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A Less Private Practice: Government Lawyers and Legal Ethics

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Government lawyers are public servants and legal professionals. How they differ from private lawyers has much to do with whom they purport to represent and how they exercise power as a lawyer. I will look at a particular case-study—the St. Anne’s Residential school adjudication. This case study illustrates the challenges that government lawyers face in fulfilling their professional duty within a traditional private lawyer framework. St. Anne’s Residential School involved some of the most egregious physical, sexual and psychological abuse of Indigenous children between 1941 and 1972. St. Anne’s Residential School litigation is used as a cautionary (and truly tragic) tale regarding the problems associated with applying a private lawyer model of professional ethics to government lawyers acting in a particular adversarial context. This paper will canvass some of the more serious problems that arose in respect of the St. Anne’s IAP litigation and provide an important lens through which to examine a different approach to government lawyering that engages some suggestions for developing an ethical approach that better suits the responsibilities and challenges of government lawyers. Such suggestions engage a justice-seeking ethic that is cognizant of the powerful role that government lawyers play in our legal system and one that is more consistent with meaningful reconciliation.

Les avocats du gouvernement sont des fonctionnaires et des professionnels du droit. Ce qui les différencie des avocats en pratique privée tient en bonne partie aux personnes qu’ils prétendent représenter et la façon dont ils exercent leur pouvoir en tant qu’avocat. J’examinerai une étude de cas particulière : la décision dans l’affaire du pensionnat Sainte-Anne. Cette étude de cas illustre les défis que les avocats du gouvernement doivent relever pour remplir leur devoir professionnel dans un cadre traditionnel d’avocat en pratique privée. Le pensionnat St. Anne a été le théâtre de certains des plus graves abus physiques, sexuels et psychologiques commis à l’encontre d’enfants autochtones dans le système des pensionnats entre 1941 et 1972. L’affaire du pensionnat Ste-Anne sert d’avertissement (et constitue un récit vraiment tragique) concernant les problèmes associés à l’application d’un modèle d’éthique professionnelle s’appliquant aux avocats en pratique privée aux avocats du gouvernement agissant dans un contexte accusatoire particulier. Dans le présent article, nous examinons certains des problèmes les plus graves qui sont survenus lors de l’audience du processus d’évaluation indépendant (PEI) relatif au litige du pensionnat Ste-Anne, et nous présentons une nouvelle optique pour l’exercice de la profession d’avocat au sein du gouvernement. Nous formulons quelques suggestions pour développer une approche éthique mieux adaptée aux responsabilités et aux défis des avocats du gouvernement. De telles suggestions engagent une éthique de la recherche de la justice qui tient compte du rôle puissant que les avocats du gouvernement jouent dans notre système juridique et qui est plus cohérente avec une réelle réconciliation.

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Introduction

It is accepted wisdom that government lawyers are a special kind of lawyer. They operate in a different context to private lawyers: they are public servants as well as legal professionals. As such, it seems odd that they would be governed by the same set of professional expectations and ethical duties as private lawyers. At the very least, it might be thought that there would be a sub-category of rules and regulations that would canvass and account for the differences between the professional contexts of government lawyers and private lawyers. Although most commentators take for granted that these differences should warrant a different approach,

it remains the case that government lawyers are lumped in with private lawyers when it comes to the application of ethical rules. This presents challenges among government lawyers and beyond the sphere of government lawyers when setting expectations and assessing conduct.¹ It is a perplexing situation. Not surprisingly, it results in anomalies and confusion in determining what government lawyers should do by way of ethical conduct and professional propriety.

In this paper, I want to explore these anomalous situations and dispel some of the confusion that surrounds the ethical roles of government lawyers. After introducing some of the important notions that influence and frame the work of government lawyers, I look at a particular case-study—the St. Anne’s Residential school settlement adjudication. It illustrates and exemplifies the challenges and troubling manifestations that government lawyers face in fulfilling their professional and public duties within a traditional and private lawyer framework. My focus is not only the inadequacy of an approach that treats government lawyers the same as private lawyers, but also the practical problems and pitfalls that this creates for government lawyers in fulfilling their ethical duties and professional responsibilities. However, there is little point in being merely critical in focus; these failings have already been amply documented.² Instead, I advance a series of proposals and suggestions for how to develop an ethical and professional imperative that is better suited to the particular context and challenges of government lawyering. These proposals and suggestions are grounded in a ‘justice’ ethic; an ethic that already serves to inform certain government lawyers’ practice. As such, my ambition is to utilize a critical approach to lay the foundations for a more constructive proposal that might be examined and expanded going forward.

Part I canvasses and critically examines the modes of professional regulation that infuses the government lawyer’s practice and conduct including the provincial and territorial codes of conduct, the Prosecutorial

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

2. Brent Cotter, “The Legal Accountability of Governments and Politicians: A Reflection Upon Their Roles and Responsibilities” (2008) 2 JPPL 63 [Cotter, “Legal Accountability”]; Brent Cotter, “The Evolving ‘Public Interest’ Dimensions of Professional Ethics for Lawyers” (2007) 13:2 *Canterbury L Rev* 155 [Cotter, “Evolving ‘Public Interest’”]; 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; Allan C Hutchinson, *Legal Ethics and Professional Responsibility*, 2nd ed (Toronto: Irwin, 2006); Abbe Smith, “Can you be a Good Person and a Good Prosecutor?” (2001) 14:2 *Geo J Leg Ethics* 355; Lauren Soubise & Alice Woolley, “Prosecutors and Justice: Insights from Comparative Analysis” (2018) *Fordham Int’l L J* [forthcoming], online: *Social Science Research Network* <papers.ssrn.com/sol3/papers.cfm?abstract_id=3175587> [perma.cc/56XA-CD24]; John Mark Keyes, “Loyalty, Legality and Public Sector Lawyers,” (2019) 97:1 *Can Bar Rev* 129.

Deskbook, the rule of law and the public interest. Part II introduces the St. Anne's Residential School litigation and more particularly, the disclosure and related challenges as well as incomplete narratives that occurred in respect of the independent assessment process involving St. Anne's. Included in this section is a survey of the government lawyers' positions respecting certain of these issues and a critique of those positions. The final section of this paper—Part III—proposes a new direction for government lawyers in the form of a justice-seeking ethic and in so doing, highlights as well as responds to the critiques of such an ethic. Important to this discussion is how such a new ethical approach would be operationalized.

I. *Government lawyers and professional codes of conduct*

Two thousand six hundred lawyers employed by the government of Canada comprise the Federal Crown Counsel. These lawyers work for the Department of Justice, the Public Prosecution Service of Canada as well as provide in-house legal services to various government departments, federal agencies, and tribunals.³ They are public servants practicing law in the service of the Crown.⁴ Additionally, across the provinces, there are a myriad of lawyers working in similar capacities at the provincial level for the provincial attorney general as well as other provincial governmental departments. Considering the general context of litigation and litigation-related work, the various government departments (and, in certain cases, Cabinet) generally act as instructing clients to government lawyers. A vast number of these government lawyers function essentially as litigation counsel working on behalf of a government department or agency. In so doing, they “consult with their clients [the various departments], give them legal advice and receive instructions from those clients on the approaches and positions to be taken in litigation.”⁵ This work encompasses a broad spectrum of civil litigation topics. Moreover, part of the mandate of the federal as well as the provincial attorney-generals is to manage the legal affairs of the various government departments and agencies by providing advice as well as conducting litigation on behalf of those various departments, agencies and tribunals. For the purposes of the discussion in this paper, the term government lawyers contemplates those lawyers

3. See “Association of Justice Counsel (AJC-AJJ)” (last updated 11 September 2019), online: *Association of Justice Counsel* <ajc-ajj.net/> [perma.cc/5TTY-78J4].

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

5. Attorney General of Canada, *The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples* (Ottawa: The Attorney General of Canada, 2019) at 5, online (pdf): <www.justice.gc.ca/eng/csj-sjc/ijr-dja/dclip-dlcpa/litigation-litiges.pdf> [perma.cc/N2XE-BP57] [*Litigation Directive*].

employed by the Department of Justice, the provincial counterparts as well as those representing a particular government department.⁶

Across Canada, the provincial and territorial law societies are responsible for governing the lawyers permitted to practice within that province and do so through the Rules of Professional Conduct. This applies in respect of the federal as well as provincial and territorial government lawyers located in a particular provincial jurisdiction. In addition, recent iterations of the Model Code of Professional Conduct generated by the Federation of Law Societies recommend the standards generally expected of lawyers across the country and are, in many respects, consistent with the provincial codes.⁷ This is a consideration that is particularly relevant in the context of federal government lawyers who may be situated in different jurisdictions throughout Canada. In accordance with these professional codes of conduct, much of the private lawyer's professional duties and responsibilities flow from and are defined in terms of their engagement with clients within the adversarial framework. Private lawyers operate on the basis of an 'enlightened self-interest' in the sense that serving their client's interests will ultimately serve their professional self-interests. In many respects, the adversarial context has fostered a singular commitment to the primary furtherance of the client's interests. Correspondingly, this singular commitment to the client's interests (to the relative exclusion of most other interests) is reflected in the dominant 'zealous advocate' approach to lawyering that permeates legal ethics. This model tends to inform much of the professional codes of conduct that regulate all lawyers as well the courts' interpretation of lawyers' duties and responsibilities.⁸ Moreover, the professional culture of lawyers reflects a continued adherence to the neutral partisanship model of lawyering that is consistent with notions of the zealous advocate.

However, this approach to legal ethics is not without its challenges. The adversarial framework tends to perpetuate a hierarchy of duties and responsibilities that places zealous advocacy and client autonomy at its peak. In keeping with these notions of client autonomy and zealous advocacy, the adversarial framework encourages and, in many circumstances, requires that lawyers conduct themselves in certain ways. This conception of the lawyer's role assumes the lawyer to be 'neutral' vis-à-vis the morality of

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

7. Federation of Law Societies of Canada, *Model Code of Professional Conduct*, (amended 19 October 2019), online (pdf): <[flsc.ca/wp-content/uploads/2019/11/Model-Code-October-2019.pdf](https://www.flsc.ca/wp-content/uploads/2019/11/Model-Code-October-2019.pdf)> [<https://perma.cc/Q5VU-TJCP>].

8. See e.g., Law Society of Ontario, *Rules of Professional Conduct*, Rule 5.2; See also *Groia v The Law Society of Upper Canada*, 2018 SCC 27.

their client's views or actions. While this is not the only conceptualization of the lawyer's ethical role and other approaches exist,⁹ this traditional model of professionalism does tend to inform current discourse on legal ethics.¹⁰ However, these expectations raise concerns about the ethical appropriateness of the lawyer's ability to distance themselves not only from the morality of a client's position, but also from the actions taken on the client's behalf. "To the extent that lawyers are not ethically accountable for the client's objectives or the means used to achieve those objectives, there is little incentive to engage in a contemplative analysis of the steps they take in the client's name."¹¹ The result is the creation of an environment in which lawyers are incentivized to exploit any advantage the system allows on behalf of their client.¹² The further consequence is a marginalization of the lawyers' competing duties to the legal system and the public. Such considerations are often rationalized in the criminal defence context when the lawyer, in acting for an accused, must take certain steps (like cross-examinations that discredit adversarial witnesses) in order to serve her client's best interests.¹³

In an adversarial system, neutral partisanship is more often than not used to justify behaviour that is unnecessary for lawyers to do their jobs: behaviour such as the adoption of unreasonable or unsound positions or use of tactics that obfuscate the process to a party's advantage. Moreover, the adversarial system, "expects parties to be selfish in their arguments, creates incentives to hide evidence, and rewards parties whose attorneys are the most skilled and well-funded."¹⁴ Thus, the debate about the scope and appropriateness of this framework as the underpinning of lawyers' professional conduct is more often than not examined in a legal context that, in theory, pits individual private parties against the state or alternatively, private parties against each other. In these contexts, the question of legal

9. For an alternative approach, see Trevor CW Farrow, "Sustainable Professionalism" (2008) 46:1 Osgoode Hall LJ 51; Deborah L Rhode, *In the Interests of Justice: Reforming the Legal Profession* (New York: Oxford University Press, 2000).

10. For a very recent reference to the zealous advocate approach to lawyering (particularly in the government lawyering context) see Andrew Flavelle Martin & Candice Telfer, "The Impact of the Honour of the Crown on the Ethical Obligations of Government Lawyers: A Duty of Honourable Dealing" (2018) 41:2 Dal LJ 443 at 446.

11. Jennifer Leitch, "Lawyers and Self-Represented Litigants: An Ethical Change of Role" (2017) 95:3 Can Bar Rev at 677.

12. C Sampford & C Condlln, "Educating Lawyers for Changing Process" in Charles Sampford, Sophie Blencowe & Suzanne Condlln, eds, *Educating Lawyers for a Less Adversarial System* (Sydney: Australia, The Federation Press, 1999) 173 at 178.

13. Elaine Craig, "The Ethical Identity of Sexual Assault Lawyers," (2017) 41:1 Ottawa LR 77 at 86.

14. Sandra Buhai, "Access to Justice for the Unrepresented Litigants" (2009) 42:4 Loy LA L Rev 979 at 982.

ethics is limited to considering how the lawyers have conducted themselves in the contest between the two private autonomous parties or as against the state by its legal representatives. This approach to legal ethics often fails to analyze conduct on behalf of the state. In this setting, each party assumes responsibility for the handling of their case guided largely by self-interest in maximizing their position.

