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Government Lawyering: Duties and Ethical Challenges of Government Lawyers

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Andrew Flavelle Martin, *Orphans No More: A Review of Elizabeth Sanderson, Government Lawyering: Duties and Ethical Challenges of Government Lawyers* (Toronto: LexisNexis Canada, 2018).

Introduction

Are government lawyers different than lawyers in private practice? If so, why does it matter? While these questions have been addressed piecemeal in the Canadian legal ethics literature, Elizabeth Sanderson's *Government Lawyering: Duties and Ethical Challenges of Government Lawyers* is the first comprehensive and long-form answer to them.¹ As Adam Dodek hints in the foreword,² and has noted elsewhere,³ the degree to which government lawyers have been overlooked in the Canadian legal literature is incongruent with their sheer numbers as a proportion of the legal profession in Canada. The need for this book is pronounced.

Sanderson's goal, in her words, "is to draw out a standard of government lawyering, a standard which many government lawyers understand implicitly...poin[ting] to elements of a basic, targeted standard against which actions of government lawyers can be judged."⁴ The accomplishment of this book is that it articulates and supports such a standard as well as offering a coherent vision of government lawyering.

Sanderson's work is a singular achievement that represents a culmination of growing scholarly attention over the last decade.⁵ In 2008,

1. Elizabeth Sanderson, *Government Lawyering: Duties and Ethical Challenges of Government Lawyers* (Toronto: LexisNexis Canada, 2018).

2. Sanderson, *ibid.*, foreword at iii.

3. Adam M Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law" (2010) 33:1 Dal LJ 1 at 4 [Dodek, "Intersection"].

4. Sanderson, *supra* note 1 at xxviii.

5. Andrew Flavelle Martin, "Legal Ethics and the Political Activity of Government Lawyers" (2018) 49:2 Ottawa L Rev 263 [Martin, "Political Activity"]; Adam Dodek, "The 'Unique Role' of Government Lawyers in Canada" (2016) 49:1 Israel LR 23; Kerry Wilkins, "Reasoning with the Elephant: The Crown, Its Counsel and Aboriginal Law in Canada" (2016) 13 Indigenous LJ 27; Micah B Rankin, "The Trials, Tribulations and Troubling Revelations of Government Lawyers in Canada" (2014) 17:2 Leg Ethics 303; Michael H Morris & Sandra Nishikawa, "The Orphans of Legal Ethics: Why Government Lawyers Are Different—and How We Protect and Promote that Difference in Service of the Rule of Law and the Public Interest" (2013) 26:2 Can J Admin L & Prac 171; Patrick J Monahan, "'In the Public Interest': Understanding the Special Role of the Government Lawyer" (2013) 63 SCLR (2d) 43; Malliha Wilson, Taia Wong & Kevin Hille, "Professionalism and the Public Interest" (2011) 38:1 Advocates' Q 1; Dodek, "Intersection", *supra* note 3; John Mark Keyes, "The Professional Responsibilities of Legislative Counsel" (2011) 5 JPPL 11; Joshua Wilner, "Service to the Nation: A Living Legal Value for Justice Lawyers in Canada" (2009) 32:1 Dal LJ 177; Allan C Hutchinson, "'In the Public Interest': The Responsibilities and Rights of Government Lawyers" (2008) 46:1 Osgoode Hall LJ 105.

Allan Hutchinson labeled government lawyers the “orphans of legal ethics.”⁶ With this book, that label can finally be left behind.

This book review begins by setting out Sanderson’s position on a few concepts key to legal ethics for government lawyers: a definition of government lawyers, an account of the duties that apply to them, and the identity of the client. It then goes on to highlight the book’s major contributions. Finally, it sets out areas for future research building on Sanderson’s work.

Key concepts for government lawyers: the definition, the duties, and the client

Fundamental to Sanderson’s analysis are her definition of “government lawyers,” her differentiation of three sets of duties that apply to them, and her assessment of the identity of the client. She defines government lawyers as “public servants practising law in the service of the Crown within the federal Department of Justice or within provincial or territorial counterparts or within client departments,” which she also refers to as “practicing lawyers working within government on behalf of ministers of departments of justice or of attorneys general.”⁷ She locates this group within a broader category of “public sector lawyers,” which includes lawyers for the judiciary or Parliament or the legislatures, as well as those practicing in “statutory bodies such as the office of the Access to Information or Privacy Commissioners or Canadian Human Rights Commission.”⁸

This definition is largely consistent with definitions in the existing literature. For example, Dodek defines government lawyers as “lawyers for the executive branch.”⁹ However, Sanderson’s reference to “statutory bodies” seems somewhat vague. The distinction between a department or ministry, on the one hand, and an agency or other body on the other, is not necessarily clear—after all, most departments and ministries are established, or at least recognized and continued, in statute. “Statutory bodies” that are established as arms or officers of the legislature can be clearly identified, but once one moves on to creatures of the executive, the boundaries become fuzzy. From an administrative law perspective, a commission or a tribunal is as much part of “the executive” as a department or a ministry.

