by government lawyers is equally if not more important than the travel expenses of public officials. It would strengthen the democratic conversation between government and the citizenry. Kent Roach has argued that the case of the Anti-Terrorism Act provides an example of the type of situation where the disclosure of legal advice would have enhanced transparency and accountability. Roach relates how Minister of Justice Anne McLellan argued that the legislation had been thoroughly vetted by human rights lawyers within the Department of Justice and was consistent with the Charter. According to Roach, “[o]pposing legal viewpoints are to be expected, but the process would have been improved if the legal advice received by the government about the bill were released to the public. Not all of the government’s lawyers’ evolving work product need be released, but the heart of the analysis could have been included in edited explanatory notes to accompany the bill.” Such proactive disclosure is a necessary but not sufficient step in creating a regime of accountability for government lawyers. There is one additional critical measure.

183. Roach, “Not Just the Government’s Lawyer,” supra note 10 at para. 52. Roach continued: “On such matters, there seems to be little interest in standing on claims of solicitor and client privilege and Cabinet confidentiality. The spectre that such information when released may be used strategically against the government either in Parliament or in court does not hold weight because it undermines the government’s claim that the legislation is consistent with the Charter.” Ibid.
3. An office of professional responsibility for government lawyers

Because of the imperative of fostering accountability for the exercise of public power, federal and provincial governments should establish an office of professional responsibility within their respective departments of justice. The purpose of such an office would be to develop the ethical standards referred to above, provide a source of ethical guidance and advice for government lawyers and receive and investigate complaints against government lawyers. This idea is not original. It finds its source in the Office of Professional Responsibility of the U.S. Department of Justice.\(^{184}\)

The question could be posed why such an office is necessary in Canada. However, the question might also be reversed and asked why it is not necessary in Canada? In fact, on public law and regulatory grounds, the case for an OPR in Canada is stronger than in the United States. In the United States, there is a constitutional separation of powers between the executive and the legislative branches of government designed to establish a system of checks and balances between those branches. Executive power at the federal or state level is subject to the scrutiny, limitation and sometimes override by the legislative branch, whether that be Congress or a state legislature. In Canada, while we have a functional separation of powers,\(^ {185}\) under our parliamentary system of government, we have a large degree of fusion between the legislative and executive branches of government. Unless there is a minority government, which until recently has been rare in Canada,\(^ {186}\) the executive effectively controls the legislature. Proposed laws originate within the executive branch of government,\(^ {187}\) are drafted based upon legal advice tendered by executive branch lawyers, and are introduced in the legislature by a minister. The executive branch decides whether to accept or reject changes proposed at legislative committees.

Moreover, there is a great imbalance of resources between the executive and legislative branches of government in Canada, especially when it comes to legal advice. Few Canadian legislatures have legal advisers who can provide legislators with independent legal advice on legislation or other matters. In the United States, legislative committees have well-resourced

---

187. Private Members Bills are an exception to this description but they rarely become law and do not play a significant part of the legislative process in Canada.
Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law

staff lawyers who can provide effective counterweights to the position of executive branch lawyers. Many American legal luminaries have worked as legislative branch lawyers including Justices Stephen Breyer,188 Clarence Thomas,189 Elana Kagan,190 Secretary of State Hillary Clinton,191 former Chief of Staff to President Bill Clinton, John Podesta,192 John Yoo193 of the torture memos infamy and Director of Homeland Security Michael Chertkoff,194 among others. In Canada, government lawyers exercise a virtual monopoly on the provision of legal advice regarding legislation and executive branch actions.

In addition, there is more external regulation of government lawyers in the United States than in Canada. Thus, we should be concerned with the significant concentration of power within Canadian departments of justice. If the federal Department of Justice was its own jurisdiction, with over 2,700 lawyers it would be the sixth largest jurisdiction in Canada. Effectively, the Department of Justice is a regulatory body of its own within the larger system of self-regulation. Whereas all Canadian law societies have made significant strides over the past decade to increase the transparency of their proceedings and strengthen their accountability to the public for their mandated role to regulate the legal profession in the public interest, few ministries of justice have responded in like fashion.