The zealous advocate model is particularly problematic in the context of government lawyers where the government entity ‘writ large’ is representational of a variety of legitimate and often competing public interests as opposed to the private law model of one client with singular interests.¹⁵ As a consequence of this dilemma, there is an argument that government lawyers should not act as private law lawyers committed to representing an individual client’s interests when addressing the legitimate claims of citizens made against government.¹⁶

Historically, by contrast to private lawyers, government lawyers’ unique responsibilities and duties are “under-theorized in academic scholarship.”¹⁷ However, it is noted that in recent years, there has been an uptake in the scholarship around the particular ethical and professional responsibilities of government lawyers; some of which is canvassed in this paper. Given the government lawyer’s unique relationship as both a lawyer acting on behalf of her public client, and an employee and public servant acting on behalf of her governmental employer, an unfettered loyalty grounded in notions of client autonomy and zealous advocacy can obfuscate the government lawyer’s professional duties. Nowhere is this more problematic than in the context of government litigation involving Indigenous groups. For example, an unfettered loyalty to zealous advocacy and neutral partisanship might well undermine the Honour of the Crown,¹⁸ and the corresponding broader objectives of the elected government, including reconciliation. In fact, a pronouncement from the Canadian Supreme Court specifically highlighted the significance of the Honour of

15. Government lawyers are not the only sub-set of lawyers that may face varied and competing interests. Another example in this regard are in-house counsel who may need to take account of senior management’s interests, the interests of the corporate board and the corporate entity itself. See Hutchinson, *supra* note 2 at 183-186.

16. Stephen K Berenson, “Public Lawyers, Private Values: Can, Should and Will Government Lawyers Serve the Public Interest” (2000) 41 BCL Rev 789; Cotter, “Legal Accountability,” *supra* note 2.

17. Dodek, *supra* note 2 at 4. See also Michael H Morris & Sandra Nishikawa, “The Orphans of Legal Ethics: Why government lawyers are different—and how we protect and promote that difference in service of the rule of law and public interest” (2013) 26 CJALP 171.

18. See *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 131, 71 DLR (4th) 193; *R v Badger*, [1996] 1 SCR 771, 133 DLR (4th) 324; *Haida Nation v British Columbia (Minister of Forest)*, 2004 SCC 73; *Manitoba Metis Federation Inc v Canada (AG)*, 2013 SCC 14.

the Crown to meaningful reconciliation with First Nations.¹⁹ The Honour of the Crown extends to the government, its departments, agencies and officials in respect of its interactions with Indigenous peoples and requires that all officials “act with honour, integrity, good faith and fairness in all its dealings with Indigenous [P]eoples.”²⁰ In interpreting the scope of this requirement, at least one court has suggested that the Honour of the Crown also extends to those representing the Crown, namely government lawyers.²¹ Additionally, Andrew Martin has considered the need for a special ethical obligation of honourable dealing when a government lawyer is acting as the ‘face’ of the Crown in negotiations with Indigenous groups.²² While this is an important discussion respecting government lawyers’ ethical obligations in the particular context of negotiation, the question that follows is what such a duty might look like in the context of government lawyers engaged in litigation such as the residential school litigation. This issue is particularly acute if it is meant to inform the professional duties of government lawyers acting in cases involving Indigenous People.²³

In light of this obligation, when taking instructions from and acting on behalf of a particular government body, the Department of Justice lawyer cannot and should not simply adopt a neutral partisan or ‘hired gun’ mentality that calls upon her to act as a zealous advocate and maintain a largely unfettered duty of loyalty to the instructing client. While this position informs much of the discussion in this paper, it is important to note that others have an entirely different approach to the duty of loyalty owed by government lawyers to their clients as zealous advocates.²⁴

A recent directive of former Attorney General Jody Wilson-Raybould speaks directly to the dilemma of how government lawyers should act

19. See *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74. Former Chief Justice McLachlin stated that, “[i]n all its dealings with Aboriginal Peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal Peoples in question. The Crown’s honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1)” (*ibid* at para 24).

20. Sanderson, *supra* note 1 at 202; See also Canada, Department of Justice “Principles respecting the Government of Canada’s relationship with Indigenous peoples” (14 February 2018), online: <www.justice.gc.ca/eng/csjsj/principles-principes.html> [perma.cc/3WE6-T94S] [*Principles*]; Canada, Department of Justice, News Release, “Government of Canada Sets a Principled Foundation for Advancing Renewed Relationships with Indigenous Peoples based on the Recognition of Rights” (14 July 2017), online: <www.canada.ca/en/department-justice/news/2017/07/government_of_canadasetsaprincipledfoundationforadvancingrenewed.html> [perma.cc/S898-733F].

21. Sanderson, *supra* note 1 at 202; See also *Joseph v Canada*, 2008 FC 574.

22. Martin & Telfer, *supra* note 10.

23. Sanderson, *supra* note 1 at 203.

24. Keyes, *supra* note 2.

in litigation, particularly in cases involving Indigenous groups and in the light of the objectives of reconciliation.²⁵ Recognizing that a change was needed in respect of how the Canadian government engaged with Indigenous groups in the context of section 35 of the Constitution, the government of Canada prepared the *Principles respecting the Government of Canada's Relationship with Indigenous Peoples*. In accordance with these principles, former Attorney General Wilson-Raybould sought to more particularly articulate an approach to litigation that underscores and furthers the objectives as outlined in the *Principles*. The directive created in this regard seeks to advance an approach to litigation that promotes resolution and settlement; pursue opportunities to narrow or avoid litigation (while still recognizing that litigation may be needed in certain instances as a means for Indigenous groups to assert a claim to certain rights or entitlements); and ensure that the practice of litigation between the government and Indigenous People is respectful of the special relationship between the Crown and Indigenous Peoples. This last consideration is meant to infuse Crown decisions about legal positions taken, the language used in expressing those positions and the procedures adopted to further those positions. For example, the directive suggests that the government of Canada's approach to litigation should be to assist the court "constructively, expeditiously and effectively" when addressing Indigenous claims.²⁶ This suggests an approach that is less adversarial in nature and, by contrast, more facilitative and more in keeping with a robust commitment to the Honour of the Crown. However, despite its good intentions, it is questionable whether this directive provides sufficient guidance or clout, particularly when it is contrasted with entrenched notions of professionalism as traditionally understood within the adversarial context. While it is acknowledged that this directive was not in force during much of the IAP at St. Anne's, it remains to be seen what effect this directive will have on government lawyers. Moreover, as a directive, there is also a question about the force of its command as well as applicability to future governments.

Notions of client autonomy and zealous advocacy are further complicated in the context of government lawyers when the fact that the client is also the lawyer's employer is taken into account. In the private law context, the ultimate fallback position for a lawyer when confronted with

25. *Litigation Directive*, *supra* note 5. This directive sought to outline an approach to litigation engaging section 35 of the Constitution by the attorney general of Canada and her representatives that is consistent with the *Principles*, *supra* note 20.

26. *Litigation Directive*, *supra* note 5.

instructions from a client that run contrary to her ethical responsibilities is withdrawal from the case. While there are some limitations placed on this option under the Rules of Professional Conduct, generally speaking a private lawyer can decline to continue to act for a client (or take a particular client in the first place), if that client requests that the lawyer act in what the lawyer believes to be an unethical way. There are, of course, potentially negative consequences associated with withdrawing from a case. But, in theory, it is not likely to end a lawyer's private practice, putting aside the in-house corporate counsel and the lawyer whose practice is limited to one large institutional client.²⁷ The same may not be said of government lawyers within the Department of Justice.

To the extent that they are instructed to take a particular position or conduct a case in a particular fashion, there is likely no 'walk away' position for that government lawyer, short of resignation. In this manner, government lawyers can be compared to junior associates in large law firms, with little control over the files they are assigned and the management of those files.²⁸ This is also similar to the position of in-house counsel who are essentially employed by the client they represent. In such legal contexts, the lawyer's decision not to follow instructions from the client may precipitate their resignation.²⁹ Where the only client a lawyer has is also their employer, it is not practically feasible to suggest that the lawyer will simply withdraw from the case. In fact, the only option available to that government lawyer may be resignation. However, practically speaking, this seems an untenable position for many government lawyers. Therefore, any development of 'government-specific' legal ethics must take account of this specific tension and, in so doing, create a space for the government lawyer to adopt an ethical position that is different than her employer. Such a development would avoid the problems such as those

27. Robert K Vischer, "Legal Advice as Moral Perspective" (2005) University of St Thomas School of Law, Legal Studies Research Paper No 05-03, online: *Social Sciences Research Network* <papers.ssrn.com/sol3/papers.cfm?abstract_id=771006> [perma.cc/3B5G-ZSL6]. See also Keyes, *supra* note 2 at 138 in which Keyes suggests that if a public sector lawyer believes that the client is engaged in wrongdoing, advises the client of same and the client persists, the lawyer must withdraw which, effectively in the governmental context, would likely expose the lawyer to disciplinary action and termination or resignation.

28. Allan C Hutchinson, "In the Public Interest: The Responsibilities and Rights of Government Lawyers" (2008) 46:1 Osgoode Hall LJ 105 at 114.

29. Hutchinson, *supra* note 2 at 187-188.

faced by Edgar Schmidt and, most recently, Jody Wilson-Raybould.³⁰ In both cases, the lawyers ultimately had no choice other than to resign (or be terminated) when faced with political pressure or policies that ran contrary to the individual lawyer's view of their ethical and professional duties as lawyers employed by the government.

1. *Additional professional regulation of government lawyers*

Recognizing some of the limits of the existing rules of professional conduct and their general inapplicability to the particular practice of government lawyers, it is important to take brief account of the various sources of professional guidance for government lawyers—Public Prosecution Service of Canada Deskbook, the rule of law, the public interest, and the pursuit of justice.

a. *The Public Prosecution Service of Canada Deskbook*

Federal crown prosecutors (and the private sector agents acting on behalf of the Crown) are regulated by the *Public Prosecution Service of Canada Deskbook*.³¹ The *Deskbook* seeks to provide specific rules and guidelines for prosecutors engaged in criminal prosecutions. The manual represents the acknowledgement of, and need for, specific rules that will guide government lawyers in conducting certain types of litigation.

Generally speaking, the *Deskbook* requires that prosecutors exercise decision-making independent of the interests of the sitting government. Underlying this independence is the concern that the prosecutorial branch not be used as a tool of the government of the day to affect certain political outcomes. Rather, the prosecutors remain accountable to the public in respect of the decision-making they undertake. The recent controversy respecting Prime Minister Trudeau and the allegation that he and/or senior members of his staff unduly pressured the Attorney General Wilson-

30. Edgar Schmidt had been employed as general counsel in the legislative services branch of the Department of Justice and during the course of his employment, he had sought a declaration that the minister of justice was “not complying with his statutory duty to report to the House of Commons on the inconsistency of government bills and regulations with the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) and the *Canadian Bill of Rights* (the “*Bill of Rights*”).” (Keyes, *supra* note 2 at 131); See also Simon Fodden, “Documents in the Edgar Schmidt Whistleblower Case” (23 January 2013), online: *SLAW* <www.slaw.ca/2013/01/23/documents-in-the-Edgar-Schmidt-whistleblower-case/> [perma.cc/25G5-QJDZ]. The case of Jody Wilson-Raybould will be discussed in further detail later in this paper.

31. Public Prosecution Service of Canada, *Public Prosecution Service of Canada Deskbook* (Ottawa: Attorney General of Canada, 2014), online: <www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/index.html> [perma.cc/8QQC-C2C2] [*Deskbook*].

Raybould speaks directly to this concern.³² It is alleged that the Prime Minister sought to pressure the Attorney General not to prosecute a large company based in Quebec. The company facing possible prosecution had insinuated that it would leave Quebec if prosecuted; this would result in the termination of thousands of jobs within the province. The political fallout from such a departure could prove harmful to the government's standing in Quebec in an election year. In this regard, the allegations and resulting resignation of the Attorney General cast a direct light on one of the concerns sought to be addressed by the *Deskbook*.

Interestingly, the preface to the *Deskbook* notes that the guide is a "permanent work in progress whereby federal prosecutors are cognizant of the need for reform when policies become outdated or unclear."³³ The recent allegations of political pressure reinforce ongoing critiques about the *Deskbook* that include questions about how the rules are interpreted and enforced internally within government. Also, it needs to be asked what assistance the *Deskbook* might provide individual government lawyers (and even the Attorney General herself) when confronted with ethical dilemmas that are particular to the context of government lawyering. In the Wilson-Raybould context, it would seem that despite the existence of the *Deskbook* and professional rules of conduct, the Attorney General was left with few options.

b. *The rule of law*

In addition to being guided by professional rules of conduct and the guidelines set out in the *Deskbook*, there are additional principles that are intended to guide government lawyers' professional duties. Relevant to the discussion in this paper, these are respect for the rule of law and the responsibility to act in the public interest. As regards those duties that might be imposed on government lawyers in respect of their duty to promote the rule of law, it is worth noting Justice Laskin's comments in *Henco Industries Ltd v Haudenosaunee Six Nations Confederacy Council*. He noted that the rule of law has a variety of different aspects that include, among other things, "respect for minority rights, reconciliation of Aboriginal and non-Aboriginal interests through negotiation, fair procedural safeguards for those subject to criminal proceedings, respect

32. "Timeline: The SNC Lavalin Controversy and Jody Wilson-Raybould," *Bloomberg* (25 March 2019), online: <www.bnnbloomberg.ca/timeline-the-snc-lavalin-controversy-and-jody-wilson-raybould-1.1221040> [perma.cc/29DP-TT3L].