6. Hutchinson, *ibid* at 106, quoted in Sanderson, *supra* note 1 at xxvii.

7. Sanderson, *supra* note 1 at xxiii.

8. *Ibid* at xxiii.

9. Dodek, “Intersection,” *supra* note 3 at 9.

Having said that, the definition is a useful and largely workable one. Crown prosecutors are clearly included, although Sanderson rightly focuses less on this one group that has been adequately covered in the case law and literature. So are civil litigators, solicitors, lawyers providing all kinds of legal advice, and legislative counsel.¹⁰ Her definition also has to be read in conjunction with her recognition later in the first chapter that there are “a few specific exemptions to this [the Minister of Justice’s] monopoly in the provision of legal services to government”, giving as examples the Canadian Forces and international law functions at the Department of Foreign Affairs, Trade and Development.¹¹ Under her definition, these are not “government lawyers” because they are not delegates of the Minister of Justice.¹²

A second fundamental part of Sanderson’s analysis are her three “layers” of duties that apply to government lawyers: “professional duties”, “public law duties,” and “public sector duties.”¹³ One layer, which largely mirrors lawyers in private practice, is their “professional duties” as members of a law society.¹⁴ Another layer is “the public law duties derived from the ancient, constitutional office of the Attorney General now codified in statute.”¹⁵ The final layer is “public service duties...that they share with other public servants as government employees.”¹⁶ Sanderson also acknowledges the common-law duties of all lawyers in contract and tort,¹⁷ although these she does not give these duties their own layer.

These three “layers” of duties are not original, as they map closely onto the three sides of Dodek’s “rule of law triangle,” those being “as delegates of the Attorney General, as public servants and as members of the legal profession.”¹⁸ However, each layer of duties is developed in detail. And while the terminology of “layers” may suggest that each set of duties is independent, Sanderson is clear throughout that there is interplay

10. See, e.g., Sanderson, *supra* note 1 at 139-140, 143.

11. Sanderson, *ibid* at 41.

12. Although somewhat circular, this aspect does clarify the “statutory bodies” exception, i.e. these bodies are part of the executive (and so their lawyers are government lawyers), unless their lawyers do not report to the Minister of Justice (and so are not government lawyers).

13. Sanderson, *supra* note 1 at 48. She is explicit that there may be additional layers of duties, referring to “at least three layers of duties.”

14. *Ibid* at 12. She notes that some of these duties, such as fees, are irrelevant to government lawyers.

15. *Ibid* at 2.

16. *Ibid* at 2. See also *ibid* at 48: “In summary, government lawyers are subject to at least three layers of duties. The first set of professional duties comes from their membership in provincial and territorial law societies. The second set of public law duties comes with their responsibilities to the Minister of Justice and *ex officio*, the Attorney General. The third set comes with their employment in the Public Service.”

17. *Ibid* at 5-6.

18. Dodek, “Intersection,” *supra* note 3 at 20.

among the three,¹⁹ although more exploration of this interplay would have been welcome.²⁰

Sanderson uses these three layers to provide excellent analytical clarity. Most importantly, the law societies can only discipline lawyers for breach of their professional duties, not their public law duties or their public service duties.²¹ Similarly, the layers allow Sanderson to make good sense of *Everingham v. Ontario*, in which the Ontario Divisional Court held that government lawyers are held to “the same single high standard of professional conduct” as all lawyers, but also recognized that government lawyers have “special public obligations” and Crown prosecutors have “public interest duties.”²² Under Sanderson’s analysis, the law society only has jurisdiction over the one layer of “professional obligations,” but it is not inconsistent to recognize two other layers of duties.

With the exception of the three layers of duties, Sanderson situates her analysis in a comprehensive application of the existing literature. Particularly notable is her focus on the role of the Attorney General, drawing heavily on the work of John L I J Edwards.²³ While this is not a book on the Attorney General, government lawyers can only be understood properly as delegates of the Attorney General, i.e. in terms of Sanderson’s “public law duties” layer.

