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The Implications of Federalism for the Regulation of Federal Government Lawyers

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Andrew Flavelle Martin* The Implications of Federalism for the
Regulation of Federal Government
Lawyers

The implications of Canadian federalism for the regulation of lawyers for the federal government are largely overlooked in the literature and case law. This article argues that employees of the federal government can practice law without being licensed by the corresponding provincial law society (or any law society). However, if they happen to be licensed by a law society, they can be disciplined by that law society—unless and until Parliament adopts legislation immunizing them from law society discipline. The article also considers the possibility that Parliament could create a separate bar for federal government lawyers. It concludes that some form of regulatory and disciplinary jurisdiction over federal government lawyers is necessary to protect the public interest and public confidence in federal government lawyers.

Les implications du fédéralisme canadien sur la réglementation des avocats à l'emploi du gouvernement fédéral sont largement négligées dans la littérature et la jurisprudence. Dans le présent article, nous soutenons que les employés du gouvernement fédéral peuvent pratiquer le droit sans être autorisés par le barreau provincial correspondant (ou tout autre barreau). Cependant, s'ils sont autorisés par un barreau, ils peuvent être sanctionnés par ce dernier, à moins que le législateur n'adopte une loi les immunisant contre la discipline du barreau. Dans l'article, nous envisageons également la possibilité que le législateur crée un barreau distinct pour les avocats du gouvernement fédéral. Nous concluons qu'une certaine forme de compétence réglementaire et disciplinaire à l'égard des avocats du gouvernement fédéral est nécessaire pour protéger l'intérêt public et la confiance du public dans les avocats à l'emploi du gouvernement fédéral.

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Introduction

Canadian federalism has legal implications for the regulation of lawyers for the federal government, but these implications are largely overlooked in the literature and case law. The federal government is one of the largest, if not the largest, legal employers in Canada. It has more than 2500 lawyers across the country, primarily in the Department of Justice and the Public Prosecution Service of Canada.¹ Recent literature has assessed the jurisdiction of provincial law societies over lawyers in government roles—

1. Almost a decade ago, Adam Dodek wrote that “Canada’s largest law entity is actually the federal Department of Justice and not one of the national law firms.... With over 2,700 lawyers, it is more than twice the size of the largest law firm.” (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 [citation omitted]). More recently, see e.g. Andrew Flavelle Martin, “Legal Ethics and the Political Activity of Government Lawyers” (2018) 49:2 Ottawa L Rev 263 [Martin, “Government Lawyers’ Political Activity”] at 303 n 138: “According to figures from the Association of Justice Counsel, there are approximately 2600 lawyers in the federal government” [citation omitted].

the Attorney General, lawyer-politicians, and government lawyers—and examined particular ethical issues facing such lawyers.² However, this literature has largely focused on lawyers employed by provincial governments, and at most has flagged the possibility of federalism considerations changing the legal answers for lawyers employed by the federal government.³ While some literature and case law addresses these implications in passing, there is no determinative let alone in-depth analysis of them.

Regulation of the professions falls under provincial jurisdiction over “Property and Civil Rights” in section 92(13) of the *Constitution Act, 1867*, and regulation of the legal profession may also fall under “The Administration of Justice in the Province” in section 92(14).⁴ Thus, it

2. Attorney General: Andrew Flavelle Martin, “The Legal Ethics Implications of the SNC-Lavalin Affair for the Attorney General of Canada” (2019) 67:3 Crim LQ 161 [Martin, “SNC-Lavalin”]; Andrew Flavelle Martin, “The Immunity of the Attorney General to Law Society Discipline” (2016) 94:2 Can Bar Rev 413 [Martin, “Attorney General Immunity”]; Brent Cotter, “The Prime Minister v the Chief Justice of Canada: The Attorney General’s Failure of Responsibility” (2015) 18 Leg Ethics 73; Andrew Flavelle Martin, “The Attorney General as Lawyer (?): Confidentiality upon Resignation from Cabinet” (2015) 38:1 Dal LJ 147 [Martin, “Attorney General Resignation”]. Lawyer-Politicians: Andrew Flavelle Martin, “Legal Ethics versus Political Practices: The Application of the Rules of Professional Conduct to Lawyer-Politicians” (2013) 91:1 Can Bar Rev 1 [Martin, “Lawyer-Politicians”]; Andrew Flavelle Martin, “Consequences for Broken Political Promises: Lawyer-Politicians and the Rules of Professional Conduct” (2016) 10:2 JPPL 337 [Martin, “Consequences for Lawyer-Politicians”]. (I follow here the definition of lawyer-politicians as politicians who happen to be lawyers, i.e., politicians whose official functions do not include the practice of law: Martin, “Lawyer-Politicians” at 3.) Government lawyers: John Mark Keyes, “Loyalty, Legality and Public Sector Lawyers” (2019) 97:1 Can Bar Rev 756 [Keyes, “Loyalty”]; Andrew Flavelle Martin & Candice Telfer, “The Impact of the Honour of the Crown on the Ethical Obligations of Government Lawyers: A Duty of Honourable Dealing” (2018) 41:2 Dal LJ 443; Martin, “Government Lawyers’ Political Activity,” *supra* note 1; Eric Pierre Boucher, “Civil Crown Counsel: Lore Masters of the Rule of Law” (2018) 12 JPPL 463; Elizabeth Sanderson, *Government Lawyering: Duties and Ethical Challenges of Government Lawyers* (Toronto: LexisNexis Canada, 2018).

3. Martin, “Lawyer Politicians,” *supra* note 2 at 20 dismisses the potential for law societies to discipline federal lawyer-politicians as “merely one of many quirks created by a federal system.” Martin, “Attorney General Immunity,” *supra* note 2 at 444, n 149 raises the possibility that Parliament could immunize the Attorney General in federal legislation “in order to protect the proper federal jurisdiction over criminal law.” Martin, “Government Lawyers’ Political Activity,” *supra* note 1 at 299 notes that federalism considerations might preclude federal legislation on government employees from prevailing over provincial legislation on the legal profession. While Keyes, “Loyalty,” *supra* note 2 focuses on federal government lawyers, he makes no mention of federalism. Similarly, while Sanderson, *supra* note 2 focuses more on lawyers for the federal than provincial and territorial governments, she focuses little on federalism (other than her proposition for a federal government lawyer code and “over-sight regim[e]” at 3-5).

4. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5; *Law Society of BC v Mangat*, 2001 SCC 67 at paras 38-41 (92(13)), 42-46 (92(14)), [2001] 3 SCR 113 [Mangat], applied e.g. in *Krieger v Law Society of Alberta*, 2002 SCC 65 at para 33, [2002] 3 SCR 372 [Krieger]. Section 92(14) reads in full: “The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.”

is provincial legislation on the legal profession that defines the practice of law, prohibits the unlicensed practice of law, and delegates to each provincial law society the power to regulate the practice of law—including the power to prosecute unlawful practice—and the legal profession in the public interest.⁵ Through that legislation or other legislation, provincial legislatures can modify the regulation of lawyers for the provincial government, such as exempting them from licensing requirements or immunizing them from law society jurisdiction.⁶

While the scope of federal jurisdiction over the legal profession and the practice of law is clear in some respects, it is not clear what power Parliament has over the regulation of lawyers for the federal government. The literature and case law are mixed as to whether federal government lawyers are bound by legislation on the legal profession and subject to regulation by the law societies. The Supreme Court of Canada in *Krieger v Law Society of Alberta* asserted that law societies have the same disciplinary jurisdiction over federal Crown prosecutors as they do over provincial Crown prosecutors:

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.⁷

However, the issue before the Court in *Krieger* was only whether provincial law societies had jurisdiction over provincial Crown prosecutors—an issue that raises different federalism concerns—and so this aspect of *Krieger* was *obiter*.⁸ (I will re-assess the implications of the *ratio* and the *obiter* in *Krieger* below.⁹) Importantly for the purposes of this article, the Court did

5. See e.g. *Legal Profession Act*, SBC 1998, c 9; *Law Society Act*, RSO 1990, c L.8; *Legal Profession Act*, SNS 2004, c 28.

6. See e.g. s 13 of the *Law Society Act*, *supra* note 5, immunizing the Attorney General from law society jurisdiction, discussed e.g. in Martin, “Attorney General Immunity,” *supra* note 2 at 437.

7. *Krieger*, *supra* note 4 at para 56.

8. The Court in *Krieger*, *ibid* at paras 33-39 considered, and rejected, the argument that the Law Society of Alberta’s rule addressing conduct by prosecutors was *ultra vires* the province as an intrusion into federal jurisdiction over criminal law and criminal procedure in section 91(27) of the *Constitution Act, 1867*, *supra* note 4 (“The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.”).

9. See below notes 97 to 99 and corresponding text.

not consider the issue of whether federal government lawyers can indeed be required to be members of law societies.¹⁰

In contrast to *Krieger*, some commentators have asserted or argued that federal government lawyers are immune from provincial law society regulation. Deborah MacNair has asserted that “there is a . . . constitutional issue concerning jurisdiction over the affairs of federal lawyers, which necessitates certain regulatory limitations.”¹¹ She has expanded on this assertion elsewhere, in the specific context of federal lawyers who draft legislation, arguing that while “[t]he courts have not considered the specific case of federal lawyers . . . it is reasonable to conclude that the law society does not regulate federal legislative drafters, including their mandate or the licensing requirements that apply to them.”¹² (MacNair argues by analogy to the decision of the Federal Court of Appeal in *The Queen in Right of Canada v Lefebvre et al.*,¹³ which I will consider below.¹⁴) Similarly, John Mark Keyes has argued that federal legislation on federal employees would prevail over provincial legislation on the legal profession.¹⁵

Consider, for example, three scenarios:

1. The Minister of Justice and Attorney General of Canada, licensed in Nova Scotia, flagrantly violates his duty to encourage respect for the administration of justice by making unsupported allegations of improper conduct against the Chief Justice of Canada.¹⁶ Can he be disciplined by the Nova Scotia Barristers’ Society?
2. A lawyer for the federal Department of Justice, licensed in Manitoba, potentially violates his duty of loyalty by seeking a declaration that the Minister and the Department are misinterpreting key legislation regarding compliance with the *Canadian Charter of*

10. As I will discuss below, there is a line of cases holding that they cannot. See below notes 50 to 68 and corresponding text.