33. *Deskbook*, *supra* note 31.

for Crown and police discretion....”³⁴ Important within this articulation is that the existence of different and potentially competing dimensions of the rule of law in a given situation will require that those tasked with upholding the rule of law adopt a more nuanced evaluation of how the rule of law is to be accounted for in a particular circumstance. Adding further complexity to an already contextualized analysis is the notion that, “the rule of law does not require a decision-maker to act simply because a rule of law would permit it.”³⁵ Notwithstanding an expanded notion of the rule of law as contemplated by Justice Laskin, the rule of law, as a source of professional or ethical guidance for government lawyers, is more likely to operate like a guiding principle rather than a standard of professional conduct against which a particular government lawyer would be able to measure or assess their own conduct.³⁶ In other words, as a principle, the rule of law may signal that government action is subject to review and accountability but not necessarily how government lawyers are to conduct themselves in the context of those reviews.

c. The public interest

Regarding the public interest, the scope and weight of the government lawyer’s public interest duties remain a contested topic. Interestingly, the private law context also struggles with a debate over the scope of the private lawyer’s public interest duty. At the core of many of these debates (in both spheres) is the difficulty associated with defining the ‘public interest’ in a particular legal context. At best, this is a challenge and at worst, it results in reliance on interests that might run contrary to the public interest. For example, in the private law context, zealous advocacy may be argued to be in the public interest because it works to ensure that clients receive the best representation possible. However, the consequence of defining the public interest in this manner is that there are few limits placed on the conduct of the zealous advocate. Within the context of the government lawyer’s public interest duty is the question of “the role and responsibilities that government lawyers do and should have in explicating or contributing to the government’s duty to act in the public interest.”³⁷ Complicating this further for government lawyers is the situation where the government lawyer disagrees with the defined public interest as articulated by their client (and elected official). In such

34. *Henco Industries Ltd v Haudenosaunee Six Nations Confederacy Council*, [2006] OJ No 4790 at paras 142-143, 82 OR (3d) 721 (ONCA).

35. Sanderson, *supra* note 1 at 90.

36. Dodek, *supra* note 2.

37. Hutchinson, *supra* note 28 at 116.

circumstances, it would be difficult to see how the government lawyer's professional conception of the public interest would be reconciled with competing conceptions proffered by the elected officials who claim to be reflecting the populace's will. Thus, for government lawyers relying on a public interest ethic raises two fundamental challenges; a challenge of definition and a challenge associated with applying the public interest in a complex political context (and in a way that may run contrary to the public interest identified by the client-governmental department). Attempting to provide some clarity respecting the government lawyer's public law duties, Elizabeth Sanderson draws on the various historical and statutory frameworks that influence the scope of these duties. She defines the public interest as:

something of importance to the public as a whole rather than just to a private individual. It can include many factors and cover matters as diverse as public morality, judicial economy, fiscal responsibility, management of contingent liability, and the search for justice and a just result.³⁸

As can be gleaned from such a definition, in any given circumstance, what constitutes the 'public interest' for a government lawyer may include a broad range of interests that shift in focus and strength depending on the particular political and legal context. Such a broad range of interests that vary from one legal context to another do not provide a basis for a professional framework that promotes certainty and direction to lawyers operating within that framework. Moreover, it does not address the scenario where the government lawyer and the government client have competing views on the public interest.

d. *The pursuit of justice*

In addition to the indeterminate demands of the rule of law and the somewhat amorphous influence of the public interest, there is an additional ethical principle that informs and shapes certain government lawyers' duties. This is the requirement that crown prosecutors, in pursuing and securing convictions, seek justice. While this principle falls broadly within the context of serving the public interest and, thus, may lend itself to a variety of contextual interpretations, it means that the crown prosecutor's primary consideration is not to obtain a conviction, but rather to ensure that justice is done through a fair trial on the merits.³⁹ In *R v Boucher*, Justice

38. Sanderson, *supra* note 1 at 242.

39. Law Society of Ontario, *supra* note 8, Rule 5.1-3[1] (commentary 1—duty as prosecutor); *R v Boucher* [1955] SCR 16, 20 CR 1 [*Boucher*].

Locke noted that, “prosecuting counsel should regard themselves rather as ministers of justice assisting in its administration than as advocates” that act on instructions of an actual client.⁴⁰ The consequence is that, “the duty to represent a client zealously within the bounds of the law becomes transformed by the duty to act in the interests of justice.”⁴¹ While at first glance, this duty might elicit a certain skepticism that tempered advocacy is really about ‘saying mean things in a soft voice,’ the duty to seek justice has informed specific prosecutorial duties.

Among other prosecutorial duties, the requirement to ‘do justice’ specifically requires that crown prosecutors provide full disclosure even where the disclosure has exculpatory effects for the accused.⁴² Linked closely with this notion of doing justice is a further obligation to obtain and promote the truth regardless of the partisan positions of the respective parties. Pursuant to an obligation to seek justice, the scope of the prosecutor’s disclosure duties are different than the disclosure duties placed on the private law lawyer acting within an adversarial context. Again, in the private law context, it is understood that parties may be required to produce all information that is relevant to the matters in issue, but not be required to assist the opposing party in building its strongest case. Moreover, despite disclosure being an essential part of the adversarial process, it is not the only duty of crown prosecutors that is viewed through a justice-based lens.⁴³ On this basis, this paper recommends that a justice ethic—already operationalized in certain government lawyering contexts might be expanded to provide a meaningful and comprehensive framework for ethical government lawyering beyond the sphere of crown prosecutors.⁴⁴

Generally speaking, the scope of the crown prosecutors’ justice ethic is framed by law society rules, judicial pronouncements in the relevant case law as well as internal guidelines published in the form of the

40. *Boucher*, *supra* note 39 at 20; See also W Bradley Wendel, *Ethics and Law an Introduction*, (Cambridge: Cambridge University Press, 2014) at 159.

41. Deborah McNair, “In the Service of the Crown: Are Ethical Obligations Different for Government Counsel?” (2005) 84:3 *Can Bar Rev* 501 at 515; See also Soubise & Woolley, *supra* note 2 at 14.

42. Soubise & Woolley, *supra* note 2; *R v Stinchcombe*, [1991] 3 SCR 326, 130 NR 277 [*Stinchcombe*]; See also Law Society of Ontario, *supra* note 8, Rule 5.1-3[1].

43. For example, the crown has a duty to ensure that the police investigations that support its cases are complete (*R v Spackman*, 2009 CanLII 37920 (ONSC)) and that once the crown is notified of relevant information, it cannot disregard the information. See *R v MacNeil*, 2009 SCC 3. Further responsibilities of crown prosecutors extend to the prosecutor’s conduct during cross-examinations, the presentation of evidence, representations made to court, and juries and treatment of self-represented accused;. See Soubise & Woolley, *supra* note 2 at 14.

44. See text accompanying note 128, *below*.

Deskbook.⁴⁵ However, the justice ethic is not without its criticisms. For example, “[C]anadian prosecutors individually and collectively enjoy significant independence. They are largely immune from regulation by provincial law societies, from judicial review of exercises of prosecutorial discretion, or for an action in wrongful prosecution.”⁴⁶ At every stage of the prosecutorial process, the prosecutor makes discretionary decisions regarding investigations, the pursuit of certain charges, plea bargaining and the process of trial. In this sense, prosecutors exercise a notable degree of power over their processes.⁴⁷ This exercise of discretion (deemed somewhat necessary in the scope of criminal prosecutions) combined with contestable meanings of justice raises questions about the efficacy and consistency of a justice ethic. Thus, notwithstanding the express recognition of the prosecutor’s obligation to seek justice, on any given file, the crown prosecutors’ independence and discretion shrouds a review of the application of the justice interest in a particular case.⁴⁸

In the light of this patchwork of ethical and professional duties, this paper discusses establishing a larger more consistent and comprehensive guide for government lawyers acting in an adversarial capacity. Adopting such a framework is particularly relevant to government lawyers operating within various civil justice contexts including those lawyers acting in cases of mass torts and class actions against the government (particularly when claims involve allegations of mistreatment of vulnerable groups by government agents) as well as environmental claims. It is also pertinent where there is an array of competing public interests and groups, marginalized or otherwise whose lives may be particularly impacted by the decisions ultimately made. These instances call out for an underlying frame of reference and set of guiding principles for the government lawyer when making decisions regarding the government’s position and conduct in a legal dispute. In conjunction with a justice ethic is the further notion that, within government (as within different fields of private law), there will be a need to add ‘mid-level’ rules that are tailored to respond to the specific challenges that arise in a particular government practice-setting.⁴⁹

45. *Deskbook*, *supra* note 31; Soubise & Woolley, *supra* note 2.

46. Soubise & Woolley, *supra* note 2 at 3.

47. Wendel, *supra* note 40 at 163.

48. Further criticisms of the justice ethic are discussed later in this paper in great detail. See text accompanying note 131, *below*.

49. David B Wilkins, “Legal Realism for Lawyers” (1990) 104 Harv L Rev 468.

II. *St. Anne's Residential School: A case study in government lawyer ethics*

St. Anne's Residential School in Fort Albany, Ontario involved some of the most egregious physical, sexual and psychological abuse of Indigenous children between 1941 and 1972.⁵⁰ The St. Anne's Residential School litigation is used as a cautionary (and truly tragic) tale regarding the problems associated with applying a private law 'zealous advocacy' model of professional ethics to government lawyers acting in a quasi-adversarial context. However, St. Anne's also provides an important lens through which to examine a different approach to the ethical responsibilities of government lawyers. This section of the paper briefly introduces the St. Anne's Residential School litigation, contextualizes the objectives and scope of the resolution of claims under the Independent Assessment Process (IAP) created under the Indian Residential School Settlement Agreement⁵¹ (IRSSA), and canvasses some of the problems that arose in respect of the IAP at St. Anne's.

1. *The Independent Assessment Process under the IRSSA*

Before examining the particular context of the litigation involving St. Anne's residential school, it is important to understand the IAP as part of the IRSSA. As well, it is vital to situate the government lawyers' responsibilities within IAP as well as the larger IRSSA negotiated between the former students, churches, federal government, the Assembly of First Nations and other Indigenous organizations. The IRSSA is a "Canada-wide settlement encompassing residential school operations spanning more than a century and includes an estimated 79,000 class members in total."⁵² Article 6 of the IRSSA established the IAP as the means for claimants to seek compensation for claims of serious physical abuse, sexual abuse, or other wrongful acts suffered by individuals while at residential schools. In *Fontaine v Canada*, Justice Brown described the IAP as a "modified adjudicative process."⁵³ The other mode of compensation under the IRSSA is the Common Experience Payment (CEP). As that term suggests, the CEP was designed to compensate all previous students for their Indian Residential School experience and the attendant lack of connection with

50. Jorge Barrera, "The Horror's of St. Anne's," *CBC News* (29 March 2018), online: <newsinteractives.cbc.ca/longform/st-anne-residential-school-opp-documents> [perma.cc/4TC8-GNCM].

51. "Settlement Agreement" (8 May 2006), online: *Residential Schools Settlement* <www.residentialschoolsettlement.ca/settlement.html> [perma.cc/MKC9-JDQD] [IRSSA].

52. *Fontaine v Canada (AG)*, 2012 BCSC 839 at para 28 [*Fontaine 2012 BCSC*].

53. *Ibid* at paras 29-30.

family and loss of culture and language.⁵⁴ Compensation pursuant to the CEP is available to everyone who resided in a residential school. Eligible individuals receive a payment of \$10,000 for at least one or part of one year and then an additional \$3,000 for each subsequent year.⁵⁵ In addition, claimants may seek compensation from an adjudicator pursuant to the IAP.

The IAP process is managed by the Indian Residential School Adjudication Secretariat (IRSAS). The executive director of the IRSAS has a dual reporting relationship to the chief adjudicator and the Deputy Minister of Indigenous and Northern Affairs. The chief adjudicator, who is court-appointed, reports directly to the supervising courts and is required to have an ‘arms-length’ relationship with Indigenous and Northern Affairs.⁵⁶ The Settlement Agreement Operations Branch (SAO) is a branch within Indigenous and Northern Affairs Canada that performs Canada’s functions as a respondent in the IAP claims resolution process.⁵⁷ The government lawyers engaged in individual IAPs are employed by the Department of Justice.

The IAP process was designed to “facilitate the expedited resolution of claims for serious physical abuse, sexual assaults and other abuse resulting in serious psychological harm.”⁵⁸ The IAP defines the harms that are compensable and provides for a maximum compensation of \$275,000 plus an additional \$250,000 in actual income loss resulting from the injury suffered by a claimant as a result of being a resident in a particular residential school.⁵⁹ At this point, the average compensation awarded to claimants in the IAP has been approximately \$91,000—considerably less

54. *Fontaine v Canada (AG)*, 2018 BCSC 63 at para 9 [*Fontaine 2018 BCSC*], aff’d 2019 BCCA 269. Please note that this case is currently on appeal to the SCC.

55. The average CEP payment is approximately \$20,457. As of 2016, approximately 79,309 eligible former students had received a CEP payment. See Indigenous and Northern Affairs Canada, “Statistics on the Implementation of the Indian Residential Schools Settlement Agreement” online: <www.aadnc-aandc.gc.ca/eng/1315320539682/1315320692192> [perma.cc/5BA4-XNRE].

56. See “About the Indian Residential School Adjudication Secretariat” (last updated 19 September 2019), online: *Indian Residential Schools Adjudication Secretariat* <www.iap-pei.ca/about-eng.php> [perma.cc/59ER-7X4T] [*IRSAS*]. Note that as of July 2019, Indigenous and Northern Affairs Canada was replaced by Indigenous Services Canada and Crown-Indigenous Relations and Northern Affairs Canada.