A third fundamental part of Sanderson’s analysis is her discussion of the identity of the government lawyer’s client. Sanderson emphasizes that the client is the Crown—as she puts it, “the executive branch of government vested in the single and indivisible Crown in right of Canada or in the right of a province.”²⁴ (As in her definition of government lawyers, she excludes “agencies created by statute, with their own in-house legal services,” although the distinction she draws is not always a clear one.²⁵)

19. See, e.g., Sanderson, *supra* note 1 at 17: “Government lawyers must therefore be mindful of their ethical challenge of marrying their professional duties as members of their respective law societies with their public law duties exercised on behalf of the Minister in the institutional context of a government department”. See also Sanderson, *supra* note 1 at 43: Government lawyers “must find a means to align their professional duties as members of the practising bar with their public law duties exercised on behalf of the Minister of Justice, and with their duties as public servants.”

20. See, e.g., Martin, “Political Activity,” *supra* note 5.

21. Sanderson, *supra* note 1 at 13.

22. *Ibid* at 14-15; *Everingham v Ontario* (1992), 8 OR (3d) 121 at 125-126, 88 DLR (4th) 755 (Div Ct), *aff’g* on other grounds (1991) 84 DLR (4th) 354, 3 CPC (3d) 87 (Ont Gen Div).

23. See esp. John L I J Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964) and John L I J Edwards, *The Attorney General, Politics and the Public Interest* (London, UK: Sweet & Maxwell, 1984).

24. Sanderson, *supra* note 1 at 102.

25. *Ibid* at 102. Her exclusion of officers of Parliament from “the Crown” is clear.

This single overarching client, as opposed to an individual Department or Ministry or Minister, has serious implications for the government lawyer:

government lawyers must resist any temptation to advance the perspective of that department to the detriment of other parts of government....The goal of government lawyers should be to find a common approach for a single client, albeit with various constituent parts. The lawyers within departments must resist adversarial or positional stances in relation to colleagues in other parts of government. Government lawyers collectively must bring together various perspectives of Ministers, departmental mandates and officials to ensure consistency in the Crown's legal positions...²⁶

While her analysis appears correct in law, it does not incorporate practical realities on the ground. In particular, it glosses over the fact that different departments may sometimes have separate policy interests and even adverse legal interests. Sanderson recognizes this problem but appears to over-minimalize it as “inevitable institutional tension.”²⁷

Major contributions

In this part I highlight what I consider to be the four most important contributions of Sanderson's book. The first is an emphasis on the role of the Deputy Attorney General as an interface between the non-partisan public service and the Minister of the day. A second is Sanderson's extensive reflection on reconciliation. A third is a critique of common comparisons between the role of the Minister of Justice in Canada and in New Zealand. The fourth, and most intriguing, is the suggestion that Parliament could establish a separate regulatory apparatus for federal government lawyers that would remove them from law society jurisdiction.

One of Sanderson's key contributions comes in the fifth chapter, which focuses on the role of the Deputy Minister of Justice and Deputy Attorney General. Commentators, including Sanderson, typically describe government lawyers as delegates of the Attorney General. However, from a civil service perspective it is the Deputy Attorney General, rather than the Attorney General, to whom civil servants—including government lawyers—report. This distinction is often overlooked, or at least fudged, in the legal ethics literature.²⁸ As Sanderson emphasizes, through the

26. *Ibid* at 106.

27. *Ibid* at 136

28. But see, e.g., Andrew Flavelle Martin, “The Minister's Office Lawyer: A Challenge to the Role of the Attorney General?” (2019) 12 JPPL 641 at 645: “under a traditional civil service lens government lawyers, as government employees in the Ministry of the Attorney General, report not to the Attorney General but to the Deputy Attorney General, who then interfaces with the Minister's office.” [Citation omitted.]

constitutional convention of political neutrality in the public service, “Ministers constitutionally play no role in the day-to-day supervision of public servants in the Departments over which they preside.”²⁹ She also considers circumstances in which a Deputy Attorney General may choose to resign, particularly the rejection of their legal advice that a course of action would be unlawful.³⁰

Another key contribution is a thirty-five page reflection on reconciliation, which is presented as a case study but could stand on its own. It is thoughtful and respectful, while clearly covering key concepts and legal principles in an accessible way that requires little background knowledge. Its inclusion here is important, as government lawyers will certainly have a key role to play in the progress toward reconciliation.