There is both a public and a governmental need for the creation of such internal accountability. The experience of the Arar inquiry demonstrates the imperative of creating an office of professional responsibility.195 Justice

189. Ibid.
193. University of California, Berkeley School of Law, Faculty Profiles (Berkeley: Berkeley School of Law, 2010), online: <http://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=235>.
195. To be clear, government lawyers were not implicated in any way in the underlying events relating to the transfer of information from Canadian officials to American officials which led to the rendition and torture of Maher Arar. Justice O’Connor’s criticisms related solely to the actions of government lawyers during the inquiry.
Dennis O’Connor headed the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (Arar Inquiry). Justice O’Connor was chosen to head the Arar Inquiry because of his reputation for fairness, diligence and political sensitivity that he earned in heading up a public inquiry into contamination of the water supply in Walkerton, Ontario that resulted in at least seven deaths and over 2,500 people becoming ill. Thus, it is to be expected that Justice O’Connor would choose his comments carefully. In his Report on the Arar Inquiry, Justice O’Connor concluded that the government had systematically overclaimed national security confidentiality.

According to Justice O’Connor, this had serious ramifications for the administration of justice. He said:

overclaiming exacerbates the transparency and procedural fairness problems that inevitably accompany any proceeding that cannot be fully open because of the [national security confidentiality] concerns. It also promotes public suspicion and cynicism about legitimate claims by the Government of national security confidentiality. It is very important that, at the outset of proceedings of this kind, every possible effort be made to avoid overclaiming.

It is likely that within the federal government there was some consideration of Justice O’Connor’s comments. However, the federal government made no public response to Justice O’Connor’s criticisms. It is unlikely that any law society undertook an investigation into the allegations. In any event, there is no public indication of any such investigation and there was certainly no discipline proceedings that resulted from Justice O’Connor’s comments.

An office of professional responsibility would help provide the needed transparency to the process of government lawyering in an age of increasing concern for transparency and accountability for the exercise of public power. It would serve a dual purpose of fostering regulatory confidence for the professional conduct of government lawyers and accountability for the exercise of public power. But what would an office of professional responsibility do?

198. Ibid. at 304 (“I am raising the issue of the Government’s overly broad NSC claims in the hope that the experience in this inquiry may provide some guidance for other proceedings...Litigating questionable NSC claims is in nobody’s interest. Although government agencies may be tempted to make NSC claims to shield certain information from public scrutiny and avoid potential embarrassment, that temptation should always be resisted.”).
Canadian offices of professional responsibility would be both proactive and reactive. They would be proactive in initiating consultations and discussions on the creation of codes of conduct for government lawyers. Such a process would constructively engage and debate the tensions in the government lawyers’ roles *qua* public servants and *qua* lawyers. The attempt to resolve such conflicts would increase confidence for both government lawyers and the public. These offices would also provide a source of confidential ethical advice for government lawyers.

Canadian offices for professional responsibility would also serve an important reactive function. They would provide, receive and respond to complaints about ethical conduct of government lawyers from other lawyers and members of the public. To be clear, I am not advocating for the creation of large bureaucracy within existing large bureaucracies. I would not expect Canadian offices of professional responsibility to receive a large volume of complaints. For reasons explained above, existing accountability mechanisms within government likely ensure a high level of competent and ethical conduct by most government lawyers. Thus, we should not expect to see the same proportion of complaints regarding ethical conduct of government lawyers that we would see in the general population. Moreover, most complaints against lawyers in the general population come from clients. In the case of government lawyers, the client is unlikely to complain. However, Canadian offices of professional responsibility could deal with internal complaints against government lawyers from within government.