11. Deborah MacNair, “The Role of the Federal Public Sector Lawyer: From Polyester to Silk” (2001) 50 UNBLJ 125 at 162. MacNair does not elaborate, but continues to state that “the Department [of Justice] does attempt to respect, to the extent that it can, the regulatory authority of the law society.” [MacNair, “Silk”].

12. Deborah MacNair, “Legislative Drafters: A Discussion of Ethical Standards from a Canadian Perspective” (2003) 24:2 Stat L Rev 125 at 134-135 (concluding at 135 that federal legislative drafters cannot be required to be lawyers) [MacNair, “Legislative Drafters”].

13. *Ibid* at 134-135; [1980] 2 FC 199, 32 NR 613 (CA) [*Lefebvre* cited to FC].

14. See below notes 50 to 56 and accompanying text.

15. John Mark Keyes, “Professional Responsibilities of Legislative Counsel” (2011) 5 JPPL 11 at 16 [Keyes, “Legislative Counsel”]. Keyes relies on *Mangat*, *supra* note 4. This reliance has been questioned: Martin, “Government Lawyers’ Political Activity,” *supra* note 2 at 299-300.

16. See e.g. Cotter, *supra* note 2, discussing Peter MacKay.

Rights and Freedoms.¹⁷ Can he be disciplined by the Law Society of Manitoba?

3. The Minister of Justice and Attorney General of Canada, licensed in Ontario, secretly records a conversation in potential violation of the rules of professional conduct.¹⁸ Can she be disciplined by the Law Society of Ontario?

The answers to all three questions are currently unclear because of federalism considerations.

This article aims to resolve this uncertainty in the literature and case law. It is organized in three parts. In Part I, I set out the necessary legal background for my analysis. In Part II, I analyze the implications of federalism for the regulation of lawyers for the federal government. Part II advances three propositions:

1. Absent a federally-imposed requirement to the contrary, employees of the federal government can practice law without being licensed by the corresponding provincial law society (or any law society).
2. But if they happen to be licensed by a law society, they can be disciplined by that law society.
3. Parliament can immunize federal government lawyers from law society regulation, including law society discipline.

In Part III, I consider Elizabeth Sanderson's intriguing inspiration for a separate regulatory regime for federal government lawyers, concluding that it warrants serious consideration.

I. *Background*

In this part I set out the necessary legal background for my analysis by identifying the three relevant federalism doctrines and by canvassing federal jurisdiction over the practice of law.

1. *Federalism doctrines*

The question of whether federal government lawyers are subject to provincial legislation on the practice of law can potentially engage three distinct federalism doctrines—although, as I will demonstrate below in

17. *Schmidt v Canada (Attorney General)*, 2018 FCA 55, 421 DLR (4th) 530, aff'g 2016 FC 269, [2016] 3 FCR 477 [*Schmidt* FC], leave to appeal to SCC denied 4 April 2019 (38179); *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. See Keyes, "Loyalty," *supra* note 2; Andrew Flavelle Martin, "Folk Hero or Legal Pariah? A Comment on the Legal Ethics of Edgar Schmidt and *Schmidt v Canada (Attorney General)*" (2020) Man LJ [forthcoming].

18. Jamie Strashin, "Wilson-Raybould may not have broken the law, but her Wernick tape crossed ethical lines, lawyers say" *CBC News* (3 April 2019), online: <www.cbc.ca/news/politics/wilson-raybould-tape-1.5082119> [<https://perma.cc/8648-6SY7>], discussing Jody Wilson-Raybould. See also Martin, "SNC-Lavalin," *supra* note 2.

Part II, it is not always clear which of these three doctrines courts are applying. Here I provide a brief introduction to the three.

One doctrine, and indeed the one that I will argue is the most appropriate to apply, is paramourncy. Where both a federal law and a provincial law are validly enacted under corresponding heads of power, and there is an inconsistency between them, the provincial law is “inoperative” (but only to the extent of that inconsistency) and the federal law prevails.¹⁹ Most important for the purposes of this article is that there will be an inconsistency where compliance with both laws is impossible or the provincial law frustrates the federal law’s purpose.²⁰

A second doctrine is interjurisdictional immunity. Under interjurisdictional immunity, a law that “impairs” the “core” of one of the other government’s heads of power is “inapplicable” to the extent of such impairment.²¹ Unlike paramourncy, interjurisdictional immunity is engaged even when that other level of government has not exercised that core power through legislation.²² The Supreme Court of Canada in *Canadian Western Bank v Alberta* was explicit that interjurisdictional immunity should be applied only where paramourncy does not provide an answer.²³

A third doctrine is the immunity of the federal Crown from provincial statutes. Under this immunity, provincial legislation does not “bind” the federal Crown: “a Provincial Legislature cannot in the valid exercise of its legislative power, embrace the Crown in right of Canada in any compulsory regulation.”²⁴ However, the Crown may incur or bring itself into coverage of the law: “[t]his does not mean that the federal Crown may not find itself subject to provincial legislation where it seeks to take the

19. See e.g. Peter W Hogg, *Constitutional Law of Canada*, 5th ed supp (Toronto: Thomson Reuters Canada, 2017), vol 1 (loose-leaf revision 2017-1), ch 16 at 16.1, pages 16-2 to 16-3; ch 15 at 15.8(a), page 15-28 (quotation is from page 15-28).

20. See e.g. *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 73, [2007] 2 SCR 3 [*Canadian Western Bank*]; Hogg, *supra* note 19, ch 16 at 16.3(a), page 16-4; 16.3(b), page 16-10.1.

21. *Canadian Western Bank*, *supra* note 20 at para 48 (“impairs” and “core”); Hogg, *supra* note 19, ch 15 at 15.8(a), page 15-28 (“inapplicable”).

22. See e.g. Hogg, *supra* note 19, ch 15 at 15.8(c), page 15-35. See also *Canadian Western Bank v Alberta*, *supra* note 20 at para 34: “If that authority is truly exclusive, the reasoning goes, it cannot be invaded by provincial legislation even if the federal power remains unexercised.”

23. *Canadian Western Bank*, *supra* note 20 at paras 77-78. See also para 33: “Interjurisdictional immunity is a doctrine of limited application.”

24. *Her Majesty in right of the Province of Alberta v Canadian Transport Commission*, [1978] 1 SCR 61 at 72, 75 DLR (3d) 257; see e.g. Hogg, *supra* note 19, ch 10 at 10.9(c), (d), pages 10-19 to 10-21.

benefit thereof.”²⁵ Whereas interjurisdictional immunity is “[i]n theory... reciprocal” or symmetrical,²⁶ federal Crown immunity is not.²⁷ I note here that this constitutional doctrine of federal Crown immunity is distinct from the statutory interpretation issue of whether a provincial statute binds the federal Crown.²⁸

Crown immunity, including federal Crown immunity, does not always apply to Crown agents, but only where there is “prejudice” to the Crown:

The courts have been properly cautious in extending to individual Crown servants the Crown’s immunity from statute law. The mere fact that a Crown servant is acting in the course of employment will not entitle the servant to the Crown’s immunity. The Crown servant will be entitled to immunity only if it can be established that compliance with the statute would prejudice the Crown.²⁹

Moreover, Peter Hogg argues that the existence and correctness of this federal Crown immunity as a constitutional doctrine is unclear and that “where the federal Crown is engaging in activity which is regulated by provincial law, it should be bound by the law.”³⁰

2. *Federal jurisdiction over the practice of law*

While the provinces have legislative authority over lawyers and the practice of law under section 92(13) and perhaps section 92(14) of the *Constitution Act, 1867*, this does not preclude some federal jurisdiction over lawyers and the practice of law under the federal heads of power. Parliament can allow the unlicensed practice of law in three kinds of contexts: federal boards and tribunals, provincial courts in areas of federal jurisdiction, and federal courts.

25. *Her Majesty in right of the Province of Alberta v Canadian Transport Commission*, *supra* note 24 at 72. See more recently *World Bank Group v Wallace*, 2016 SCC 15 at para 97, [2016] 1 SCR 207: “The “benefit/burden” principle is a common law exception to the Crown’s presumed immunity from statute, which applies when the Crown accepts a statutory benefit that has a sufficient nexus with an attendant burden. The exception is intended to prevent the Crown from simultaneously taking advantage of rights conferred by legislation while invoking its own immunity to shield itself from related liabilities or restrictions.”

26. *Canadian Western Bank*, *supra* note 20 at para 35.

27. See e.g. Hogg, *supra* note 19, ch 10 at 10.9(f), page 10-22.

28. *Ibid.*, ch 10 at 10.9 (a), (b), pages 10-18 to 10-19. See also Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Thomson Reuters Canada, 2011) at 451: “a constitutional question lurks in the background of the interpretative question.”

29. Hogg, Monahan & Wright, *supra* note 28 at 446. The same text in the third edition was quoted with approval in *Breton c Comité de discipline de l’Ordre professionnel des travailleurs sociaux du Québec*, 2005 QCCA 195 at para 22, [2005] RJQ 432 [*Breton*]. Thank you to a reviewer for bringing *Breton* to my attention.