57. *Fontaine v Canada (AG)* 2016 ONCA 241 (appeal of the order of Justice Perell dated 6 August 2014 regarding disclosure and archiving of documents generated in the IAP processes) [*Fontaine 2016 ONCA*].

58. *Baxter v Canada (AG)*, 2006 CanLII 41673 at para 7, 83 OR (3d) 481 (ONSC).

59. It is worth noting that as of January 2014, there were over \$2 billion dollars in compensation awarded in respect of 17,000 claims. See *Fontaine v Canada (AG)* 2014 ONSC 283 at para 69 [*Fontaine 2014 ONSC*]. This has subsequently been updated in the context of IAP proceedings.

than the limits contemplated under the IRSSA.⁶⁰ Since the commencement of this process, approximately, 3.24 billion dollars has been paid out in respect of about 26,703 IAP proceedings. Eighty-nine per cent of the claims made in the IAP have been successful.⁶¹

In a quasi-inquisitorial fashion, it is the appointed adjudicator within the IAP process who is responsible for questioning the claimant about the details of the claim. The IAP is considered to be a form of litigation, albeit a modified form that is supposed to take account of the particularly sensitive nature of the claimants and claims brought forward.⁶² In fact, early in the IRSSA process, Justice Winkler stated that the IAP was “an opportunity to litigate their [claimant’s] claims in an extra-judicial process.” In a subsequent decision, Justice Brown stated,

The purpose of the IAP is to provide a modified adjudicative proceeding for the resolution of claims of serious physical or sexual abuse suffered while at a residential school. The hearings are to be inquisitorial in nature and the process is designed to minimize further harm to claimants. The adjudicator presiding over the hearing is charged with asking questions to elicit the testimony of claimants. Counsel for the parties may suggest questions or areas to explore to the adjudicator but they do not question claimants directly.

The hearings are meant to be considerate of the claimant’s comfort and well-being but they also serve an adjudicative purpose where evidence and credibility are tested to ensure that legitimate claims are compensated and false claims are weeded out. It is strongly recommended that claimants retain legal counsel to advance their claims within the IAP.⁶³

Notwithstanding the quasi-inquisitorial nature of the IAP, the corresponding powers of the adjudicators and the recognition of the sensitive nature of the claims under the IAP, courts have also stressed the need for legal representation for the claimants. Moreover, as noted in the case law and reflected in the certain positions adopted by government lawyers engaged in the IAP, the scope and jurisdiction of the process has been subject to debate. One of the questions that has dogged the process has been whether the IAP process is a continuation of the pre-existing litigation or a separate compensation scheme. The significance of this debate lies in the application of certain litigation-related duties and responsibilities and the

60. “Independent Assessment Process (IAP) Statistics” (30 September 2019), online: *Indian Residential Schools Adjudication Secretariat* <www.iap-pei.ca/stats-eng.php> [perma.cc/H42W-3HLA] [*IAP Statistics*].

61. See *IAP Statistics*, *supra* note 60.

62. *Fontaine 2014 ONSC*, *supra* note 59.

63. *Fontaine 2012 BCSC*, *supra* note 52 at para 29.

powers of the supervisory courts to review the IAP decisions. These duties are in play in traditional litigation processes and subject to the principles of procedural fairness. Additionally, another issue that has been raised in a number of Requests for Direction (RFD) under the IRSSA is whether the terms of the IRSSA essentially forms the total landscape of the signatories' duties and responsibilities in the IAP.⁶⁴ This is particularly relevant in the context of the internal review process of adjudicators' decisions and the role of the supervisory judges in each province.

In terms of procedure, a claimant commences the IAP process with an application not dissimilar to a private law pleading: the claimant outlines details of the harm or abuse, including dates, times, parties involved in the wrongdoing as well the individual's request for compensation. If the claim is not previously settled, a hearing is held in front of an adjudicator. At the hearing, the adjudicator's job is to evaluate the credibility of the claimant's claim, assess the harm to the claimant and determine appropriate compensation.⁶⁵ Adjudicators are expected to be "highly-qualified individuals selected by all-party consensus, who receive intensive training approved by the IAP oversight committee and ongoing mentoring by the chief adjudicator and other senior adjudicators."⁶⁶ The main parties to the hearing are the claimant, their counsel (if they have counsel), representatives of the government of Canada as well as representatives of any relevant religious order that had been involved in running the school in question. Hearings are private and confidential. Moreover, an alleged perpetrator may be excluded when the claimant is testifying and there is no right of cross-examination by any alleged perpetrator.⁶⁷ This is relevant in terms of the original design of the process being sensitive to the nature of the claims and the particular types of harms suffered by the claimants participating in the IAP. Parties may call witnesses; however, the specially-trained adjudicators manage the hearing, question the claimant

64. These contrasting views were very recently considered by the SCC in the case of *JW v Canada (AG)*, 2019 SCC 20 [*JW SCC*]. In that case, the majority held that while the parties do not have a broad right to judicial intervention, they do have a right to the implementation of the terms of the agreement. As such, the "existence of the agreement was contingent on judicial approval, and judicial approval, in turn, was contingent on ongoing judicial supervision" (*ibid* at para 23). However, in this context, judicial supervision means that the supervisory judges have an ongoing duty to supervise the administration and implementation of the agreement and ensure that the agreement is adhered to; not a broad right of judicial intervention.

65. *Fontaine v Canada (AG)*, 2017 ONCA 26 at para 15 [*Fontaine 2017 ONCA*].

66. *Fontaine v Canada (AG)*, 2017 BCSC 946 at para 14.

67. *The Attorney General of Canada v JW and Reo Law Corporation et al*, 2017 MBCA 54 at para 47 [*JW Appeal*]; *Fontaine 2016 ONCA*, *supra* note 57 at para 48.

or witnesses and provide a decision with reasons.⁶⁸ The lawyers present do not ask questions of the claimant directly, but may request that the adjudicator pursue certain lines of inquiry regarding the claimant's claim (presumably including the scope or nature of the claim).

Under the IAP, the claimant does not face direct cross-examination by the government lawyers. The claimant must prove his or her claim on a balance of probabilities. In structuring the process in this way, there are certain benefits provided to the claimant, namely, closed hearings at a location of the claimant's choosing, and the availability of a support person and/or trained counselors at the hearing.⁶⁹ However, now that the process is almost complete, the question that remains to be explored in greater detail is how the claimants themselves experienced the IAP.

2. *The importance of narratives to the IRSSA and the IAP*

Pursuant to its disclosure obligations under the IRSSA, the government of Canada is obligated to provide information about the IAP claimants, the residential school in question as well as information about alleged perpetrators (persons of interest (POI) reports) and/or allegations of abuse at a particular school.⁷⁰ Consistent with these obligations is the further requirement that the government prepare a narrative in respect of each of the residential schools. These narratives are essentially a history of a particular residential school prepared by the government and are intended to include reference to any abuse that took place at the school in question. Not insignificantly, the obligation to disclose information and prepare the narrative is ongoing in the sense that as new information becomes available, the Canadian government is obligated to include it and update the narrative accordingly.⁷¹ As was noted by Justice Perrell, "Canada is not doing a favour in providing school narratives or POI reports; it is performing a hard-bargained for contractual promise."⁷² Additionally, claimants and their counsel are entitled to documents collected in respect

68. *Fontaine 2017 ONCA*, *supra* note 65 at para 14; *Fontaine 2012 BCSC*, *supra* note 52 at paras 29-30.

69. *JW Appeal*, *supra* note 67 at para 47.

70. *Fontaine 2014 ONSC*, *supra* note 59 at para 97.

71. Under the IRSSA, *supra* note 51 the government has an obligation to "search for, collect and provide a report about the persons named in the Application Form as having abused the Claimant, including information about those persons' jobs at the residential school and the dates they worked or were there, as well as any allegations of physical or sexual abuse committed by such persons, where such allegations were made while the person was an employee or student" (*ibid* at Schedule D Appendix VIII "Government Document Disclosure") [emphasis added]. Additionally, the government is required to gather documents about the residential school that the claimants attended and write a report summarizing those documents. These Narratives are also available to the claimant (as well as the underlying documents if requested); See also *Fontaine 2014 ONSC*, *supra* note 59 at paras 99-100.

72. *Fontaine v Canada (Attorney General)*, 2015 ONSC 4061 at para 68 [*Fontaine 2015 ONSC*].

of a particular school. In the context of the IAP, the information contained in the narrative may be used by the adjudicator as a basis for fact-finding or credibility respecting a particular claimant's claim of abuse.⁷³ In fact, the IRSSA contemplates adjudicators taking previous criminal or civil trial into account in the IAP hearings.

3. *Disclosure and related challenges in the IAP at St. Anne's Residential School*

The government and its lawyers engaged in the IAP at St. Anne's Residential School prioritized traditional notions of the adversarial process over the truth-seeking and claim resolution objectives of the IRSSA. However, understanding the historical background of abuse, investigations and resulting civil and criminal litigation contextualizes the ethical challenges that arose in respect of the litigious nature of certain of the hearings at St. Anne's.

a. *The OPP disclosure*

Between 1992 and 1996, the Ontario Provincial Police conducted an extensive investigation into abuse allegations at St. Anne's. The abuse allegations spanned over 30 years and included serious physical, sexual and psychological abuse of students.⁷⁴ There were over 992 statements taken from 700 individuals. The OPP obtained over 7000 documents from the religious organizations connected to the school. Ultimately in 1997, seven employees of St. Anne's were charged with various abuse-related crimes and six of those individuals were convicted. The OPP information, including investigative documentation as well as trial transcripts, were not referenced in the first narratives that the government prepared pursuant to the IRSSA. Examples of the significant documentation not disclosed included expert medical evidence transcripts of Crown witnesses in the criminal trials respecting the type of abuse suffered at St. Anne's. The medical evidence had been used by the crown prosecutors to articulate the nature of the abuse at St. Anne's for the purpose of securing convictions in the criminal prosecutions.

73. *Fontaine 2014 ONSC, supra* note 59 at para 101.

74. Barrera, *supra* note 50: In a report prepared by the CBC documenting the abuse, survivors said that "nuns, priests and lay brothers would hit students with large straps, small whips, beaver snare wire, boards, books, rulers, yardsticks, fists and open hands.... Sometimes, students were locked away in the dark basement for hours at a time. They also told investigators of being force-fed porridge, spoiled fish, cod liver oil and rancid horse meat that made students sick to the point of vomiting on their plates. They said they were often forced to then eat their vomit. There were numerous allegations of sexual abuse involving nuns, priests, lay brothers and other staff, ranging from fondling and forced kissing to violent attacks and nighttime molestation." Ontario Provincial Police files obtained by CBC News reveal the history of abuse at the notorious residential school that built its own electric chair.

By 2000, a significant number of civil actions had been commenced by former students against the federal government in respect of the abuse that had taken place at St. Anne's over a 30-year period. The government was named as a defendant in those actions.⁷⁵ Ultimately, these actions were deemed dismissed pursuant to the terms of the IRSSA and continued as claims under the IRSSA.⁷⁶ In 2003, prior to the dismissal of the class actions, the government of Canada had obtained an order for production of the OPP records for use in the civil actions it was defending in respect of St. Anne's. In undertaking to obtain those OPP records, the government of Canada claimed such information was relevant and necessary for its defence of the civil actions. As a consequence of moving to obtain these records, the government had, at its disposal, a vast and extensive record of the history and scope of abuse at St. Anne's for the purpose of defending civil actions pre-IRSSA.

Notwithstanding being in possession of this extensive documentation, the government made no mention of that same documentation once the civil actions were settled pursuant to the IRSSA and the IAP proceedings were initiated. The reality was that if class actions had continued against the government as a defendant, the government would have had ongoing disclosure requirements pursuant to the discovery process in litigation. In fact, the government had obtained the criminal records for the purpose of defending the class actions. Instead, pursuant to the IRSSA, these disclosure obligations were essentially replaced by the requirement that the government prepare a narrative under the IRSSA. Arguably, the government interpreted the scope of the disclosure requirement under the IRSSA in a different fashion. In the context of the IRSSA, the government took the position that it was "barred from producing the documents because they obtained the documents from the OPP subject to an undertaking that it would not disclose the documents to any third party."⁷⁷ The government also claimed that requiring it to produce the St. Anne's documentation required the government to seek documents from third parties and that requiring this would be "burdening the government of Canada with this obligation."⁷⁸

75. See *Fontaine 2014 ONSC*, *supra* note 59 at para 36 which describes the civil actions commenced in respect of St. Anne's.

76. *Ibid.*

77. Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, (2015) at 27, online (pdf): <nctr.ca/assets/reports/Final%20Reports/Executive_Summary_English_Web.pdf> [perma.cc/A278-YPWM].

78. *Ibid* at 27-28; See also *Fontaine 2014 ONSC*, *supra* note 59 at para 24.