Moreover, the existence of a dedicated office of professional responsibility within government would likely encourage more lawyers or aggrieved members of the public to come forward. In the absence of an office of professional responsibility, persons with complaints against the conduct of government lawyers are left with limited options: they can complain to the government lawyer’s superior—perhaps a Director, Assistant Deputy Minister or the Deputy Minister; they can complain at the political level directly to the Attorney General/Minister of Justice; or they can lodge a complaint with the relevant law society. None of these options are particularly attractive. A complaint against a government lawyer to the law society is largely viewed as making a complaint against government itself. While clients do not hesitate to make complaints against lawyers, lawyers are more reticent to inform on their own. As indicated previously, such complaints are rare.
Similarly, lawyers or members of the public are likely to be reticent to complain to the government lawyer's superiors. Even when such complaints are made, the process is not transparent. The public has no idea how many complaints are made against government lawyers, what the circumstances are or what the resolution is. In short, the process is informal, ad-hoc and not transparent.

Canadian offices of professional responsibility therefore would receive and investigate complaints about the conduct of government lawyers. They could take a variety of actions: dismiss the complaint as unfounded, discuss the issue with the affected government lawyer, refer the matter to the government lawyer's superior for action, if found to have violated a government rule or regulation, refer the matter for discipline within government or, if they conclude that there is reason to believe that the government lawyer has violated a provision of a law society's rules or code of conduct, or refer the matter to the appropriate law society.

The work of the offices of professional responsibility would be published. Each office of professional responsibility would maintain a website which members of the bar and the public could access and obtain information on its work. The office of professional responsibility would publish an annual report, available on its website, which would provide both a statistical and substantive analysis of the complaints received and the resolution of them, while preserving the privacy of those involved. In short, offices of professional responsibility would create transparency in the regulation of the conduct of government lawyers where currently little of it exists in Canada. They would foster accountability and increase public confidence in the exercise of public power by these important government officials.

**Conclusion**

Throughout this paper I have argued that government lawyers are different. As delegates and agents of the Attorney General, government lawyers owe special higher duties in comparison to other lawyers. The prevailing practice of segregating government lawyers' public law duties from their

---

199. The perspectives on this are likely mixed. Senior members of the bar have told me that they and their colleagues hesitate to complain about a government lawyer's conduct to their superior. During my time in government, I was approached on occasion by members of the bar concerned with the conduct of government counsel and asked what to do. I advised them to contact the government lawyer's superior but I do not know if such advice was followed or what happened if it was. From the perspective of government, senior government officials have told me that they frequently receive complaints about government lawyers from members of the bar.

ethical duties does not make sense. In fact, if anything, the example of the higher duties owed by Crown prosecutors is an example of the fusion of public law and ethical duties. However, all government lawyers, not just prosecutors, operate at the intersection of public law and legal ethics. They all have a special responsibility to uphold the rule of law as lawyers, public servants and agents of the Attorney General. Unlike other lawyers, government lawyers are involved in the making and the interpretation of the law. This unique responsibility translates into a higher ethical duty for government lawyers. They cannot contort the law and they must take affirmative measures to protect other important elements of the rule of law.

I have attempted to show how government lawyers exercise public power and how this necessitates increased accountability for their actions. I have proposed the creation of specialized codes of conduct for government lawyers to facilitate a democratic conversation about the roles of government lawyers and how they should deal with such issues as “who is the client” and the clash of regulatory responsibilities such as the whistleblowing example that I provided in the introduction. Increased transparency through the publication of policies regarding how government lawyers operate and proactive disclosure of some legal opinions would shine some much needed sunlight on the exercise of power by government lawyers. And the creation of an office of professional responsibility along the American model would explain to the public how complaints of misconduct are dealt with.

Over the past few decades the number of government lawyers and their percentage in the Canadian legal profession has continued to rise. On both a descriptive and a normative basis, the work of government lawyers casts shadows on the traditional paradigm of lawyering in Canada which continues to dominate our thinking. Government lawyers are not “zealous advocates” or “neutral partisans” nor should they be. They are custodians of the rule of law in whom we have entrusted significant power for crafting, interpreting and preserving our laws. They play a critical role in creating and preserving the rule of law in our country.