30. Hogg, *supra* note 19, ch 10 at 10.9(d), pages 10-20 to 10-21.

The Supreme Court of Canada in *Mangat* held that Parliament can allow non-lawyers to appear before the Immigration and Refugee Board, and provide related services, even though such appearances constitute the unlicensed practice of law under provincial legislation, under its power over “naturalization and aliens” under section 91(25) of the *Constitution Act*:

Flowing from this jurisdiction over aliens and naturalization is the authority to establish a tribunal to determine immigration rights in individual cases as part of the administration of these rights. Also flowing from this jurisdiction is the authority to provide for the powers of such a tribunal and its procedure including that of appearance before it.³¹

At the same time, “representation before a tribunal has as its object the determination of legal rights. It falls within the scope of legal representation and the practice of law” and thus provincial jurisdiction.³² That is, “Parliament must be allowed to determine who may appear before the tribunals it has created, *and* the provinces must be allowed to regulate the practice of law as they have always done.”³³ Justice Gonthier for the Court held that there was “an operational conflict” between the federal law and the provincial legislation, because Parliament “was pursuing the legitimate objective of establishing an informal, accessible (in financial, cultural, and linguistic terms), and expeditious process, peculiar to administrative tribunals”—and dual compliance, while technically possible, “would go contrary to Parliament’s purpose.”³⁴ That is, “it is impossible to comply with the provincial statute without frustrating Parliament’s purpose.”³⁵ (The Supreme Court of Canada has subsequently clarified that the branch

31. *Mangat*, *supra* note 4 at para 34.

32. *Ibid* at para 38.

33. *Ibid* at para 50 [emphasis added].

34. *Ibid* at para 72.

35. *Ibid* at para 73

of paramountcy engaged in *Mangat* was frustration of purpose, not operational conflict.³⁶)

While the decision in *Mangat* concerned only the Immigration and Refugee Board, it would apply to federal tribunals more broadly, so long as those tribunals were validly created under a federal head of power. Justice Gonthier noted that “[m]any federal tribunals allow representation by counsel other than barristers or solicitors” and that Parliament’s objective regarding those tribunals was similar to the specific objective in *Mangat*: “[r]epresentation by non-lawyers is consistent with the purpose of such administrative bodies, which is to facilitate access and decrease the formality of these bodies as well as to acknowledge the expertise of other classes of people.”³⁷ Although the question was not squarely raised in *Mangat*, *Mangat* appears to recognize that Parliament can also allow the federal government to be represented before federal tribunals by non-lawyers.³⁸

The second context in which Parliament can allow the unlicensed practice of law is before provincial courts in matters under federal jurisdiction. The best example here is the *Criminal Code* provisions allowing a non-lawyer agent to appear in summary conviction proceedings, which were held *intra vires* Parliament in *R v Romanowicz* as criminal

36. See e.g. *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53 at para 19, [2015] 3 SCR 419 [citation omitted]: “Under the second branch of the paramountcy analysis, provincial legislation will be found to be inoperative when it frustrates the purpose of a federal law.... In *Law Society of British Columbia v Mangat*, [2001] 3 S.C.R. 113, for example, this Court held that provincial legislation prohibiting non-lawyers from practising law for a fee before a tribunal, conflicted with federal legislation providing that a non-lawyer could represent a party before the Immigration and Refugee Board, even for a fee. Acknowledging that dual compliance was not strictly impossible because a person could either join the Law Society or not charge a fee, the Court nonetheless found the provincial law to be ‘contrary to Parliament’s purpose’: para. 72.” See also e.g. *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para 26, [2015] 3 SCR 327: “The application of a more restrictive provincial law may, however, frustrate the federal purpose if the federal law, instead of being merely permissive, provides for a positive entitlement.” See also Côté J at para 120, dissenting but not on this point [citations omitted]: “In my view, the Court actually found in that case [*Mangat*] that there was no operational conflict (as that concept is understood today), as it noted in the above passage that the statutes at issue allowed dual compliance at a ‘superficial level’; the words ‘superficial level’ corresponded to the operational conflict branch. And it then found that dual compliance was not possible on the basis of an ‘expanded interpretation,’ ...; the words ‘expanded interpretation’ referred to the frustration of purpose branch.”

37. *Mangat*, *supra* note 4 at para 58.

38. *Ibid* at para 30: “The officers who appear on behalf of the Minister...are not required to be lawyers or have any legal training.”

procedure under 91(27) of the *Constitution Act, 1867*.³⁹ While the Court in *Romanowicz* did not engage in a paramountcy analysis—apparently because the *Law Society Act* prohibited unlicensed practice “except as provided by law,” and a valid federal law qualified as “provided by law”⁴⁰—the *Criminal Code* would prevail over the provincial legislation on the legal profession via paramountcy.

Admittedly, *Romanowicz* and *Mangat* both become less clear after *R v Toutissani*.⁴¹ *Romanowicz* and *Mangat* suggest that, if provincial legislation prohibited non-lawyers from appearing in summary conviction matters, the *Criminal Code* provisions allowing non-lawyers to appear would prevail via paramountcy, and specifically frustration of purpose. *Toutissani* holds that the provincial legislatures can impose additional qualifications on non-lawyer agents despite the *Code* provisions. There is no conflict, because the prospective agent “can become licensed under the provincial law,” and because “parliament’s purpose in permitting defendants on summary conviction matters to be represented by non-lawyers is furthered”—not impaired—“by the provincial legislation.”⁴² While Casey Prov Ct J in *Toutissani* purported to distinguish *Mangat*, he is, with respect, unconvincing.⁴³ If the goal is to allow representation by non-lawyers, which will presumably be more accessible than representation by lawyers as was the case in *Mangat*, a parallel system of requirements runs the risk of making these non-lawyers subject to the kinds of costs that make non-lawyers attractive in the first place—i.e., frustrating the purpose of allowing representation by non-lawyers. Thus *Toutissani*, as a provincial court decision, ultimately seems inconsistent with the decisions in *Romanowicz* and *Mangat* that were binding on Casey Prov Ct J.

The third context in which Parliament can allow the unlicensed practice of law is before federal courts created under section 101 of the *Constitution Act, 1867*. The power to create these courts would necessarily include the power to govern the right of appearance before them. The *Federal Courts Act* and the *Supreme Court Act* allow those who are

39. *R v Romanowicz* (1999), 45 OR (3d) 506 at paras 15-20, 178 DLR (4th) 466 (CA), Carthy, Doherty & Laskin JJA. This is not the only example. A non-lawyer trustee performing functions under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 for a fee is not illegally practicing law, as that Act prevails over provincial legislation on the practice of law via the doctrine of paramountcy: *Barreau du Québec c Marcoux*, [1988] RJQ 1457.

40. *Romanowicz*, *supra* note 39 at para 23.

41. *R v Toutissani*, 2008 ONCJ 139, [2008] OJ No 1174 (QL).

42. *Ibid* at paras 27, 30.

43. In fairness to Casey Prov Ct J, the court in *Romanowicz*, *supra* note 39 at para 88, opened the door for *Toutissani* when it observed that “[u]nregulated representation by agents who are not required to have any particular training or ability in complex and difficult criminal proceedings where a person’s liberty and livelihood are at stake invites miscarriages of justice.”

“barristers or advocates in a province” or “attorneys or solicitors of the superior courts in a province” to practice in those roles before the Federal Court, the Federal Court of Appeal, and the Supreme Court of Canada.⁴⁴ The *Tax Court of Canada Act* is to similar effect.⁴⁵ But the *Court Martial Appeal Court Rules* go further, recognizing as counsel not only those “entitled by law to practise as barristers or advocates in any province or territory of Canada” but also those who are “assigned to practise in the Court by the Judge Advocate General.”⁴⁶ The *Tax Court of Canada Act* also allows appearances by non-lawyer agents for “all parties”—not just the taxpayer—under its informal procedure.⁴⁷ Again, to the extent that these federal statutes are inconsistent with legislation on the legal profession, they would prevail via paramountcy.⁴⁸

II. *The implications of federalism for the regulation of lawyers for the federal government*

In this part, I analyze the implications of federalism for the regulation of lawyers for the federal government. I set out and advance three consecutive propositions. The first proposition is that employees of the federal government can practice law without being licensed by the corresponding provincial law society (or any law society), absent a federally-imposed requirement to the contrary. The second proposition is that if federal government lawyers nonetheless happen to be licensed by a law society, they can be disciplined by that law society. And the third proposition is that Parliament can immunize federal government lawyers from law society discipline.

1. *Federal government “lawyers” can practice without being licensed by a law society*

I first argue that employees of the federal government can practice law without being licensed by a law society. There is a line of cases holding that employees of the federal government can practice professions without being licensed or otherwise complying with provincial legislation governing those professions. While these cases do not address lawyers

44. *Supreme Court Act*, RSC 1985, c S-26, ss 22-23; *Federal Courts Act*, RSC 1985, c F-7, ss 11(1), (2).

45. *Tax Court of Canada Act*, RSC 1985, c T-2, s 17.1(2): “Every person who may practise as a barrister, advocate, attorney or solicitor in any of the provinces may so practise in the Court and is an officer of the Court.”

46. *Court Martial Appeal Court Rules*, SOR/86-959, made under s 244(1) of the *National Defence Act*, RSC 1985, c N-5, r 19(2).

47. *Tax Court of Canada Act*, *supra* note 45, ss 18, 18.14.

48. Since legal officers in the Canadian Forces are servants of the federal Crown, the appearance rights in the *Court Martial Appeal Court Rules* might also prevail via federal Crown immunity.

specifically,⁴⁹ the same reasoning would appear to apply to lawyers—except perhaps for an argument around independence of the bar. However, courts may exercise their inherent jurisdiction to refuse to allow non-lawyers to appear before them.