One of Sanderson’s more intriguing original ideas comes in her analysis of section 4.1 of the *Department of Justice Act*, the provision requiring the Minister of Justice to inform the House of Commons if government bills are inconsistent with the *Canadian Charter of Rights and Freedoms*.³¹ Commentators typically use a similar provision in the *New Zealand Bill of Rights Act 1990*, under which many reports have been made, to argue that there is a problem in the application of section 4.1, under which no reports have ever been made.³² However, Sanderson provides a persuasive argument that New Zealand is not a useful comparator.³³

Sanderson’s most intriguing contribution comes in the first chapter. She argues that Parliament could create its own enforceable code of conduct for federal government lawyers that would “ous[t] provincial jurisdiction.”³⁴ (She also argues, less provocatively, that provincial and territorial legislatures could create an enforceable code of conduct for provincial and territorial government lawyers.) Sanderson anchors this possibility by applying *Law Society of British Columbia v. Mangat*, in which paramountcy provided that federal legislation allowing non-lawyers to appear in front of the Immigration and Refugee Board prevailed over provincial legislation prohibiting non-lawyers from practicing law.³⁵

29. Sanderson, *supra* note 1 at 213.

30. *Ibid* at 222.

31. *Ibid* at 153-167; *Department of Justice Act*, RSC 1985, c J-2; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

32. See, e.g., Kent Roach, “Not Just the Government’s Lawyer: The Attorney General as Defender of the Rule of Law” (2006) 31:2 *Queen’s LJ* 598 at 602-603, 626-629.

33. Sanderson, *supra* note 1 at 159-161. In short, the *New Zealand Bill of Rights* does not allow courts to strike down legislation that is inconsistent with those rights—making debate and deliberation in the legislature relatively more important than in Canada.

34. *Ibid* at 3-4 (quote is from 4).

35. *Ibid* at 4; *Law Society of British Columbia v Mangat*, 2001 SCC 67 at para 73.

While Sanderson is correct that such an innovation would prevail over provincial jurisdiction (and thus provincial law society jurisdiction) over the practice of law, it is less clear that in the absence of such a scheme provincial law societies actually have jurisdiction over federal government lawyers. Sanderson accepts at face value, and relies on, the *obiter* in *Krieger v. Law Society of Alberta*.³⁶ The Supreme Court of Canada in *Krieger* held that provincial law societies have disciplinary jurisdiction over provincial Crown prosecutors.³⁷ Without acknowledging that it was *obiter*, the Court also stated that law societies have disciplinary jurisdiction over federal Crown prosecutors.³⁸ In my view, it is an open question whether federalism considerations, which the Court in *Krieger* did not address, limit or even preclude law society jurisdiction over lawyers for the federal government.

Similarly, Sanderson also appears to assume that *Schmidt v. Canada (Attorney General)*, was correctly decided.³⁹ Justice Stratas for the Federal Court of Appeal stated in *Schmidt* that the Attorney General and Minister of Justice is not a lawyer to the legislature. However, this conclusion seems contrary to the historical analysis that Sanderson herself provides.⁴⁰ For example, while she recognizes one of the functions of the Attorney General transposed from England as being “to advise members on legal implications in matters before the House,”⁴¹ she doesn’t include this as one of the “devolved duties” incorporated from England into Canada under section 5(a) of the *Department of Justice Act*.⁴² And while she recognizes that the Attorney General has duties to Parliament,⁴³ she restricts the relevant duty to “explaining the government’s legal position,” which is narrower than a duty to advise on legal implications.⁴⁴

36. *Krieger v Law Society of Alberta*, 2002 SCC 65.

37. Sanderson, *supra* note 1 at 3; *Krieger*, *supra* note 36 at para 4.

38. Sanderson, *supra* note 1 at 3; *Krieger*, *supra* note 36 at para 56: “A law society has the jurisdiction to review the conduct of a federal or provincial Crown prosecutor to determine whether the prosecutor has acted dishonestly or in bad faith in exercising prosecutorial discretion or fulfilling the disclosure obligations of the Crown. As members of their respective law societies, federal Crown prosecutors are subject to the same ethical obligations as all other members of the bar and not immune to discipline for dishonest or bad faith conduct.”

39. *Schmidt v Canada (Attorney General)*, 2018 FCA 55, aff’g 2016 FC 269.

40. See also the *obiter* in *Krieger*, *supra* note 36 at para 27: “[a]s in England, they [Attorneys General] serve as Law Officers to their respective legislatures” as quoted in Andrew Flavelle Martin, “The Attorney General’s Forgotten Role as Legal Advisor to the Legislature: A Comment on *Schmidt v Canada (Attorney General)*” (2019) 52:1 UBC L Rev 201 at 215.

41. Sanderson, *supra* note 1 at 25. From the context, “members” here appears to mean members of the House as opposed to members of Cabinet.