IAP hearings in respect of the abuse allegations involving St. Anne's were heard from 2007–2014, although challenges regarding certain of the adjudicator's decisions have continued in the supervising courts. The government's non-disclosure raises significant concerns about the scope of the information available to the adjudicators; the claimants' abilities to establish abuse allegations and the scope of the compensation. One of the consequences was that a limited number of claimants were initially unable to establish the facts or timelines necessary to prove their claims of abuse under the IAP. Equally significant is the concern that the failure to produce information undermined the objectives of the IRSSA and reconciliation more generally. This was despite there being substantial information within the government's control regarding the history of abuse at St. Anne's. In fact, during the course of the IAP process involving St. Anne's, the government was obligated to prepare multiple versions of the narratives and POI reports.⁷⁹ These narratives with differing degrees of factual detail were created despite the government having access to the relevant information and materials from 2003 onward.

b. *The incomplete narratives of St. Anne's*

In 2007–2008, Canada prepared its first narrative (post-IRRSA) in respect of St. Anne's and in so doing, represented that four complaints not part of the OPP investigation constituted all of the identifiable complaints and allegations known by the government. The narrative made no mention of the OPP documentation, the numerous allegations of sexual and physical abuse at St. Anne's or the employees' convictions and further suggested that there were no further incidents found in the documentation relating to sexual abuse at St. Anne's.⁸⁰ While the narratives are prepared by Aboriginal Affairs and Northern Development Canada (as it was known at the time), the federal government and its lawyers were in possession of significant portion of information and documentation from 2003 onward.⁸¹ In effect, they had been made aware of the deficiencies in the narrative; however,

79. *Fontaine 2015 ONSC*, *supra* note 72; Colin Perkel, "Court Urged to Clear up 'Mystery' of Hidden Residential School Documents," *CBC News* (24 March 2017), online: <<https://www.cbc.ca/news/indigenous-court-urged-mystery-residential-school-documents-1.4040225>> [perma.cc/KK8T-G5SM].

80. *Fontaine 2014 ONSC*, *supra* note 59 at para 126.

81. See text accompanying note 93, *below*. Specifically, Justice Perell noted that the OPP documents and transcripts had been stored in the federal Department of Justice's offices in Toronto since 2003 but not provided to AANDC.

they made no attempt to correct the narrative for over a year.⁸² When confronted with these inaccuracies in the original narratives (given the OPP documentation) in the course of the RFD heard by Justice Perell, the government took the position that the omissions were not of “any moment or consequence.”⁸³ In 2012, the Truth and Reconciliation Commission (TRC) requested that Canada produce copies of all records relating to any criminal convictions at all residential schools.⁸⁴ In response, Canada advised that it did not maintain a list of convictions. Contemporaneously, the government brought an RFD challenging its obligations under the IRSSA to produce the OPP documentation. In 2013, Canada prepared a new narrative that made reference to the OPP charges and convictions but made no reference to the criminal trial transcripts or OPP documents in the Department of Justice’s possession. The government took the position that it had not disclosed the criminal trial transcripts in its possession because the transcripts were irrelevant, inadmissible in respect of the assessment of individual claims and outside the scope of Canada’s disclosure obligations under the IRSSA.⁸⁵ By contrast, it would appear that the disclosure obligations placed on private lawyers in litigation would be significantly more demanding than the government’s interpretation of its responsibilities under the IRSSA; which included a responsibility to prepare narratives and POI reports in respect of each of the residential schools including details of any complaints of abuse, those involved and what happened regarding those complaints.⁸⁶ In contrast to other interpretive arguments asserted by the government respecting the scope of the IRSSA, the government asserted “significant discretion in how it structures and complies with its obligations”⁸⁷ as it pertains to the Narratives and POI reports.

c. Government’s position on disclosure

In addition to the RFDs brought by the TRC and the government, approximately 60 of the St. Anne’s claimants also brought an application in the form of an RFD requiring the government produce the OPP records as well as all criminal and civil transcripts of proceedings involving abuse

82. Goldblatt Partners, “Independent Assessment Process for Abuse Victims of Indian Residential Schools” (6 March 2014), online: <goldblattpartners.com/experience/class-action-cases/post/independent-assessment-process-for-abuse-victims-of-residential-schools/> [perma.cc/H4EN-6MM9].

83. *Fontaine 2014 ONSC*, *supra* note 59 at para 127.

84. *Ibid* at para 12.

85. *Ibid* at para 124. Ultimately, Justice Perell ordered that the Government produce the copies of the OPP documents in its possession to the Commission.

86. See *supra* note 71 *above* outlining the duties of government to prepare a narrative.

87. *Fontaine 2015 ONSC*, *supra* note 72 at para 61.

allegations at St. Anne's and amend the narratives for St. Anne's.⁸⁸ During the course of this contest, lawyers for the government indicated that (i) it was compliant with its obligations under the IRSSA; (ii) the government's disclosure obligations under the IRSSA did not extend to documents outside its possession; (iii) the government did not have to produce OPP documents in its control pursuant to the deemed undertaking rule; (iv) the statements made to the OPP regarding particular abuse allegations were not admissible in an IAP hearing because live testimony was required and/or the OPP information was not probative; and (v) the government was not obligated to produce information about abuse allegations about persons of interest once they left the school.⁸⁹ In its submissions, the government further maintained that it retained the right to argue relevance and admissibility of the OPP documents, if ordered produced, at each IAP proceeding. As a final position, the government argued that the supervising court would not have jurisdiction to appoint an individual to review settled claims to determine if they were prejudiced by the 'alleged' non-disclosure.⁹⁰ It is worth noting that subsequent to Justice Perell's order to produce the OPP documentation, in August 2014, the government produced over 12,000 documents. However, the material "including trial transcripts, witness statements to police, even certificates of conviction, was heavily redacted."⁹¹ In fact, this redaction included the names of perpetrators as well the names of possible witnesses.

In addition to maintaining these positions on the OPP disclosure, certain of the government's positions on disclosure in the St. Anne's IAP process do not meet a minimum standard required of parties in private civil litigation. For instance, the government exerted privilege over a variety of documents relating to the civil actions involving St. Anne's, but, in so doing, failed and/or refused to identify the privileged documents in question; contrary to established practice under provincial procedural rules and relevant case law.⁹² Instead of complying with basic disclosure standards, the government made blanket claims of privilege

88. Truth and Reconciliation Commission of Canada, *supra* note 76 at 27; *Fontaine 2014 ONSC*, *supra* note 59.

89. *Fontaine 2014 ONSC*, *supra* note 59 at paras 143, 216-217.

90. *Ibid* at para 24.

91. Tonda MacCharles, "Heavily edited Residential School documents an Obstruction of Justice, NDP says," *The Toronto Star* (4 September 2014), online: <www.thestar.com/news/canada/2014/09/04/heavilyedited_residential_schools_documents_an_obstruction_of_justice_ndp_says.html> [perma.cc/GF3G-VDVJ]; See also Barrera, *supra* note 50.

92. See e.g., *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 30.03(2)(b) [*Civil Procedure*]; *Grossman v Toronto General Hospital* (1983), 41 OR (2d) 457, 146 DLR (3d) 280.

that would be difficult for the claimants' lawyers to dispute in a vacuum.⁹³ Again, this course of conduct is inconsistent with the obligations of parties (and by extension, private law lawyers) under the *Rules of Civil Procedure* respecting privileged documents.⁹⁴ Not surprisingly, there were consequences associated with the government's non-disclosure. For example, one claimant was denied his claim on the basis that he could not establish the correct timeline respecting a priest's presence at the school, evidence of which was within the government's knowledge at the time of his claim. As a consequence, he was obligated to re-tell his story of horrific sexual abuse, after asserting a right to have a review and re-review of the adjudicator's original decision.⁹⁵

Pursuant to an Order of the Superior Court in early January 2014, Justice Perrell ordered the government to produce civil and criminal transcripts relating to St. Anne's and to revise its narrative accordingly.⁹⁶ Ultimately, the government did not appeal the January 2014 Order of Justice Perrell requiring that it disclose the OPP-related documentation involving St. Anne's nor did it seek an amendment of Justice Perrell's order. Rather, in June 2014 (approximately 4 months after the decision was handed down), lawyers for the Government sent a letter to the Superior Court advising that the Government would not produce certain civil proceeding transcripts of examinations for discovery. The Government, through its lawyers, claimed it was doing so, on the basis of "settlement privilege and/or undertakings of confidentiality given to the plaintiffs in the pre-IRSSA settlements."⁹⁷ Moreover, the government asserted that non-disclosure of certain transcripts was consistent with the goals of reconciliation.⁹⁸ Again, it is important to note that the private law lawyer, having disagreed with the decision of a Superior Court judge, would not be entitled to clarify and unilaterally limit a judge's order.⁹⁹

d. *Legal argument respecting abuse at St. Anne's*

Separate from the disclosure issues in the St. Anne's residential school litigation, there was another troubling aspect involving the adoption by government lawyers of certain legal positions respecting the scope of

93. *Fontaine 2014 ONSC*, *supra* note 59 at para 128.

94. *Civil Procedure*, *supra* note 89, Rule 30.02, 30.03.

95. *Fontaine v Canada (AG)* (May 31, 2018) Toronto Court File No. C63804 (ONCA) (Cost Submissions of Independent Counsel) at para 20-23 [*Fontaine Cost Submissions*] [on file with the author].

96. *Fontaine 2014 ONSC*, *supra* note 59.

97. *Fontaine Cost Submissions*, *supra* note 92 at paras 18-19.

98. *Fontaine v Canada (Attorney General)*, 2017 ONSC 2487 [*Fontaine 2017 ONSC*].

99. *Ibid* at paras 78-79.

‘abuse’ under the terms of the IRSSA.¹⁰⁰ Several of the survivors of St. Anne’s had made reference to a homemade electrical chair located in the school and used as a form of punishment for the students. The children would be strapped to the chair and electrocuted, sometimes to the verge of or past unconsciousness. Details of the electric chair and its uses had been documented in the OPP documentation in the government’s possession. However, during the early IAP process (from approximately 2008–2015), the government lawyers argued that the use of the electric chair did not constitute physical abuse under the terms of the IRSSA and therefore students subject to this ‘treatment’ were not entitled to compensation. A similar approach was taken with regard to allegations that children at St. Anne’s had been forced to eat their own vomit as a form of punishment. These arguments were ultimately withdrawn as a consequence of Crown-Indigenous Relations Minister Bennett instructing government counsel to stop making this argument as a basis for challenging a claimant’s abuse claims.¹⁰¹

e. *Critique of government lawyers in the independent assessment process*
The relationship between the government lawyers and St. Anne’s survivors seeking compensation pursuant to the IAP under the IRSSA has been described as a “festering sore of suspicion, animosity, distrust and shared resentment.”¹⁰² Notwithstanding Elizabeth Sanderson’s comments respecting government lawyers’ obligations in litigation, the conduct of the government lawyers engaged in certain IAP processes at St. Anne’s does not reflect a tempered approach to advocacy or a justice-seeking ethic. In the context of a second RFD respecting the inadequacy of the narratives and POI reports on St. Anne’s, the government commented that “to the extent that any document (source or otherwise) benefits a claimant’s case, it is the claimant and their counsel that bears the onus of producing that document.”¹⁰³ This type of comment reflects a commitment to zealous advocacy consistent with hard-fought private civil litigation. However, if there was ever a time for government lawyers to adopt a different ethical stance, it is in respect of this quasi-inquisitorial process

100. For more detail of the allegations in this regard, see *supra* note 50, *above*.

101. Jorge Barrera, “Ottawa initially fought St. Anne’s residential school electric chair compensation claims,” *CBC News* (2 December 2017), online: <www.cbc.ca/news/Indigenous/st-annes-residential-school-electric-chair-compensation-fight-1.4429594> [perma.cc/M36C-6A9P].

102. See the quote from Justice Perell in Gloria Galloway, “Carolyn Bennett asks Catholic groups to allow residential school survivors to have documents outlining abuse made public,” *The Globe and Mail* (16 January 2018), online: <www.theglobeandmail.com/news/national/carolyn-bennett-asks-catholic-groups-to-allow-residential-school-survivors-to-have-documents-outlining-abuse-made-public/article37615745/> [perma.cc/SM9P-TC9T].

103. *Fontaine 2017 ONSC*, *supra* note 98 at para 64.

where residential school survivors and the government were attempting to allocate compensation in respect of historical claims of serious physical and sexual abuse against members of Indigenous communities.

Thus, insofar as there is any accepted wisdom among legal ethicists and government lawyers that there ought to be a different ethical framework for government lawyers, the example of St. Anne's makes the development of such a framework an ever more compelling and urgent task. The various court proceedings that have arisen out of the IAP process at St. Anne's suggest that the government lawyers adopted an intensely adversarial approach to its disclosure requirements and interpretation of the IRSSA.¹⁰⁴ While it is acknowledged that the majority of the claims made by former residents of St. Anne's were resolved without a court-involved contest, the various RFDs, appeals and positions taken by government lawyers throughout the IAP process at St. Anne's suggest a continued and unchecked adherence by those same government lawyers to the principle of zealous advocacy. This is inconsistent with reconciliation and the resolution of residential school abuse claims. In fact, in the context of some of the legal disputes involving St. Anne's, there is a major gap between how Elizabeth Sanderson suggests that government lawyers should act in the IRSSA and how the government lawyers actually conducted themselves in respect of St. Anne's. Sanderson suggests Crown lawyers involved in cases with Indigenous individuals or groups should "build reconciliation into the resolution of the litigation" and, in so doing, "temper the professional duty to raise fearlessly any issue or ask every question however distasteful, where the public interest factors such as the fiscal responsibility, judicial economy, pursuit of justice, healing and harm reduction, and nation-building compel it."¹⁰⁵ The sentiment was echoed by Justice Perell when he stated that:

[i]f truth and reconciliation is to be achieved and if nous le regrettons, we are sorry, nimitataynan, niminchinowesamin, mamiattugut, is to be a genuine expression of Canada's request for forgiveness for failing our Aboriginal Peoples so profoundly, the justness of the system for the compensation for the victims must be protected. The substantive and procedural access to justice of the IRSSA, like any class action, must also be protected and vouched safe. The court has the jurisdiction to ensure that the IRRSA provides both procedural and substantive access

104. See the following cases as examples in this regard: *Fontaine 2014 ONSC*, *supra* note 59; *Fontaine v Canada (AG)*, 2018 ONCA 421; *JW Appeal*, *supra* note 67; *Fontaine et al v Canada (AG)*, 2014 MBQB 200 [*Fontaine MBQB*], *Fontaine 2017 ONCA*, *supra* note 65; *Fontaine 2016 ONCA*, *supra* note 57; *Fontaine et al v Canada (AG)*, 2013 ONSC 684; *JW SCC*, *supra* note 64.