In *Lefebvre*, the Federal Court of Appeal held that a federal government employee could engage in what would otherwise be the provincially regulated profession of chemists without complying with corresponding provincial legislation, because the provinces cannot interfere with the federal government’s choice of personnel:

the statutes adopted by a provincial legislature cannot limit the power enjoyed by the federal government to choose whomever it will to perform the administrative functions falling within its jurisdiction.... The performance by the federal government of the administrative functions pertaining to it requires that there be a federal Public Service. The power to regulate hiring of its employees, like that of regulating their working conditions, seems to me to belong exclusively to the federal Parliament. It is for this reason that, in my opinion, statutes such as the Professional Code and the Professional Chemists Act cannot be applied to federal employees on account of acts which they perform in the course of their duties. If that were not so, it would amount to saying that each of the ten provinces could establish as it saw fit the standards of competence that the federal government should meet in hiring its personnel.⁵⁰

Note here the specific language that these provincial statutes cannot “apply” to federal employees—which suggests the doctrine of interjurisdictional immunity, although Pratt JA never mentions that doctrine by name. In drawing an analogy to the power “of regulating their [federal employees’] working conditions,” Pratt JA cites *Reference re Minimum Wage Act (Saskatchewan)*.⁵¹ In that case, the Supreme Court of Canada held that provincial minimum wage legislation could not apply to federal servants.⁵² While Pratt JA does not cite a federal head of power for the hiring and regulating of federal employees, it is best identified as 91(8).⁵³

I note here that while it is not entirely clear from the text of *Reference re Minimum Wage Act* which doctrine the court was applying, and thus the doctrine for which Pratt JA followed the case, the Supreme Court of

49. As I will discuss below, one case does involve students-at-law. See below note 61 and accompanying text.

50. *Lefebvre*, *supra* note 13 at 203-204.

51. [1948] SCR 248, [1948] 3 DLR 801 [*Reference re Minimum Wage Act* cited to SCR].

52. *Ibid.*

53. *Constitution Act, 1867*, *supra* note 4, s 91(8): “The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.” See below notes 67 and 68 and accompanying text.

Canada subsequently confirmed in *Bell Canada v Quebec (Commission de la Santé et de la Sécurité du Travail)* that *Reference re Minimum Wage Act* was an example of interjurisdictional immunity.⁵⁴

Another complication in understanding and applying *Lefebvre* at present is that the Supreme Court of Canada in *Canadian Western Bank* narrowed interjurisdictional immunity, holding that the doctrine only applies where the challenged statute “impairs,” not merely “affects,” the relevant head of power: “[t]he difference between “affects” and “impairs” is that the former does not imply any adverse consequence whereas the latter does.”⁵⁵ However, the language of Pratt JA appears to meet the threshold of impairment. The adverse consequence is that the federal government cannot freely choose and regulate its own employees, which essentially defeats section 91(8).

Lefebvre was not a case about a prosecution for unlicensed practice, but instead an appeal from the adjudication of a public service grievance. The respondents had sought reimbursement for the professional fees they paid to the Order of Chemists of Quebec, under a term of the collective agreement that provided that professional fees would be reimbursed “when the payment of such fees is a requirement for the continuation of the performance of the duties of his position.”⁵⁶ The employer lost the grievance but prevailed on appeal.

This point of *Lefebvre* has been followed in several grievance adjudications: nurses in Manitoba⁵⁷; engineers in British Columbia⁵⁸; and nurses in Quebec.⁵⁹ However, other decisions have noted that compliance with legislation is required, and thus fees must be reimbursed, where membership is a requirement of federal, not provincial, legislation—such as for veterinarians whose duties involve functions for which the *Controlled Drugs and Substances Act* and the *Food and Drugs Act* require

54. *Bell Canada v Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 74 at 762, 51 DLR (4th) 161.

55. *Canadian Western Bank*, *supra* note 20 at para 48.

56. *Lefebvre*, *supra* note 13 at 200-201.

57. *Chorney v Canada (Treasury Board – Solicitor General)*, 1985 CarswellNat 941 at para 17, [1985] CPSSRB No 101 (QL).

58. *Churcher and Treasury Board (Transport Canada)*, 1991 CarswellNat 2141, [1991] CPSSRB No 115 (QL).

59. *Barbas and Treasury Board (Veterans Affairs Canada)*, 1989 CarswellNat 1910, [1989] CPSSRB No 111 (QL); *Dagenais and Treasury Board (Department of Veterans Affairs)*, 1987 CarswellNat 1575, [1987] CPSSRB No 160 (QL).

a provincial licence.⁶⁰ Similarly, membership is required, and thus fees must be reimbursed, where membership is a condition of employment.⁶¹

Lefebvre was followed by the Quebec Superior Court in *Corporation professionnelle des médecins vétérinaires du Québec c Hardy*—a case squarely about the unauthorized practice of a self-regulated profession.⁶² Hardy, an employee of the federal government, had practiced veterinary medicine in the course of meat inspection in Quebec without being on the roll of l'Ordre des Médecins-Vétérinaires.⁶³ Justice Martineau held that the relevant legislation could not bind the federal Crown:

Il est évident que les provinces ont toutes la compétence législative nécessaire pour régir l'exercice de leur pouvoir. Cependant, en examinant l'arrêt *Lefebvre* cité plus haut, et plusieurs autres, dans la même veine, il est tout autant évident que la Couronne Fédérale n'est pas liée par les Lois Provinciales en cause, soit celle sur les médecins-vétérinaires, ainsi que sur le Code des professions.⁶⁴

Justice Martineau continues in language similar to *Lefebvre* (before explicitly adopting the language in *Lefebvre*), and specifically cites federal legislation that is to govern these matters:

... Si l'on devait régir les préposés de la Couronne Fédérale par la législation provinciale, ou une portion d'icelle une telle exigence imposerait un nombre de contraintes importantes à l'exercice par l'administration fédérale des pouvoirs de gérance qui lui sont dévolus par la loi.

La Couronne Fédérale a légiféré en adoptant entre autres la loi sur l'emploi dans la fonction publique, S.R.C. 1970, c. P-32 et la loi sur

60. *Katchin v Canadian Food Inspection Agency*, 2004 PSSRB 26 at paras 53 and 55, 2004 CarswellNat 952, [2004] CPSSRB No 25 (QL); *Harper v Canadian Food Inspection Agency*, 2002 PSSRB 87 at paras 53-54, 92, 2002 CarswellNat 5746, [2002] CPSSRB No 70 (QL); *Controlled Drugs and Substances Act*, SC 1996, c 19; *Food and Drugs Act*, RSC 1985, c F-27.

61. *Association of Justice Counsel v Treasury Board*, 2015 PSLREB 23 at para 49, 2015 CarswellNat 781. Oddly, the government in the agreed statement of facts at para 4 conceded that "13. Law Society statutes (regulations/ policies) state that anyone performing the duties of an articling student must be registered with the law society in their jurisdiction (as an articling student, student-at-law, or whatever other title is used by the law society in that jurisdiction). As such, articling students employed at the Department of Justice are required to be registered by the law society in that jurisdiction." And that "14. All articling students are governed by the law societies in their jurisdiction, including being bound by the professional codes of conduct in those jurisdictions." I proceed on the basis that this concession in a single grievance adjudication, while odd and unwise, does not bind the federal government.

62. [1986] JQ no 2357 (QL) [*Hardy*].

63. *Ibid* at paras 7-8.

64. *Ibid* at para 19. An unofficial translation is as follows: "It is clear that the provinces all have the necessary legislative competence to govern the exercise of their powers. However, in examining the *Lefebvre* judgement cited above, and others in the same vein, it is just as clear that the Federal Crown is not bound by the Provincial laws in question, be it the one on veterinary surgeons, as well as the Professional Code."

l'administration financière, S.R.C., 1970, c. F-10, pour mettre sur pied les cadres, les préposés et les employés ainsi que l'infra-structure nécessaire à la réalisation de ses objectifs, entre autre, seule la Couronne Fédérale peut déterminer et, de fait, a déterminé par ses lois, les préposés ou autres employés dont elle a besoin pour assurer une saine administration.

Appliquer la Loi Provinciale ou de la Couronne aux droits de la Province dans le choix de ces personnes seraient imposer une grande entrave aux droits, privilèges et prérogatives de la Couronne aux droits du Canada.

Établir des critères d'admissibilité et des conditions d'emploi dans la fonction publique fédérale constitue un aspect essentiel de l'administration de la fonction publique et de sa régie interne. Soumettre l'exercice de tel pouvoir à une législation provinciale constituerait une intrusion qui aurait comme effet, de priver l'autorité fédérale de l'une de ses compétences essentielles.⁶⁵

Justice Martineau also relied on *Canada (Attorney General) v St Hubert Base Teachers' Assn*,⁶⁶ in which the Supreme Court of Canada quoted approvingly from André Tremblay's conclusion that subsection 91(8) of the *Constitution Act, 1867* grants power beyond its explicit content of "The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada"⁶⁷: "L'article 91(8) permet de penser que c'était vraiment l'intention des hommes de 1867 de confier au Dominion la réglementation totale des rapports entre la Couronne fédérale et ses employés."⁶⁸ *St Hubert Base*, like *Reference re Minimum Wage Act*

65. *Ibid* at paras 39-42. An unofficial translation is as follows:

"If we had to govern the officers of the federal Crown through provincial legislation, or a portion thereof, such a demand would impose a number of important restraints to the federal administration's exercise of governing powers conferred to it by the law.

The Federal Crown legislated by adopting, among others, the *Public Service Employment Act*, RSC 1970, c P-32, and the *Financial Administration Act*, RSC 1970, c F-10, to establish the managers, officers, and employees, as well as the infrastructure necessary to accomplish its objectives, among others, only the Federal Crown can determine and as such, has determined through its laws, the officers and other employees that it needs to ensure sound administration.

Applying the provincial law or the law of the provincial Crown in the choice of these people would impose a great impediment to the rights, privileges, and prerogatives of the Federal Crown.

Establishing admission criteria and employment requirements in the federal public service constitutes an essential aspect of public service administration and its internal management. Subjecting the exercise of such a power to a provincial legislature would constitute an intrusion which would have the effect of depriving the federal authority of one of its core competences."