42. *Ibid* at 39; *Department of Justice Act*, *supra* note 31.

43. *Ibid* at 117-120.

44. *Ibid* at 119-120.

Sanderson closes the book with what she calls “a sample code of government lawyering.”⁴⁵ This Code is essentially a precis of her key points, organized into rules and commentary—no easy task, given the complexity of her analysis. The value of this Code, which in no way replaces the Code of Conduct of a provincial or territorial law society, is as an easy reference document for government lawyers, and will be particularly useful for new government lawyers.

What comes next: Future research

Sanderson’s book is a commendable contribution to the Canadian legal ethics literature, but there is only so much a single book can accomplish. *Government Lawyering* provides a foundation and a stepping stone to a range of future research issues. There are at least three areas for such future research.

First, and perhaps most obvious, are the lawyers that Sanderson excludes from her definition of “government lawyers” and the lawyers she identifies as an exception to the Minister of Justice’s “monopoly” on the provision of legal services. Most important, in my view, are what she describes as lawyers working “in court administrations,”⁴⁶ which I understand to include law clerks, staff lawyers, and executive legal officers. As focus increases in the Canadian legal literature on judicial ethics,⁴⁷ so too should focus increase on the lawyers who advise judges.⁴⁸ As I have argued in the context of political activity,⁴⁹ perhaps some duties imposed on judges should also apply to their lawyers. Almost as important, in terms of a group needing future research, are lawyers in the Canadian Forces. Following Sanderson’s layers approach, such lawyers have at least two layers of duties: the professional obligations that apply to all lawyers, and what we might term the “military duties” or “officers’ duties” that apply to these lawyers as officers under military law.

Second, as I mentioned above, another area for future research is the implication of federalism for the provincial regulation of federal government lawyers. Sanderson plants some seeds here but more work is warranted.

45. *Ibid* at 228-250.

46. *Ibid* at xxiii.

47. See, e.g., Stephen GA Pitel & Liam Ledgerwood, “Judicial Confidentiality in Canada” (2017) 43:1 *Queen’s LJ* 123; Stephen GA Pitel & Michal Malecki, “Judicial Fundraising in Canada” (2015) 52 *Alta L Rev* 519; Thomas Cromwell, “The Development of Principles of Judicial Ethics” (2012) 56 *SCLR* (2d) 101; Stephen GA Pitel & Will Bortolin, “Revising Canada’s Ethical Rules for Judges Returning to Practice” (2011) 34 *Dal LJ* 483.

48. See also, e.g., Joshua Wilner, “To Be or Not to Be? Some Legal Ethics for Judicial Law Clerks” (2011) 89:3 *Can Bar Rev* 611.

49. Martin, “Political Activity,” *supra* note 5 at 291-292.

A third area for future research is the interplay among the three layers of duties. Sanderson recognizes the potential for this interplay but, understandably, does not explore it in detail. For example, when do public service duties conflict with professional duties, and what is the lawyer to do? Sanderson gives the example of whistleblowing legislation.⁵⁰ Another is political activity.⁵¹ As I mentioned above, while Sanderson recognizes the common-law duties of lawyers in tort and contract, these duties seem to be missing from her three layers. This set of duties is worthy of consideration alongside the other three. Likewise, although Sanderson emphasizes the importance of bijuralism for federal government lawyers,⁵² the book largely overlooks the private law duties of government lawyers under civil law in Quebec.

Conclusion

Sanderson's *Government Lawyering* unquestionably fills what Adam Dodek describes as a "void" in the Canadian legal ethics literature.⁵³ Her main contribution is a clear, coherent, and supported account of three sets of duties that apply to government lawyers: professional, public law, and public service. In providing this account, Sanderson draws from the existing literature and notes its disagreements without getting bogged down in those disagreements. She acknowledges the uniquely Canadian context of these duties, while drawing on noteworthy foreign examples and explaining their relevance. In doing all these things, the book provides a solid foundation for government lawyers in practice and for future research. Moreover, it will be valuable to stakeholders, and to lawyers in private practice, who seek to better understand the government lawyers with whom they interact.

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50. Sanderson, *supra* note 1 at 149: "However, resorting to the scheme under this Act may have implications for the exercise of their professional duty of confidentiality as practicing lawyers."

51. Martin, "Political Activity," *supra* note 5.

52. Sanderson, *supra* note 1 at 87.

53. *Ibid.*, foreword at iii.

* Thanks to Adam Dodek, Ian Stedman and Alexander Corley for comments on a draft.