105. Sanderson, *supra* note 1 at 132-133.

to justice.¹⁰⁶

However, this does not appear to be the approach adopted by the government lawyers in the St. Anne's Residential School litigation. Moreover, the approach taken by the government lawyers in respect of St. Anne's would also appear to run contrary to the *Department of Justice Values and Ethics Code of Conduct* that came in to effect in February 2013. According to this internal code of conduct, the Department of Justice is committed to carrying out its duties in a non-partisan and impartial manner and further committed to "providing decision-makers with all the information, analysis and advice they need."¹⁰⁷ Presumably, the withholding of significant documentation about the historical abuse at St. Anne's would appear to undermine the Department of Justice's commitment in this regard. The disputes over the disclosure of information about the abuse at St. Anne's and, in respect of certain positions taken by the government lawyers respecting the scope of the IRSSA, IAP and the nature of compensable abuse all point to an unbridled approach to zealous advocacy that is focused on winning rather than a non-partisan and impartial approach to their professional duties. Thus, again, notwithstanding the technical arguments the government *could* make in the context of the IAP process, the more significant question is whether they *should* have made such arguments and what they hoped to achieve in so doing. What lawyers can do is not the sole test of what they should do as a matter of legal ethics and professional responsibility.

However, it is not only the failure to produce relevant documentation or include certain information in the narratives prepared by the government that causes concern about the professional approach adopted by the government lawyers involving St. Anne's. It is also the positions adopted by the government lawyers when confronted with their non-disclosure and, more importantly, requests for additional information or more comprehensive and accurate narratives. In such instances, the government lawyers adopted traditional adversarial positions regarding the government's obligations. The lawyers adopted the position that the OPP information and information from the earlier civil actions were immaterial, not likely to impact the outcome of the IAP processes, subject to the deemed undertakings rule, subject to settlement privilege, not

106. *Fontaine 2014 ONSC*, *supra* note 59 at para 226.

107. Department of Justice, "Chapter 1: Values" (26 February 2013), online: *The Department of Justice Values and Ethics Code of Conduct* <www.justice.gc.ca/eng/rp-pr/cp-pm/vec-cve/c1.html#Chapter1> [perma.cc/H48H-2K8E]; See also the discussion regarding internal codes of conduct contained in Morris & Nishikawa, *supra* note 17 at 180 in which the authors assert that internal codes of conduct such as the Department of Justice's code are a better means by which to regulate the unique ethical and professional duties of government lawyers.

required respecting persons of interest once they left the school and finally, that the government was not obligated to produce the civil transcripts under Schedule D of the IRSSA on the basis of settlement privilege or the deemed undertaking rule (then subsequently acknowledging no basis in law for such positions).¹⁰⁸ While it is not disputed that the privilege and the deemed undertaking rule represent legitimate responses of a party engaged in disclosure disputes in civil litigation, the issue here is the use of these positions by the government within the IAP and the context of the IRSSA, and reconciliation more broadly.

As a consequence, the claimants, their lawyers and the TRC were forced to take the government to court to compel it to fulfill its obligations under the IRSSA. Without such steps being taken, it is likely that the full scope of the history of abuse at St. Anne's would not have come to light. Added to this is the position adopted by the government in respect of the immateriality of the disclosure ultimately ordered disclosed by Justice Perell. Specifically, the government lawyers took and continue to take the position that the court-ordered disclosure was immaterial to the IAP at St. Anne's. This later position in particular serves to highlight a disconnect between a narrowly construed and traditionally adversarial position adopted by the government lawyers in respect of the 'proof' of claims in the IAP and the broad reconciliation objectives underlying the government's participation in the IRSSA. These broader objectives contemplated the creation of ongoing narratives that chronicle the history of abuse perpetrated against the residential school students; however, in the case of St. Anne's, an adversarial-based rationalization overtook those broader objectives.

Recently, the federal government disclosed that it had spent approximately \$2.3 million in respect of the continuing legal disputes involving the St. Anne's IAP process.¹⁰⁹ Indigenous and Northern Affairs asserted that this sum includes the cumulative salaries of certain of its lawyers. The government defended these costs on the basis that the government was obligated to respond to various legal proceedings brought by the claimants and the TRC. However, arguably, what necessitated the government's need to respond was its failure to disclose relevant information about the history of abuse at the school.

108. *Fontaine 2014 ONSC*, *supra* note 59; *Fontaine Cost Submissions*, *supra* note 92; Interview with Independent Counsel, 5 October 2018.

109. Jorge Barrera, "Ottawa spent \$2.3M on court battles with St. Anne's residential school survivors," *CBC News* (20 September 2018), online: <www.cbc.ca/news/Indigenous/federal-legal-battle-costs-stannes-residential-school-1.4831887> [perma.cc/8Q2C-TJP4].

The position taken by the government is highly problematic. Following Justice Perell's disclosure order of January 2014, government lawyers advised the court by letter that the government would not comply with certain aspects of the order. It raises certain troubling questions about the government lawyers' views about the application of the rule of law to government conduct. Notwithstanding that government lawyers' professional duties are often framed in terms of their role as protectors of the rule of law and guardians of the public interest, the decision to clarify a court order sends a message that expressly undermines the rule of law.¹¹⁰ Again, in the private law context, it would be difficult to conceive of a scenario in which it would be appropriate professionally for a losing party to advise the court by writing that they did not intend to comply with the terms of a judicial order made against them. This is particularly troubling when the order in question required that the party produce information relevant to the dispute between the parties. In the private law setting, such action would likely be met with the striking of a party's pleading, significant costs and possibly a contempt order against a party that fails to comply with a court order.

Finally, and most recently, the federal government has sought declarations from certain of the IRSSA-designated supervisory courts (in the form of RFDs and appeals from RFDs) regarding the inapplicability of the principles of procedural fairness to the IRSSA process and the scope of judicial review of IAP decisions.¹¹¹ This has arisen in several contexts including both the review and re-review of IAP decisions in cases where the dismissal of a claimant's claim is linked to insufficient disclosure and/or flawed interpretations of the terms of the IRSSA by an adjudicator.¹¹² Adopting the position that the IRSSA does not incorporate any accepted norms of procedural fairness (other than those explicitly articulated in the express terms of the IRSSA) raises difficult questions about the types of

110. Dodek, *supra* note 2 at 20; Sanderson, *supra* note 1 at 80.

111. *JW SCC*, *supra* note 64; Jorge Barrera, "Ottawa gets sealing order on court document that undercuts 'reconciliation agenda' says NDP MP," *CBC News* (14 March 2019), online: <www.cbc.ca/news/Indigenous/bc-judge-seals-residential-school-compensation-case-documents-1.5054761> [perma.cc/5C2A-ZXM3]; See also *Fontaine v Canada*, (*Attorney General*) 2020 BCSC 63 (17 January 2018) Vancouver L051875 (BSSC) (Request for Direction (Re: Re-Review and Review Jurisdiction of the Chief Adjudicator and Adjudicators)) at para 2 [Request for Direction]. *Fontaine v Canada* (*Attorney General*) 2020 ONSC 336.

112. Request for Direction, *supra* note 111. In *Fontaine v Canada (AG)*, *Fontaine 2018 BCSC*, *supra* note 54 at para 41, counsel for Canada submitted that "procedural fairness is an administrative law construct that the Chief Adjudicator and his designates have used as a means of importing new rights for IAP claimants, rights for which the parties did not contract"; For further iterations of this argument see *JW SCC*, *supra* note 62; *Fontaine v Canada (AG)*, 2017 BCSC 946; and *Fontaine 2017 ONCA*, *supra* note 64.

positions that the government should adopt in a quasi-inquisitorial process that aims to provide compensation for those who suffered abuse at the hands of the government in the first place. Moreover, it would appear that ensuring that IAP adjudicators are impartial and adjudicating without bias would be components of procedural fairness that are important to the federal government.¹¹³ In attempting to reconcile the role it played in creating the harm in the first place, it is questionable whether the government should adopt positions that seek to undermine or limit accepted norms of fairness and justice.¹¹⁴ In fact, it is troubling that a party uses a variety of arguments typically grounded in ensuring a fair procedural process in order to defend against certain disclosure obligations (i.e., the deemed undertaking rule) and then rejects notions of procedural fairness when it suits other objectives such as a claimant's right to review in circumstances where new evidence was adduced.¹¹⁵ Finally, to suggest that there is no entitlement to principles of procedural fairness because the process is contractual in nature is problematic in light of the nature of the bargain made; namely, the resolution of claims of serious sexual and physical abuse in a sensitive and compassionate forum.

In this regard, an RFD was brought by the government involving the assertion by government lawyers that principles of procedural fairness do not apply to the residential school settlement process.¹¹⁶ In fact, the position adopted by the government's counsel is that the IAP provides a "complete code for which the parties have specified all of the procedural protects that they intended."¹¹⁷ Additionally, the government lawyers in this case also sought a sealing order from Justice Brown in respect of this RFD. The government's position respecting the sealing order was grounded in protecting the identity of the claimants in the IAP. Notwithstanding the legitimacy of this concern, it is a little difficult to see how confidentiality might extend to legal arguments made by the government in respect of the legal interpretation of the terms of the IRSSA.

113. *Fontaine 2018 BCSC*, *supra* note 54 at para 48.

114. Carrie Menkel-Meadow, "Unsettling the Lawyers: Other Forms of Justice in Indigenous Claims of Expropriation, Abuse and Injustice" (2014) 64:4 U Toronto LJ 620; *JW Appeal*, *supra* note 66.

115. For example, Claimant H-15019 who sought a re-review of his claim in respect of abuse at St. Anne's once it was determined that evidence contained in the OPP files would have assisted his claims (*Fontaine Cost Submissions*, *supra* note 92 at paras 202-223).

116. *Fontaine v The Attorney General of Canada* 2020 BCSC 63, (17 January 2018) Vancouver L051875 (BSSC) (Request for Direction (Re: Re-Review and Review Jurisdiction of the Chief Adjudicator and Adjudicators)) at para 2; Barrera, *supra* note 103.

117. *Fontaine 2018 BCSC*, *supra* note 54 at paras 39-42; Appeal Record of Independent Counsel in *Fontaine v Canada (AG)*, BCCA. In this case, the Government sought and was granted a sealing order respecting its arguments.

In the circumstances of St. Anne's Residential School litigation, the government lawyers would be hard pressed to articulate the legitimate public interests that informed some of the steps (particularly as it relates to the OPP disclosure) they took during the IRSSA process. Specifically, if the public interest was to minimize the financial costs by putting claimants to the near impossible task of proving claims without the requisite information and by challenging the validity of claims,¹¹⁸ it would appear that the government lawyers adopted a very 'private law' notion of their role: they infused public lawyering with private values.¹¹⁹ However, if the public interest that the government claimed to be pursuing was reconciliation (and a fundamental change in Canada's relationship with Indigenous people),¹²⁰ the withholding of 12,000 pages of information about the abuse at St. Anne's residential school and adoption of hard-line litigation tactics and positions undermines meaningful reconciliation.

III. *A different direction for government lawyers*

Having offered a critical take on the St. Anne's litigation, I will canvass some different approaches to re-framing the ethical duties and responsibilities of government lawyers. In so doing, I will focus more particularly on the potential benefits that a justice ethic might add. In an effort to articulate a different approach to legal ethics for government lawyers, differing emphasis has been placed on the scope of the government lawyer's ability to access and exercise public power and their responsibilities in respect of their role as guardians of the rule of law and promoters of the public interest given this public authority.¹²¹ These approaches will also be canvassed in the course of this discussion with the hope that the re-framing of government lawyers' ethical duties might build on these earlier approaches. Before canvassing these approaches, it is worth noting that not all theories of legal ethics contemplate a higher or different standard

118. The chief adjudicator of the Indian Residential School Adjudication Secretariat, Dan Ish, has indicated that there were three times more applications for the IAP process than had been expected at the outset, thereby extending the duration of the IAP and the associated costs: Kathleen Martens, "Outgoing Chief Adjudicator criticizes lawyers in residential school compensation process," *APTN National News* (11 March 2013), online: <aptnews.ca/2013/03/11/outgoing-chief-adjudicator-criticizes-lawyers-in-residential-school-compensation-process/> [perma.cc/TF9E-WZCY].

119. Berenson, *supra*, note 16 at 45. It is worth noting that as of 2014, there were approximately 17,000 resolved residential school claims totaling about 2 billion dollars. Originally, Canada had put aside a \$1.9 billion fund in respect of the CEP payments. Additionally, Canada agreed to "fund the IAP to the extent necessary to ensure its implementation" (*Fontaine 2016 ONCA, supra* note 57 at para 21).

120. *Principles, supra* note 20.