66. [1983] 1 SCR 498, 1 DLR (4th) 105 [*St Hubert Base* cited to SCR].

67. *Constitution Act, 1867*, *supra* note 4.

68. *St Hubert Base*, *supra* note 66 at 507, quoting from André Tremblay, *Les Compétences législatives au Canada et les Pouvoirs provinciaux en Matière de Propriété et de Droits civils* (Ottawa: l'Université d'Ottawa, 1967) at 239, n 461, which is quoted in *Hardy*, *supra* note 62 at para 37. The official English translation from the SCR is as follows: "Section 91(8) suggests that it was really the intent of the statesmen in 1867 to give the Dominion complete control over relations between the federal Crown and its employees."

relied on in *Lefebvre*, is not completely clear on which doctrine is being applied and does not explicitly use the term “interjurisdictional immunity.” The Court in *St Hubert Base* held that Quebec labour legislation “has no application” to an association of teachers on a military base.⁶⁹ It also described this proposition as stating that “the federal Crown cannot be subject to provincial statutes regulating labour relations.”⁷⁰ These statements are consistent with interjurisdictional immunity, although they could also reflect federal Crown immunity to provincial statutes. Moreover, the court in *St Hubert Base* does not identify federal legislation that would prevail over the provincial legislation,⁷¹ and thus paramouncy seems inapplicable. However, unlike *Reference re Minimum Wage Act*, the Supreme Court of Canada has not in subsequent cases explicitly clarified which doctrine was applied in *St Hubert Base*.

Justice Martineau’s reasoning in *Hardy* appears to have two connected arguments. The first argument, which is not necessarily a constitutional argument, is that the provincial legislation in question does not “bind” the federal Crown.⁷² For the purposes of this argument it is sufficient to note first that *Krieger* must mean that the provincial Crown and provincial government lawyers are bound by necessary implication by provincial legislation on the legal profession,⁷³ and second Hogg’s argument that a provincial law that binds the provincial Crown will also bind the federal Crown, at least as a matter of statutory interpretation.⁷⁴ Justice Martineau may also be invoking the constitutional doctrine of federal Crown immunity from provincial legislation.

Justice Martineau’s second argument in *Hardy*, which is unquestionably a constitutional one, is that provincial legislation cannot affect the federal government’s power to select its employees. The precise nature of this constitutional argument is unclear. Where he refers to other federal legislation that governs these matters, it looks like paramouncy—but elsewhere it looks more like interjurisdictional immunity.⁷⁵

69. *St Hubert Base*, *supra* note 66 at 503.

70. *Ibid* at 507.

71. The school was authorized by an Order in Council under the *National Defence Act*, RSC 1970, c N-4 (*St Hubert Base*, *supra* note 66 at 499-500), but there was otherwise no mention of federal legislation that applied to the teachers.

72. See above note 64: “la Couronne Fédérale n’est pas liée.”

73. Martin, “Attorney General Immunity,” *supra* note 2 at 425-426.

74. Hogg, *supra* note 19, ch 10 at 10.9 (a), (b), (c), (d), pages 10-18 to 10-21.

75. See above note 65: “Soumettre l’exercice de tel pouvoir à une législation provinciale constituerait une intrusion qui aurait comme effet, de priver l’autorité fédérale de l’une de ses compétences essentielles.”

Indeed, *Lefebvre* and *Hardy* are both imprecise about which federalism doctrine they are applying, interjurisdictional immunity or paramountcy or federal Crown immunity. The more likely is interjurisdictional immunity: insofar as they purport to apply to federal government employees, the statutes on regulated professions encroach on the protected core of the federal head of power over federal government employees in section 91(8) of the *Constitution Act, 1867*, and so are inapplicable.⁷⁶ (Here the federal government is the entity whose affairs are impacted by the law, as well as the lawmaker whose head of power is affected by the law—collapsing or defusing at least in part the doctrinal disagreement over whether interjurisdictional immunity is really about the affected entity or instead is really about protecting the head of power.⁷⁷) Alternatively, provincial legislation on regulated professions frustrates the purpose of federal legislation on the hiring of government employees—which purpose is to establish a complete set of conditions for, and restrictions on, such hiring—and thus the provincial legislation is inoperative to the extent of the inconsistency, via the doctrine of paramountcy.⁷⁸

In the further alternative, the doctrine applied could be federal Crown immunity: the provincial legislation cannot bind the federal Crown. As mentioned above, this federal Crown immunity applies to Crown employees only insofar as its absence would prejudice the Crown.⁷⁹ However, both *Lefebvre* and *Hardy* seem to suggest that the requirement to comply with provincial legislation on regulated professions would prejudice the Crown by restricting its choice and regulation of its own employees.

Given that the Supreme Court of Canada has since *Lefebvre* and *Hardy* held that interjurisdictional immunity should be applied only after paramountcy,⁸⁰ and that there is some uncertainty in the caselaw and literature over the application of interjurisdictional immunity,⁸¹ as well as uncertainty over federal Crown immunity,⁸² paramountcy seems the preferable approach. Under this approach, provincial legislation on

76. See e.g. *Canadian Western Bank*, *supra* note 20.

77. See e.g. Robin Elliot, “Interjurisdictional Immunity after *Canadian Western Bank* and *Lafarge Canada Inc.*: The Supreme Court Muddies the Doctrinal Waters—Again” (2008) 43 SCLR (2d) 433 at 436 [Elliot, “Muddies”].

78. See e.g. *Mangat*, *supra* note 4.

79. See above note 29 and accompanying text.

80. See *Canadian Western Bank*, *supra* note 20 at para 67, as discussed e.g. in Robin Elliot, “*Quebec (Attorney General) v Lacombe* and *Quebec (Attorney General) v. C.O.P.A.*: Ancillary Powers, Interjurisdictional Immunity and “The Local Interest in Land Use Planning against the National Interest in a Unified System of Aviation Navigation” ”(2011) 55 SCLR (2d) 403 at 429 [Elliot, “*Quebec*”].

81. See e.g. Elliot, “*Quebec*,” *ibid* at 429-437.

82. See Hogg, *supra* note 19, ch 10 at 10.9(c),(d), pages 10-20 to 10-21.

the regulated professions, including the legal profession, frustrates the purpose of federal legislation on the public service, the purpose of which is to fully govern the hiring and regulation of federal employees.

Thus, *Lefebvre* and *Hardy* stand for the proposition that federal government employees can engage in the practice of regulated professions without complying with provincial legislation, unless compliance is required by federal legislation or as a condition of employment. As mentioned above, MacNair uses *Lefebvre* to argue that federal government lawyers, and specifically legislative drafters, cannot be subject to provincial legislation on the legal profession.⁸³

However, one could argue that the legal profession is special because of the independence of the bar. While this concept was not adopted as a principle of fundamental justice in *Canada (Attorney General) v Federation of Law Societies of Canada* (with Cromwell J for the majority instead articulating a narrower conception that he termed “commitment to the client’s cause”),⁸⁴ the Supreme Court of Canada has nonetheless clearly recognized its importance.⁸⁵ The independence of the bar is usually understood as independence from the state, but it can also refer to independence from the client⁸⁶—and for federal government lawyers, the federal government is both the state and the client at the same time. By tying these lawyers’ ability to practice to their employment status, arguably these unlicensed “lawyers” lose both independence from the government as client, and independence from the government as the state. However, it is unclear how independence of the bar would operate as a legal barrier to, as opposed to a policy argument against, federal government employees practicing law without membership in a provincial bar.

Moreover, if *Lefebvre* and *Hardy* do permit the practice of law by unlicensed employees of the federal government, it does not necessarily follow that such employees can appear in court.⁸⁷ If employees of the

83. MacNair, “Legislative Drafters,” *supra* note 12 at 134-135.

84. *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7 at para 80, [2015] 1 SCR 401 [*Canada v FLSC*].

85. See e.g. *Attorney General of Canada v Law Society of British Columbia*, [1982] 2 SCR 307 at 335-336, quoted e.g. in *Canada v FLSC*, *supra* note 84 at para 98.

86. See e.g. Alice Woolley, “Integrity in Zealousness: Comparing the Standard Conceptions of the Canadian and American Lawyer” (1996) 9 Can JL & Juris 61 at 87. See also e.g. *R v Samra* (1998), 41 OR (3d) 434 at 447, 129 CCC (3d) 144 (CA), Rosenberg JA, quoting with approval from Arthur Maloney, “The Role of the Independent Bar,” in Law Society of Upper Canada, ed, *Special Lectures of the Law Society of Upper Canada, 1979: The Abuse of Power and the Role of an Independent Judicial System in its Regulation and Control* 49 at 61-62 (Toronto: R De Boo, 1979): “[A] lawyer must never allow himself to become a mere mouthpiece of his client.”

87. MacNair, “Legislative Drafters,” *supra* note 12 at 135 notes that legislative drafters do not appear in court.

federal government are immune to provincial legislation on the legal profession, and can practice without being bound by that legislation, it follows not only that such employees are immune from the jurisdiction of the corresponding law society but also that they are not officers of the court and are not bound by obligations to the court.⁸⁸ How, then, should courts respond to the appearance of such a person? It is trite law that courts have the inherent jurisdiction to control their own process. Within this inherent jurisdiction lies the discretion of courts to refuse appearances not only by non-lawyers,⁸⁹ but also by lawyers: “[i]t is within the inherent jurisdiction of a superior court to deny the right of audience to counsel when the interests of justice so require.”⁹⁰ (The Supreme Court of Canada in *United States of America v Shulman* was explicit that all courts possess this inherent jurisdiction to control their own processes.⁹¹) Thus, courts can—and perhaps should—deny the right of appearance to such unlicensed employees.⁹²

What about the federal Minister of Justice and Attorney General, which comprised two of the three examples I gave in the introduction? For similar reasons as federal government employees, the federal Minister of Justice and Attorney General can practice law without being licensed. As section 91(8) refers to “Officers of the Government of Canada,” and not merely employees, this head of power should include Ministers.⁹³ The Attorney General is an officer of the Crown (indeed the chief legal officer), and it would be troublingly inconsistent for Ministers (at least the Minister of Justice) to not be.⁹⁴

If we accept that *Lefebvre* and *Hardy* allow the unlicensed practice of law by employees of the federal government (and the federal Minister of Justice and Attorney General), the implications are significant but not dire. There is good reason to suspect that the federal government would

88. See e.g. *BC Act*, *supra* note 5, s 14(2); *Ontario Act*, *supra* note 5, s 29.

89. *Romanowicz*, *supra* note 39.