121. Dodek, *supra* note 2 at 20: All members of the legal profession have a professional responsibility to uphold respect for the rule of law however there are particular statutory duties placed on the attorney general and its representatives to ensure that public matters are carried out in accordance with the law. See also Sanderson, *supra* note 1 at 84.

of conduct for government lawyers. In this regard, Andrew Martin notes, “others—almost all of whom are government lawyers—argue that there are no special ethical obligations on government lawyers. While they largely recognize ‘public interest’ duties, these commentators argue that such duties do not constitute ethical duties.”¹²² A further critique of the call for a higher or different ethical standard for government lawyers is that such a higher standard presupposes a lower standard for the rest of the profession; an assumption that is not particularly palatable to the profession or the public (and certainly not accepted in the context of this paper).¹²³

Despite objections over the application or appropriateness of a different ethical standard for government lawyers, the reality is that such standard already exists for crown prosecutors. As a response to and check on the public power exercised by crown prosecutors, they have specific duties. These duties restrain the government’s ability to pursue, prosecute and punish individuals who have allegedly contravened the law. While these duties are situated in the criminal context, it is entirely reasonable that there may be other types of proceedings brought forward by government and/or that government defends that can and do have serious consequences for individuals or groups.¹²⁴ Arguably, government lawyers acting in these contexts would be subject to the same justice-seeking ethical duties as crown prosecutors.

However, before exploring the application of a justice ethic in more detail, this paper takes account of some of the existing approaches to government lawyer ethics that have contributed to the discourse in this field and in so doing, provides a basis for a distinct ethical approach for government lawyers. The intent is to build upon aspects of these existing perspectives in legal ethics to formulate a theory of legal ethics that takes account of the unique position, power and challenges of government lawyers. One such approach is grounded in the government’s democratic and representational role. The scope of a government’s ‘representative’ nature is that it is representative of all citizens, including those who disagree with and challenge the government’s policies or conduct. In light of its representative nature, it is imperative that governments remember its obligation to represent all citizens when in an adversarial relationship with

122. Martin & Telfer, *supra* note 10 at 454 citing Dodek, *supra* note 2.

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

124. Examples of such cases might include the operation of certain publicly-owned facilities; regulation of medical drugs; the management of blood transfusion cases; solitary confinement in prisons, Indigenous child welfare cases.

one (or more) of its citizens.¹²⁵ This obligation also extends to the lawyers acting on behalf of the government. When representing a government entity that is in opposition to a legitimate claim of one of its citizens, the government lawyer must also take meaningful account of the fact that their client's adversaries are also its citizens. In this context, government lawyers cannot adopt a neutral partisanship approach to lawyering that declines to engage in a meaningful assessment of the implications of its client's actions on an adversarial party.

The rationale underlying this approach is similar to that underlying the responsibilities placed on crown prosecutors in the criminal context. More specifically, in lawyering legitimate claims made against it by its citizens, the "nature of the government's relationship to that citizen is different from the relationship a private disputant would have with that citizen, and that the nature of this relationship shapes the nature of the lawyer's duties in his or her representation of government."¹²⁶ In this capacity, they adopt a 'duty of fair dealing' whereby government lawyers recognize that the minimum requirements placed on private lawyers in legal proceedings in respect of adversaries are insufficient in legal disputes involving government entities and private citizens.¹²⁷ While the basis for this approach is clearly grounded in notions of democracy and representative government, the articulation of how this duty might operate in practice is more general in its application. For instance, Cotter suggests that fulfilling this duty would require government lawyers to admit "what should reasonably be admitted, conceding what should reasonably be conceded, [and] accommodating what should reasonably be accommodated."¹²⁸

This qualification alone does not go far enough in re-defining the scope of the government lawyer's ethical responsibilities in litigation outside the particular context of crown prosecutors. A 'duty of fair dealing' places certain obligations on government lawyers to recognize the legitimate and conflicting interests of its citizens. They must act fairly when engaging in legal conflict with such citizens. However, it does not provide a mechanism by which to balance legitimate and contradictory interests of citizens and government. As such, as an ethical consideration, a 'duty of fair dealing' may be more appropriate as a guiding principle for the government 'clients' instructing government lawyers than the government lawyers acting on those instructions. In addition, this duty

125. Cotter, "Legal Accountability," *supra* note 2 at 70.

126. Cotter, "Evolving 'Public Interest,'" *supra* note 2 at 160.

127. *Ibid.*

128. Cotter, "Legal Accountability," *supra* note 2 at 71.

does not contain a descriptive account of what constitutes ‘fair dealing’ in the context of the actual steps to be taken by government lawyers in a given case. Moreover, when such aspirational language (without more detailed articulation) is confronted with the pressures associated with the deeply ingrained traditional professional framework of zealous advocacy and neutral partisanship, it would not be surprising that many government lawyers would default to the traditional approach to professional conduct. It is for these reasons, among others, that the extension of a justice-seeking ethic (currently articulated only in the context of criminal prosecutions) could provide a helpful framework for ethical government lawyering more generally.

The duty of fair dealing is also consistent with another approach to government lawyer ethics that recognizes the unique powers exercised by government lawyers. Specifically, the basis for this approach to and justification for a higher standard of ethical conduct for government lawyers is grounded in the assertion that government lawyers exercise power on behalf of the state.¹²⁹ In this regard, Adam Dodek states that:

[g]overnment lawyers interpret, advise and advocate on the powers and duties of the Crown. In so doing, government lawyers exercise public power. This exercise of public power is therefore the key distinction between government lawyers and all other lawyers. This is why it is an oversimplification, an understatement and is misleading to characterize government lawyers as lawyers for an organization.¹³⁰

This imposition of a higher standard associated with the exercise of public power is, in part, informed by the attorney general’s responsibility (and all those lawyers who act on behalf of the attorney general) to uphold the rule of law. In effect, it is the government lawyer’s responsibility to ensure that the actions and policies of the government are consistent with the rule of law.¹³¹ Along with the recognition that government lawyers exercise public power (and, as such, should be held to a higher standard of conduct)

129. Dodek, *supra* note 2 at 18.

130. *Ibid.* For a contrasting view respecting the assertion that government lawyers should be subject to a higher standard of professional conduct see Deborah McNair, “In the Service of the Crown: Are Ethical Obligations Different for Government Counsel?” (2006) 84:3 Can Bar Rev 501 and John Mark Keyes, “The Professional Responsibilities of Legislative Counsel” (2009) 3 JPPL 453.

131. This assertion has led to different characterizations of the importance of the solicitor–client relationship between government lawyers and the governmental entity they advise. Morris & Nishikawa, *supra* note 17 suggests that the solicitor–client relationship must be jealously protected in order to ensure that government lawyers are able to provide meaningful advice to government bodies regarding the legality of a proposed course of action. Similarly, John Mark Keyes suggest that this relationship is grounded in a duty of loyalty and trust that is needed such that governmental ‘clients’ can rely on their legal advisers to provide sound advice in Keyes, *supra* note 2.

is the corresponding recognition that there are specific contexts outside of criminal prosecutions in which government lawyers are expected to act differently. Further examples of these include where the Honour of the Crown is invoked in legal matters engaging Indigenous groups or where government is engaged in litigation involving vulnerable parties, regardless of whether those parties are represented by counsel.¹³² In these instances, the objective for the government lawyer is not winning the case on behalf of the government. Rather, it is ensuring that there is a fair and just outcome in the resolution of the matter.

The suggestion that there should be a higher standard of conduct when vulnerable parties are involved is a worthy objective, but it raises certain questions. For instance, it tends to not address whether the presence of a well-lawyered opposing vulnerable party would relieve the government lawyers of conducting themselves in accordance with such a higher standard.¹³³ In fact, there is a concern that a well-lawyered opposing party would alleviate the government lawyer's duty to deal with the party fairly and result in a retreat to more traditional modes of adversarial professionalism. In addition to obligations stemming from the government lawyers' role as guardians of the rule of law and/or democratic representatives, a further consideration engages government lawyers' public interest duties. This is framed in terms of the government lawyers' additional role as public servant; a role that requires that the government lawyer act independently of partisan politics.¹³⁴

Taking account of the important contributions that these approaches make as well as the challenges associated with implementing a duty of fair dealing and a public interest or rule of law-based higher standard of conduct, the next section of this paper discusses the merits of applying a justice-seeking ethic to government lawyering outside the context of crown prosecutors. It also addresses the criticisms associated with this approach as well as the ways in which such an ethic might inform government lawyers' practice outside of the criminal context.

1. *Toward a justice ethic*

Interestingly, the previous sampling of approaches to government lawyer ethics incorporate by comparison the specific ethical duties and responsibilities of crown prosecutors. However, neither go so far as to suggest that a justice ethic should be adopted by all government lawyers working in an adversarial context. This section intends to make just that

132. Dodek, *supra* note 2 at 26.

133. Berenson, *supra* note 16 at 45.

134. Martin & Telfer, *supra* note 10 at 454.

suggestion. In drawing upon the benefits of these earlier approaches as well as the limitations associated with them, my argument is that the justice ethic could be expanded to encompass government lawyers acting outside the criminal context. In addition to discussing the merits and challenges associated with adopting such an approach, this section will briefly examine those aspects of legal practice that would be subject to a justice ethic (taking account of the lessons learned from St. Anne's) as well as propose language that could form the basis of a professional rule in this regard.

In the context of the crown prosecutor, the justice ethic has resulted in both a general direction to act fairly as well as the articulation of particular duties and responsibilities owed by crown prosecutors when prosecuting criminal cases. The adoption of a justice-seeking ethic reflects the significant power and responsibility that criminal prosecutors have over citizens. Over time, this ethic has been articulated through a variety of sources including case-law, the rules of professional conduct and internal manuals. The result is a framework that more contextually governs how crown prosecutors are expected to conduct themselves when prosecuting cases. As such, the adoption of a justice ethic reflects a move away from a broad ethical standard that is informed by notions of neutral partisanship and zealous advocacy as the lawyer's primary duties. Notions of neutral partisanship and zealous advocacy are, at a minimum, not easy to apply in the context of certain government lawyers and more seriously, may have grave effects on those citizens subject to government lawyers who adopt such an approach.

One of the benefits of expanding a justice-seeking ethic among a broader range of government lawyers is that it has already been subject to definition within the context of adversarial proceedings. Thus, the concept is more than an aspirational objective; it has infused and, in turn, altered the role of specific government lawyers within a particular practice context, namely crown prosecutors. One such example of this has played out in the context of the crown prosecutor's disclosure obligations; an example that is particularly relevant in the context of St. Anne's. In *Stinchcombe*, Justice Sopinka stated that, "the fruits of the investigation which are in [the crown's] possession are not the property of the Crown for use in securing a conviction, but the property of the public to be used to ensure that justice is done."¹³⁵ This decision had, in part, been influenced by the findings of *The Royal Commission on the Donald Marshall Jr. Prosecution*, which had determined that the Crown's failure to disclose certain statements to the

135. *Stinchcombe*, *supra* note 42.

defence was a contributing factor in the miscarriage of justice that resulted when Donald Marshall was convicted of murder.¹³⁶ As a consequence of *Stinchcombe*, there is an obligation on crown prosecutors to disclose all relevant information including evidence that might prove to be exculpatory for the defence.

This does not mean that there is a comprehensive framework. But, unlike other ethical articulations, there is at least a starting point for fleshing out this ethical approach in more concrete terms. Thus, in certain legal contexts (e.g., claims as against the government and matters like the IRSSA), a justice-seeking ethic could assist government lawyers in better achieving their commitment to the public interest. In so doing, it might improve the public's perceptions of the role of the government lawyer who more often than not becomes the 'face' of government in high profile cases.¹³⁷ Moreover, an expanded justice ethic can provide the individual government lawyer with a better structural framework in which to operate. This is in contrast to the private law zealous advocate framework, which fails to account adequately for the unique duties and interests required of government lawyers and the needs of the citizens–litigants.

2. *Criticisms of a justice ethic*

While there are benefits to expanding the notion of a justice ethic beyond the strictly prosecutorial context, it is necessary to address certain criticisms associated with adopting such an approach. One of the most compelling critiques involves the concern that, without significant corresponding structural and regulatory reform, a justice ethic remains largely philosophical. At best, justice is a “contested concept” such that “working out the meaning of justice, and thus the content of the prosecutor’s duty to seek justice, requires one assign weights or priorities to different components of justice, such as security, respect for dignity, freedom from arbitrary harassment, and protection of rights. Others may assign different weights or priorities however.”¹³⁸ In short, its scope is subject to indeterminate application or manipulation. Thus, subjective interpretations of what constitutes ‘justice’ within a case may allow a government lawyer to justify conduct that is anything but ethical. This is further complicated by the fact that, on a regular basis, prosecutors

136. *The Royal Commission on the Donald Marshall, Jr. Prosecution: Digest of Findings and Recommendations* (Halifax: The Commission, 1989).

137. An interesting example of this is the case of St. Anne’s in which the public’s perceptions of the federal government’s commitment to reconciliation are played out in the negative publicity associated with certain of the legal steps taken by the government lawyers involved in the IAP and related litigation on St. Anne’s.

138. Wendel, *supra* note 40 at 160.

exercise discretion that requires an analysis and balancing of competing values that underscore conceptions of justice; an analysis that may not be thoroughly undertaken by the courts when called upon to review a prosecutor's conduct.¹³⁹

Moreover, as an aspirational objective that is meant to inform actual procedures and processes, it is not consistently enforced or enforceable.¹⁴⁰ In addition to being open to interpretation and, more troublingly, manipulation, the vagueness of the term 'justice' raises difficult theoretical and philosophical questions about differing conceptual bases for justice as a guiding principle. In considering the principle of 'justice' that is to inform ethical legal decision-making and practice, are government lawyers to consider a procedural form of justice that leaves outcomes out of the conversation or a substantive concept of justice that potentially treads on government policy?¹⁴¹ As a consequence, even when government lawyers are attempting to 'seek justice,' it could mean different things to different lawyers in different contexts.