90. *Everingham v Ontario* (1992), 8 OR (3d) 121 at 126, 88 DLR (4th) 755 (Div Ct).

91. 2001 SCC 21 at para 33, [2001] 1 SCR 616 [emphasis added]: “Not only is the Court of Appeal a forum of original jurisdiction for *Charter* purposes under the *Extradition Act* as a result of the 1992 amendments, but it also has, *like all courts*, an implied, if not inherent, jurisdiction to control its own process, including through the application of the common law doctrine of abuse of process.”

92. This would also be a reasonable response by courts to any provincial legislation purporting to allow government employees to practice law without being lawyers.

93. Alternately it could be the peace, order, and good government power. See below note 120 and accompanying text.

94. See also Karen Horsman & Gareth Morley, eds, *Government Liability Law and Practice* (Toronto: Thomson Reuters Canada, 2017) (loose-leaf release no 32, June 2019), ch 1 at 1.50.20(1), page 1-46.5. noting that although Ministers are traditionally not employees at common law, they are now considered part of the Crown.

require, as a condition of employment, its lawyers to be licensed and in good standing with at least one law society, as a cost-effective way of ensuring basic competence.⁹⁵ However, for purposes of mobility, one can imagine the federal government not wanting its lawyers to be required to re-license every time they changed provinces—under this approach, the federal government might require its lawyers to be licensed only in any one province, and not necessarily the province in which they carry out their duties at any given time. Consider, for example, a federal government litigator practicing in Halifax who is transferred to Ottawa. There may be good reason to allow her to practice without an Ontario license if she retains her Nova Scotia license. Indeed, Parliament could encourage public confidence by inserting a provision in federal human resources legislation that requires employees practicing a profession to be licensed in at least one province or territory. The spectre of an army of completely unlicensed federal government “lawyers” is thus unrealistic. Moreover, case law already provides that the Minister of Justice and Attorney General need not be a lawyer,⁹⁶ and so this conclusion from federalism does not change the law in this respect, it merely reinforces it at the federal level.

2. *But any federal government lawyers who happen to be licensed by a law society may be disciplined by that law society*

While *Krieger* may appear to contradict my first proposition—that federal government employees may practice law without being licensed by a law society, absent a federally-imposed requirement to the contrary—it does not. Instead, *Krieger* supports my second proposition: any federal government lawyers who happen to be licensed by a law society may be disciplined by that law society.

As mentioned above, the Supreme Court of Canada in *Krieger* noted in *obiter* that provincial law societies have the same disciplinary jurisdiction over federal Crown prosecutors as they do over provincial Crown prosecutors. However, this observation relied on the fact that federal Crown prosecutors were members of the corresponding provincial law society:

95. Indeed, the Department of Justice currently requires that applicants for counsel positions hold “[m]embership in good standing in a Law Society of one of the Provinces or Territories of Canada.” See e.g. *GC Jobs*, online: <<https://emploisfp-psjobs.cfp-psc.gc.ca/psrs-srfp/applicant/page1800?poster=1319530>> [<https://perma.cc/4SJX-F7FM>]. See also McNair, “Silk,” *supra* note 11 at 140.

96. *Askin v Law Society of British Columbia*, 2013 BCCA 233, 363 DLR (4th) 706, leave to appeal to SCC refused, 35463 (7 November 2013).

*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.*⁹⁷

The Court took this membership as a given, and did not specify where the requirement for membership came from. The holding itself in *Krieger*—that provincial law societies have disciplinary jurisdiction over provincial Crown prosecutors for all conduct other than matters of prosecutorial discretion⁹⁸—likewise relied on the fact that provincial Crown prosecutors were required to be members of the corresponding law society. The Court noted that:

To be a Crown prosecutor in Alberta, there are two requirements: (1) employment as such by the Attorney General's office and (2) membership in the Law Society of Alberta. To keep his or her job, a Crown prosecutor must perform to the standards of the employer, the Attorney General's office, and must remain in good standing by complying with the ethical requirements of the Law Society. All Alberta lawyers are subject to the rules of the Law Society—Crown prosecutors are no exception.⁹⁹

However, as it did with federal Crown prosecutors, the Court took the requirement of membership in the Law Society as a given for provincial Crown prosecutors, and did not specify where that requirement came from. Presumably, membership was a requirement because Crown prosecutors' duties included the practice of law, and provincial legislation on the legal profession permits practice only by members of the law society. Thus, *Krieger* does not—in itself—hold that federal government employees must be members of the law society to practice law.

It is important to emphasize here that the *Lefebvre* and *Hardy* line of cases is not inconsistent with my interpretation of the *obiter* in *Krieger*. *Krieger* states that federal prosecutors are subject to law society discipline if they are members of the law society. It turns out, following *Lefebvre* and *Hardy*, that federal government lawyers need not be members of a law society.

Here I note that, even if federal Crown immunity indeed applies to federal government lawyers as Crown employees, by joining a provincial law society under provincial legislation on the legal profession, they are agreeing to be bound by that legislation and subject to the regulatory authority of that law society.¹⁰⁰ This point is similar to that made in *Breton*

97. *Krieger*, *supra* note 4 at para 56 [emphasis added].

98. *Ibid* at para 60.

99. *Ibid* at para 41.

100. See above note 25 and accompanying text on the limitations of federal Crown immunity.

c Comité de discipline de l'Ordre professionnel des travailleurs sociaux du Québec, in which a social worker in the Canadian Forces had registered with the Order not because he was required to but in order to have the right to practice after he had left the Forces.¹⁰¹

En agissant ainsi, il a choisi de s'assujettir à la discipline de l'Ordre et, conséquemment, aux normes déontologiques que celui-ci détermine pour ses membres.... L'adhésion à un ordre professionnel confère des privilèges mais elle entraîne, également, des obligations; on ne peut se réclamer des droits et prétendre se soustraire aux devoirs.¹⁰²

Justice Otis is explicit that one cannot voluntarily come under the jurisdiction of a professional regulator for some purposes but not others.¹⁰³ Like the social worker in *Breton*, federal government lawyers are not required to join a law society, but any lawyer who chooses to do so must accept the obligations that come along with that membership.

Thus, my first proposition—that federal government “lawyers” may practice law without being licensed by a law society, absent a federally-imposed requirement to the contrary—is qualified by my second proposition: that any federal government lawyers who happen to be licensed by a law society may be disciplined by that law society.

A wrinkle: The Ontario Barristers Act and federal Attorneys General

Before proceeding to my third proposition, I pause to note a caveat to my second proposition. While any federal government lawyers who happen to be licensed by a law society may be disciplined by that law society, there may be an exception for federal Attorneys General called under the Ontario *Barristers Act*.¹⁰⁴ This provision essentially provides that a federal Attorney General is entitled, purely by virtue of being appointed the federal Attorney General, to be called to the Ontario bar:

101. *Breton*, *supra* note 29 at para 20: “il s’était inscrit à l’Ordre afin d’avoir le droit d’exercer sa profession après avoir quitté les Forces.”

102. *Ibid* at paras 19, 20 [citation omitted]. An unofficial translation is as follows: “In doing so, he chose to submit to the discipline of the Order and, consequently, to the ethical standards that it determines for its members.... Membership in a professional order confers privileges, but it also entails obligations; we cannot claim rights and pretend to evade duties.”

103. *Ibid* at para 20: “On ne peut s’inscrire au tableau d’un ordre professionnel à la seule fin d’assurer la validité de son permis d’exercice professionnel.” An unofficial translation is as follows: “You cannot register on the roll of a professional order for the sole purpose of ensuring the validity of your professional license.”

104. *Barristers Act*, RSO 1990, c B.3. For example, Jody Wilson-Raybould was called under that provision: Elizabeth Thompson, “Can Wilson-Raybould claim solicitor–client privilege over SNC-Lavalin?” *CBC News* (21 February 2019), online: <<https://www.cbc.ca/news/politics/wilson-raybould-lawyer-law-society-1.5027143>> [<https://perma.cc/7H8M-3Y7Q>].

A person who is or has been Minister of Justice and Attorney General of Canada or Solicitor General of Canada is entitled to be called to the bar of Ontario without complying with the *Law Society Act* or any of the regulations or rules of the Society as to licensing, examinations, payment of fees or otherwise, and is thereupon entitled to practise at the bar of Her Majesty's courts in Ontario.¹⁰⁵

This provision dates back to 1891 and remains virtually unchanged.¹⁰⁶ It has not been considered in any reported case.

The manner in which this provision is drafted potentially creates uncertainty over whether the Law Society of Ontario has regulatory and disciplinary jurisdiction over such a lawyer. The provision does not require compliance “with the *Law Society Act* or any of the regulations or rules of the Society as to licensing, examinations, payment of fees or otherwise” and grants an “entitlement” to practice in Ontario. The compliance that is waived appears to be compliance with the conditions for entry to the profession, i.e. to be called to the bar of Ontario. Thus, for example, a federal Attorney General would not be subject to any assessment or proceedings related to her good character. However, the addition of the “entitlement” clause suggests that she could not face any restriction or suspension based on disciplinary grounds (including competency grounds).

3. *And Parliament can immunize federal government lawyers from law society discipline*

So far in this part I have argued that (1) federal government “lawyers” can practice law without being licensed by any law society, absent a federally-imposed requirement to the contrary, but (2) any federal government lawyers who happen to be licensed by a law society may be disciplined by that law society. My third proposition, which qualifies the second proposition, is that Parliament can immunize federal government lawyers from law society discipline. So long as there is a valid federal head of power under which these immunity provisions fit, they would prevail over provincial legislation on the legal profession via paramountcy.

Why would disciplinary immunity be desirable? As mentioned above, many if not most lawyers for the federal government will be licensed in

105. *Barristers Act*, *supra* note 104, s 1.

106. Jeanette Bosschart, “Lawyers and Lawmakers: A Statutory History of *The Law Society Act*, *The Barristers Act* and *The Solicitors Act*, 1785–1993” (1994) 28 [LSUC] Gazette 171 at 187. See *An Act to amend the law as to Barristers and Solicitors in certain cases*, SO 1891, c 35, s 1: “Any person who is, has been, or shall be, Minister of Justice of Canada, if not already a member of the bar of Ontario, shall be entitled to be called to the bar by the benchers of the Law Society of Upper Canada without complying with any of the rules or regulations of the society as to admission on the books of the society, examinations, payment of fees or otherwise, and shall thereupon be entitled to practice at the bar in Her Majesty’s Courts in Ontario.”

at least one jurisdiction, and Parliament would be wise to require such licensing. However, disciplinary immunity may nonetheless be desirable. Here we can recycle the classic argument against civil liability as applied, for example, recently in the context of disciplinary liability in *Groia v Law Society of Upper Canada*.¹⁰⁷ Arguably, the prospect of law society discipline deters or chills lawyers from providing effective services, via the lens of resolute advocacy, or otherwise. More specifically, Crown prosecutors and the Attorney General make difficult and controversial decisions on a regular basis. (In response, one would admittedly note that many of those decisions are already protected under prosecutorial discretion following *Krieger*.) In civil litigation, particularly constitutional litigation, counsel may also take unpopular positions and make controversial decisions. They would seem to have a similar need as Crown prosecutors for disciplinary immunity.

I will consider three groups for which Parliament may seek to provide disciplinary immunity: federal Crown prosecutors, all federal government lawyers (including federal Crown prosecutors), and the federal Attorney General.

Following *Krieger*, Crown prosecutors comprise a likely group that Parliament may wish to grant immunity from law society discipline. Here the relevant federal head of power would be criminal law and procedure under section 91(27) of the *Constitution Act, 1867*. Thus, the most intuitive legislative vehicle for such an immunity provision would be the *Criminal Code*. Parliament could also immunize the Attorney General, as a matter of criminal law and procedure under s 91(27) of the *Constitution Act, 1867*, at least for actions taken pursuant to her duties and powers under the *Criminal Code*. (I return to the scope of immunity below.) Indeed, it would appear that Parliament could immunize both federal and provincial prosecutors, and federal and provincial Attorneys General, under this head of power.¹⁰⁸ The reasons to immunize federal prosecutors and the federal Attorney General would presumably apply equally to the immunization of provincial prosecutors and the provincial Attorney General.

107. *Groia v Law Society of Upper Canada*, 2018 SCC 27, e.g. at para 76, [2018] 1 SCR 772: “Nevertheless, when defining incivility and assessing whether a lawyer’s behaviour crosses the line, care must be taken to set a sufficiently high threshold that will not chill the kind of fearless advocacy that is at times necessary to advance a client’s cause. The Appeal Panel recognized the need to develop an approach that would avoid such a chilling effect.” For a forceful rejection of the chilling effect of civil liability, see e.g. *Hill v Hamilton Wentworth Regional Police Services Board* (2005), 76 OR (3d) 481 at para 63, 259 DLR (4th) 676 (CA), MacPherson JA, aff’d (albeit a little less forcefully) 2007 SCC 41, [2007] 3 SCR 129.

108. Such provisions, if they were inconsistent with provincial law, would prevail via paramountcy.

Alternately, Parliament could immunize federal Crown prosecutors only, and/or all federal government lawyers and/or the federal Attorney General, under the head of power in section 91(8) (federal government employees) of the *Constitution Act, 1867*. This immunity provision could be added to the *Department of Justice Act* and the *Director of Public Prosecutions Act*,¹⁰⁹ or perhaps to the *Public Service Employment Act*.¹¹⁰

Whichever approach is taken, the scope of the immunity provision(s) must also be chosen. As an example, the provision of the Ontario *Law Society Act* immunizing the Attorney General defines the scope of this immunity: “No person who is or has been the Attorney General for Ontario is subject to any proceedings of the Society or to any penalty imposed under this Act for anything done by him or her while exercising the functions of such office.”¹¹¹ The original language in the bill that added this provision granted immunity “for anything done by him while in such office.”¹¹² Presumably the former version, which preserves disciplinary liability for extraprofessional conduct, would be preferable. The scope may also be limited by the head of power used, which would be reflected in the legislative vehicle chosen. For example, an immunity provision for the Attorney General in the *Criminal Code* would presumably, whether explicitly in its text or implicitly, cover only conduct related to her functions under the *Criminal Code* and related legislation.

I also note here the importance of precise language for the federal Attorney General, who is also the Minister of Justice.¹¹³ As federal legislation usually distinguishes between the two roles, referring to one and not the other, legislators should turn their minds to whether they wish to immunize activity in both roles or in one only. An immunity provision should explicitly refer to both roles if the intention is comprehensive immunity.

I acknowledge that, at first glance, the reasons and powers for granting immunity to federal Ministers, including the Minister of Justice and Attorney General, might appear to be somewhat different than the reasons for granting immunity to federal government lawyers. A primary concern for Ministers would be that the law society regulatory discipline process,

109. *Department of Justice Act*, RSC 1985, c J-2; *Director of Public Prosecutions Act [DPPA]*, enacted by s 121 of *Federal Accountability Act*, SC 2006, c 9.

110. *Public Service Employment Act*, Part 7, ss 111-22 [*PSEA*], being Part 3 of the *Public Service Modernization Act*, ss 12-13, SC 2003, c 22.

111. *Law Society Act*, *supra* note 5, s 13 [emphasis added].

112. Martin, “Attorney General Immunity,” *supra* note 2 at 437 [emphasis added].

113. *Department of Justice Act*, *supra* note 109, s 2(2): “The Minister [of Justice] is *ex officio* Her Majesty’s Attorney General of Canada, holds office during pleasure and has the management and direction of the Department.”

and particularly complaints, could be used as a political weapon.¹¹⁴ While the Attorney General's non-partisan role should arguably prevail over his or her political role,¹¹⁵ the Attorney General is indisputably a politician.¹¹⁶ With respect to the Attorney General in particular, given the Attorney General's many discretionary and controversial functions, similar chilling effect concerns would apply as to Crown prosecutors and other government lawyers.¹¹⁷ For these reasons, it may actually be more important to grant disciplinary immunity to Ministers than to grant such immunity to federal government lawyers. While Ministers are undoubtedly officers and not employees, they are nonetheless part of the federal Crown under section 91(8) and so it would be within federal power to immunize them from law society discipline.¹¹⁸

Thus the implications of federalism for the regulation of lawyers for the federal government can be summarized as follows: (1) federal government "lawyers" can practice law without being licensed by any law society, absent a federally-imposed requirement to the contrary, but (2) any federal government lawyers who happen to be licensed by a law society may be disciplined by that law society, and (3) Parliament can immunize federal government lawyers from law society discipline.

One method and reason to exempt federal government lawyers from provincial law society jurisdiction would be to create a parallel regulatory system for federal government lawyers, following Sanderson's suggestion. I turn to this possibility in the next part.

III. *A federal government bar?*

I have argued above that, while federal government lawyers are not required to be licensed by any law society, Parliament would be wise to require them to be licensed by at least one law society to ensure basic competency and promote public confidence.

Another option would be to create a unique federal licensing and regulatory scheme for federal government lawyers—a federal government bar, in effect. Sanderson has intriguingly suggested that Parliament could create a separate code of conduct and "over-sight regim[e]" for federal government lawyers that would "ous[t] provincial jurisdiction."¹¹⁹

114. See e.g. Martin, "Lawyer-Politicians," *supra* note 2 at 23-26.

115. See e.g. The Honourable Ian Scott, "Law, Policy, and the Role of the Attorney General: Constancy and Change in the 1980s" (1989) 39:2 UTLJ 109 at 122.

116. See e.g. Krieger, *supra* note 4 at para 29.

117. See e.g. Martin, "Attorney General Immunity," *supra* note 2 at 441-442.

118. Alternatively, authority over Ministers could be located in the peace, order, and good government power. See below notes 120 to 122 and accompanying text.

119. Sanderson, *supra* note 2 at 3-5 [quotes are from 3 and 4].

(Sanderson relies on *Mangat*, discussed above.) While Sanderson does not go into detail as to what such a regime might entail, here I interpret that idea as meaning a separate federal government bar. Indeed, this would be a compelling reason to allow federal government employees to practice law without belonging to a provincial or territorial bar. In this part I consider whether this approach is indeed within the jurisdiction of Parliament and what some of the advantages and disadvantages of this approach would be.

The idea of a separate federal government bar, while creative, appears to be soundly supported by federalism doctrine and particularly the precedent of *Mangat* combined with *Lefebvre* and *Hardy*. Legislation establishing such a federal regulatory regime would prevail, via paramountcy, over provincial legislation on the legal profession. Sanderson does not specify which federal head of power would apply. However, for the reasons discussed above, the most likely head of federal power would be subsection 91(8) of the *Constitution Act, 1867*. In the alternative, Parliament could use the national concern branch of its peace, order, and good government power.¹²⁰ A federal government bar appears to meet the requirements affirmed by the Supreme Court of Canada in *R v Hydro-Québec*:

For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;

In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.¹²¹

The regulation of federal government lawyers appears to have a sufficient singleness and indivisibility to qualify, as well as a relatively minor impact on provincial jurisdiction over the practice of law. However, it is unclear whether it has sufficient distinctiveness from the regulation of the rest of the legal profession and whether there is a sufficient effect of a provincial failure to address the intra-provincial aspects.¹²² Whether under subsection 91(8) or the peace, order, and good government power, such legislation would prevail so long as the purpose of the legislation was clearly to

120. See e.g. *R v Hydro-Québec*, [1997] 3 SCR 213, 151 DLR (4th) 32 [*Hydro-Québec* cited to SCR].

121. *Hydro-Québec*, *ibid* at para 65, Lamer CJ and Iacobucci J dissenting but not on this point.

122. See e.g. *ibid*.

establish a complete regulatory scheme for federal government lawyers—i.e., to replace and not to supplement provincial regulatory regimes. Such a regime could nevertheless incorporate, by reference, provincial codes of conduct.¹²³

The creation of a single federal regime would promote not just mobility but also consistency and expertise. The Crown in right of Canada is a single employer and single client with lawyers spread across thirteen jurisdictions. While the Federation of Law Societies of Canada and its initiatives promote consistency, there are limits to that work.¹²⁴ Similarly, the national mobility agreement provides only short-term mobility. The federal government might prefer a single regime, which would facilitate and simplify regulatory compliance as well as promote mobility. Such a single regime would also accumulate and develop expertise in the unique aspects of government lawyering. Commentators have emphasized that government lawyering is different from private practice and that the rules of professional conduct and some of the major regulatory concerns of the provincial and territorial law societies simply do not apply to lawyers for the government.¹²⁵ For example, Adam Dodek notes that government lawyers do not engage in advertising or marketing or hold client funds in trust accounts, and thus “whole chapters in the applicable codes of conduct are absolutely irrelevant to government lawyers.”¹²⁶ Moreover, federal government lawyers, to some extent like other lawyers for organizations, face particular pressures—especially “client capture”—to which such a regime could pay particular attention.¹²⁷ Another benefit would be that government lawyers would almost by definition no longer be under-

123. Sanderson, *supra* note 2 at 4.

124. See for example Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2009, as amended 19 October 2019), online: Federation of Law Societies of Canada <<https://flsc.ca/resources/>> [<https://perma.cc/FY6X-KFHF>] [*FLSC Model Code*]. While the *Model Code* has promoted uniformity, and most provincial and territorial codes of conduct mostly follow the *Model Code*, some degree of variation persists.

125. See e.g. Dodek, *supra* note 1 at 4-5: “government lawyers and the work they do are largely ignored. They are barely acknowledged in codes of conduct, underrepresented in law societies and undertheorized in academic scholarship.” See also e.g. Allan C Hutchinson, “‘In the Public Interest’: The Responsibilities and Rights of Government Lawyers” (2008) 46 *Osgoode Hall LJ* 105 at 106: “Not only do the various official codes of professional conduct remain almost silent in their applicability to government lawyers, there is also a paucity of academic literature and professional commentary about how these lawyers are supposed to approach their working obligations and institutional imperatives. Yet this default approach...fails to recognize that the ethical duties and professional obligations imposed on private lawyers do not transfer easily or usefully to the different context of government lawyers.”

126. Dodek, *supra* note 1 at 11.

127. *Ibid* at 11, 13-15 (on “client capture”).

represented as benchers in such a federal government bar.¹²⁸ This kind of specialized regulator would be able to focus all of its resources and regulatory attention on government lawyers, perhaps making it more likely that proactive regulation would be effective while wrongdoing would lead to disciplinary consequences.¹²⁹ As discussed above, there may also be a concern that disciplinary liability has a chilling effect on resolute advocacy by federal government lawyers.¹³⁰ Regulation by a federal government bar that better understands the dimensions and realities of government lawyering would counteract in part that purported chilling effect.

Such a regime could include the Minister of Justice and Attorney General, and potentially lawyer-politicians. If so, the regime would have the opportunity to develop special expertise and appreciation of the tensions Ministers face between their responsibilities as lawyers and their roles as politicians.¹³¹

Moreover, such a regime could provide that federal government lawyers are officers of all Canadian courts. This would affirm that they have obligations to the court and so reduce, and perhaps eliminate, the likelihood that courts would refuse them appearance rights because they are not members of the corresponding provincial law society.

On the other hand, there may be suspicion among the bench and bar, if not among the general public, that such a regulatory apparatus would be overly lenient to its members. There would need to be clear separation between the new regulator and the federal government in order to protect the independence of the bar, in both reality and appearance. Such a regime would also require an extensive bureaucratic infrastructure—however, given the number of federal government lawyers, efficiencies of scale may well make such a regime more cost-effective than at least the smaller law societies.

Federal government lawyers may also find that a federal government bar limits their career mobility and prospects. It is not clear how receptive provincial law societies would be to the transfer and call of such lawyers into provincial bars. Furthermore, the *Constitution Act, 1867* would

128. *Ibid* at 4-5.

129. See e.g. *ibid* at 12, note 40: “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.”

130. See above note 107 and accompanying text.

131. See generally Martin, “Lawyer-Politicians,” *supra* note 2.

preclude appointment of members of a federal government bar instead of a provincial bar as section 96 judges.¹³²

While Sanderson does not identify the specific form that such a federal regime could or would take, the principle of the independence of the bar would suggest a form that tracks closely to the provincial law societies— if for no other reason, so that federal government lawyers could not reasonably be criticized for lacking the independence from the client and employer that their provincial counterparts enjoy. A federal government law society could be governed by benchers primarily elected from the various provinces and territories, with some non-lawyers appointed by the Governor in Council and some lawyers (such as the Minister of Justice and Attorney General) as *ex officio* benchers. Such a bar should be arms-length from the federal government in a similar way as the provincial bars are arms-length from the provincial government. Indeed, the fact that such a federal bar was composed solely of lawyers for the federal government would make it more important, not less important, that there be independence from the government as employer-client.

At minimum, for Parliament to require federal government lawyers to belong to Sanderson's federal government bar would be preferable to the current state of the law, in which federal government employees can practice law without being licensed. The simpler, though not necessarily more cost-effective, alternative would be for Parliament to adopt legislation requiring government lawyers to belong to at least one provincial or territorial law society.

Thus, while Sanderson characterizes her proposal as “simply a matter of possibly, constitutional theory, far from a likely policy choice at this point,”¹³³ it does have considerable advantages and warrants serious consideration.

A federal bar could potentially extend even further than Sanderson suggests, to include not only lawyers for the federal government but any and all lawyers who serve federally-regulated entities such as banks and airlines.¹³⁴ (Such a regime would necessarily rely on the other heads of power in section 91 and not merely section 91(8).) While beyond the

132. *Constitution Act, 1867*, *supra* note 4, s 97 [emphasis added]: “Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected *from the respective Bars of those Provinces*.” Section 98: “The Judges of the Courts of Quebec shall be selected *from the Bar of that Province*.” [Emphasis added.] I thank a reviewer for this suggestion.

133. Sanderson, *supra* note 2 at 5.

134. I thank a reviewer for this suggestion.

scope of this article, this is nonetheless a possibility which merits further consideration.

Conclusion

In this article, I have assessed the implications of federalism for the regulation of federal government lawyers. I have argued that federal government employees cannot be required by provincial legislation to be licensed by a law society in order to practice law; that, nonetheless, any such lawyers who are so licensed are subject to the regulatory and disciplinary jurisdiction of those law societies; and that Parliament can pass legislation immunizing federal government lawyers from such discipline. I have also considered the feasibility, advantages, and disadvantages of a separate federal government bar and concluded that the idea warrants serious consideration.

To return to the questions I posed in the introduction, all three lawyers could potentially face discipline because all three were members of a provincial law society at the time of the impugned conduct.¹³⁵ However, Parliament could pass legislation immunizing similarly situated lawyers—as a class—from that discipline in the future.¹³⁶

The focus of this article has been on law, and while legal considerations are important they should not be allowed to eclipse policy considerations. Questions of law society regulatory jurisdiction over lawyers—and the ability of Parliament and the legislatures to interfere with that regulatory jurisdiction, including discipline—go to the heart of administrative law generally, and legal ethics and professionalism specifically. Ultimately, this article is a reminder to reflect on the overriding purpose of law society regulatory and disciplinary jurisdiction: to protect the public interest.¹³⁷ Indeed, the Supreme Court of Canada in *Krieger* held that law societies must have disciplinary jurisdiction over Crown prosecutors because their disciplinary powers are uniquely able to protect the public:

A prosecutor whose conduct so contravenes professional ethical standards that the public would be best served by preventing him or her from practising law in any capacity in the province should not be immune from disbarment. Only the Law Society can protect the public in this way.¹³⁸

135. Subject to my caveat about the third lawyer, the Attorney General called to the bar of Ontario under the *Barristers Act*, *supra* note 104.

136. More controversially, Parliament could explicitly make that immunity retroactive.

137. See e.g. *Law Society Act*, *supra* note 5, s 4.2, para 3: “The Society has a duty to protect the public interest.”

138. *Krieger*, *supra* note 4 at para 58.

This statement applies beyond prosecutors to all government lawyers, whether federal or provincial. To interfere with this disciplinary jurisdiction is ultimately to erode the protection of the public interest. Any legislated derogations from this disciplinary jurisdiction, though legally and constitutionally permissible, should be adopted sparingly. For this reason, Parliament would be wise to provide in federal legislation that all federal government lawyers must be licensed by at least one Canadian law society. Sanderson's proposal—under which federal government lawyers would be licensed and regulated by a separate federal regulatory regime—is a more radical approach but nonetheless warrants careful consideration.