These interpretive challenges are further complicated by the dual role played by government lawyers as both public employees and advocates and by a further question about the implications of a civil versus criminal context for government lawyers. While there is a clearer understanding of the consequences associated with government lawyers failing to seek justice in the criminal context (i.e., the potential loss of an individual's liberty), the analysis becomes somewhat murkier in the civil context. In the civil context, the dispute is often grounded in questions of tortious or contractual liability and the resulting scope of compensation to an aggrieved party. An argument might be made that these types of disputes do not approach the level of consequence like that of the criminal context. However, it is possible to consider a variety of civil contexts in which the actions of the state may have a "serious and profound effect" on an individual's life.¹⁴² As a consequence, in these particular civil contexts, the government's legal representatives could be subject to a different standard of conduct. In contrasting government lawyers' conduct in a criminal context with conduct in a civil context, the question becomes whether a citizen is "less entitled to this standard of fairness and evenhandedness because the matter does not involve criminal proceedings against him

139. Alice Woolley, "Reconceiving the Standard Conception of the Prosecutor's Role" (2017) 95:3 Can Bar Rev 795 at 820-822.

140. Soubise & Woolley, *supra* note 2 at 4, 9, 13.

141. Stuart Hampshire, *Justice is Conflict* (New Jersey: Princeton University Press, 2000).

142. *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46 at para 49, 177 DLR (4th) 124.

or her?”¹⁴³ The IRSSA and the IAP provide concrete examples of non-criminal proceedings that would benefit from the application of a justice ethic.

A final criticism that is important to address in the context of a justice ethic involves the fact that, while government lawyers may adopt such an ethic, the private lawyers against whom they are acting may continue to conduct themselves in accordance with the traditional model of professionalism. In such circumstances, even government lawyers attempting to adhere to a justice framework may be tempted to ‘fight fire with fire.’ Moreover, are we asking only a certain group of lawyers, namely government lawyers, to pledge allegiance to competing duties—justice and a corresponding disinterested search for the truth and zealous advocacy?¹⁴⁴ Two considerations might be raised in reply. First, just because it is difficult to articulate a standard does not mean it is not a worthy undertaking. In fact, seeking justice is and should remain one of the core tenets of the legal profession. And second, by engaging in a discussion about the nature of a justice ethic that results in a clearer articulation of objectives and concrete guidelines, government lawyers operating in the civil context would be able to respond to such pressures and conduct themselves accordingly.

Thus, to do ‘justice,’ it is imperative that a series of more definitive principles and rules be created that will guide lawyers’ conduct in particular legal contexts.¹⁴⁵ While, in the context of crown prosecutor’s existing duties, many of the concrete expressions of the crown’s duties have been articulated by the courts, it does not mean the courts can or should carry all of the burden of developing an ethical framework for government lawyers. In fact, it is worth noting that the courts’ work in this regard has also been tempered by a broad degree of discretion that courts bestow on crown prosecutors in their practice. Justice L’Heureux-Dube has suggested that for the criminal justice system to work well, the Crown must possess a fair deal of discretion extending to all aspects of the trial process.¹⁴⁶ Moreover, as the litigation involving the IAP processes under the IRSSA has demonstrated, courts across the country have struggled to define the scope of their review of the government’s responsibilities in the process.¹⁴⁷ For example in *Attorney General of Canada v JW and Reo Law Corporation*, the Attorney General took the position that the supervisory judges under

143. Cotter, “Evolving ‘Public Interest,’” *supra* note 2 at 160-161.

144. Woolley, *supra* note 133 at 825.

145. Berenson, *supra* note 16 at 45.

146. *R v Cook*, [1997] 1 SCR 1113, 146 DLR (4th) 437.

147. *JW Appeal*, *supra* note 67 at paras 27-30. This case has recently been considered by the SCC, see *JW SCC*, *supra* note 64.

the IRSSA have no jurisdiction to hear an appeal of or judicially review a decision of an adjudicator under the IAP—except in exceptional cases. The supervisory court’s ability to review decisions of an adjudicator is limited to a correctness standard. Essentially, the government argued that there are no procedural protections afforded to the claimants outside the terms articulated in the IRRSA.¹⁴⁸ These arguments underscore the concern that judicial review of IAP adjudicators’ decisions would ultimately impact and extend the completion of the process.¹⁴⁹ The further consequence is that supervisory judges are meant to defer to the adjudicative process and by extension, not oversee the government lawyers’ conduct.

In light of these criticisms, a better approach would engage the provincial law societies as well as the Federation of Law Societies in drafting more guidelines for government lawyers. As it stands, the provincial professional codes have taken small steps to carve out and articulate specific rules and directives for prosecutors.¹⁵⁰ As an example, the commentary under Rule 5.1-3 of the Rules of Professional Conduct in Ontario state that the prosecutor’s “prime duty is not to seek to convict but to see that justice is done through a fair trial on the merits.”¹⁵¹ This responsibility expressly extends to the crown’s disclosure obligations. Arguably, similar language could be added within this commentary or in respect of a separate rule or sub-rule to include government lawyers practicing outside the criminal prosecutorial context. For instance, as a starting point, the Model Code of Professional Conduct might include language that states,

- (1) When acting on behalf of the Crown in adversarial proceedings, a lawyer must act fairly and dispassionately to ensure that justice is done.
- (2) In seeing that justice is done in court proceedings as well as proceedings before boards, administrative tribunals, arbitrators and other forms of adjudication, a lawyer acting on behalf of the Crown engaged in adversarial proceedings must fairly assist the tribunal to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed fairly before the tribunal, and must seek to assist the tribunal with adequate submissions of law that enable the law to be properly applied

148. *JW Appeal*, *supra* note 67.

149. *Ibid* at paras 21, 31.

150. Law Society of Ontario, *supra* note 8.

151. *Ibid*.

to the facts.¹⁵²

While this rule attempts to cover significant ground in terms of the scope of the government lawyer's duty, it could ultimately be parceled out into several sub-rules and commentary that attempt to capture certain aspects of a justice framework. Namely, the rules would need to encapsulate the type of lawyer subject to the rule, the nature of the legal setting in which the lawyer was operating and the scope of her duties within that setting. Once the general principle underscoring the justice framework is established, additional rules that reflect other concrete aspects of the crown prosecutor's duties to seek justice might be added to the rule and extended to apply to government lawyers outside the realm of crown prosecutors. *The Directive on Civil Litigation Involving Indigenous Peoples* could assist in establishing a coherent set of rules consistent with a 'justice' ethic.

In developing such rules, it would be helpful to draw on David Wilkins' suggestion regarding the need for and creation of practice-specific rules. His 'mid-level' rules take account of both the legal realism associated with the practice of law in particular contexts as well as an overarching commitment to the systemic values that are chosen to infuse all practice spheres.¹⁵³ In creating mid-level rules that are more attuned to particular practice contexts, it is important to consider the specific legal task, the legal subject matter, the status of the player (plaintiff or defendant), the type of lawyer and the nature of the client.¹⁵⁴ Within the context of government lawyers, the relevant factors that would serve to define both the scope and content of mid-level rules are multi-focused—the articular legal task at hand, assuming that the steps of civil litigation might be further subdivided; the subject matter (important in delineating the overall types of matters that would be subject to a justice ethic); and the status of the lawyer (in this case, to a lesser extent whether the government lawyer is acting as plaintiff or defendant). All these factors would together set parameters on what 'seeking justice' looks like in more particular legal contexts.

Consistent with the creation of even more specific mid-level rules that articulate particular duties and responsibilities within a specific practice

152. As a basis for this rule, see New South Wales Government, *Law Profession Uniform Conduct (Barristers) Rules 2015*, online: <www.legislation.nsw.gov.au/#/view/regulation/2015/243/partadvocacyru/rule83> [perma.cc/H2YL-YDLK] at Rule 83, which has been altered and expanded for the purposes of this discussion. See also Law Society of Alberta, *Code of Conduct*, Rule 12 respecting the clarification that a "client of a lawyer employed by the government is the government itself and not a Board, Agency, Minister or Crown Corporation"; See also Wendel, *supra* note 40 at 160.

153. Wilkins, *supra* note 49 at 515.

154. *Ibid* at 517.

setting, it is important that work be done to identify better when a justice-seeking ethic would arise in legal problems that government lawyers face in their daily sphere of practice. By more specifically addressing those problems, government lawyers are not left to interpret how a contested and philosophical concept of justice applies. Rather, it should be considered how it is best operationalized in a particular setting given certain guidelines and expectations. Again, the drafters of these rules could draw on the government's own directive respecting civil litigation with Indigenous Peoples. While the development of a justice ethic and accompanying rules is meant to extend beyond litigation involving Indigenous Peoples, the language and substance of those particular principles would be applicable in a broader context and in respect of any litigation as between the Crown and an Indigenous group. Moreover, incorporating elements of the federal government's directive within newly drafted professional rules can ensure that the rules apply across Canada and in respect of both federal and provincial government lawyers.

In the context of St. Anne's, an enhanced disclosure requirement that included production of the inculpatory as well as exculpatory information would have dramatically changed the dynamic of the IAP process both in terms of administration of the process and perceptions about fairness of the process. If the government lawyers' conduct had been infused with a justice-seeking ethic, they would have been required to produce all relevant information: the OPP files would have been produced and there would likely not have been a need for multiple litigious RFD's as well as multiple narratives over the span of seven years. More importantly, claimants who had suffered significant and traumatic abuse at St. Anne's would not have been denied their claims or forced to recount extremely painful stories in an effort to prove claims originally denied due to a lack of disclosure. There would have been a different perception of the role of the government and its lawyers in the process. This latter consideration cannot be downplayed in the context of reconciliation.

Taking the disclosure example in St. Anne's IAP process further, the production of all relevant information pursuant to a justice-seeking ethical obligation is consistent with a commitment to finding the truth rather than defeating a claim. It is in keeping with the government's professed commitment to reconciliation. An ethical approach to practice that requires government lawyers to seek justice would also cause those same government lawyers to ask themselves what would constitute justice in a given case. And, in the case of the government lawyer receiving instructions from or providing advice to a government department as 'client,' a formalized professional duty to promote justice would likely

require that the individual lawyer engage in a dialogue about justice with that instructing department. Certainly in the case of St. Anne's, if the government lawyers contemplated how justice might be affected in the circumstances, it is not likely that seeking justice would entail the withholding of information from abuse victims, long drawn out procedural battles or the requirement that victims of abuse be required to tell and re-tell their story in order to obtain compensation.

While this paper has focused on the example of disclosure, a justice approach would extend beyond disclosure requirements. For instance, the crown's responsibility to seek justice also extends to the manner in which it presents evidence in a criminal proceeding.¹⁵⁵ Specifically, in keeping with an obligation to secure just results, the crown prosecutor is "not at liberty to curate the evidence [at trial], excising anything that might be exculpatory. To do so is to place too high a premium on 'winning.' It is to lose sight of the Crown's primary duty to present the case fairly and in a manner that will secure a just result."¹⁵⁶ Thus, in extending the underlying justice principle to litigation outside the criminal context, we could explore how the responsibility to seek justice would inform different aspects of the litigation process from pre-trial and preliminary procedural matters through to the completion of a trial and beyond—particularly as it relates to the appropriateness of an appeal.

While the impact on some of the aspects of civil litigation can be imported from the criminal context, some will need to be constituted anew. For instance, in learning from the lessons provided in the case of St. Anne's, it would be important to import a justice ethic into the government's decision to proceed with certain procedural steps within a proceeding as well as the position taken by the government in the course of procedural motions. Infusing procedural motions with a justice ethic would attempt to ensure that government lawyers are pursuing procedural orders that are just and responding to procedural motions of opposing parties with positions that reflect a commitment to obtaining a just result overall. Again, in these circumstances, it is and would be incumbent on government lawyers to act in accordance with a justice ethic notwithstanding any action taken by opposing parties and private lawyers who continue to act in a traditionally adversarial manner. While ultimately the goal is to ensure that all lawyering is infused with a justice ethic, the purpose of this paper is to ensure that the focus remains on the steps and positions taken by government lawyers. Thus, when initiating procedural motions as well as responding

155. *R v Ahmed* 2015 ONCA 751; *R v Hillis* 2016 ONSC 451 [*Hillas*].

156. *Hillas*, *supra* note 149 at para 24.

to procedural motions brought by opposing counsel, government lawyers should ask whether the positions they adopt contribute to the fair and just resolution of the litigation rather than winning a motion at all costs.¹⁵⁷ Such an inquiry might prevent the adoption of positions that serve to delay and obfuscate proceedings.¹⁵⁸

For instance, the government's position regarding the limited supervisory role of the courts in the IRSSA may serve an argument of finality and certainty often made in litigation processes but again, these are not purely litigious processes. Alternatively, adopting a justice ethic in this circumstance might require that government lawyers balance the need for finality, as an adversarial objective, with the promotion of reconciliation, the voice of survivors and recompense of abuse of all victims of residential schools. In another example, maintaining arguments about the interpretation of the term 'resident' for the purpose of denying a minor's sexual assault claim might also be better served by a justice analysis.¹⁵⁹ In that case, a claimant had remained in a guardianship relationship at the school after finishing her schooling because her family could not care for her at home. While in a guardian relationship at the school, she earned room and board, but was sexually assaulted by an adult employee of the residential school on school grounds. Government counsel took the position that, as she was paid by the school (essentially earning her room and board), she was not a student nor a resident, but rather an employee. As an employee, it was argued that she was not entitled to compensation under the terms of the IRSSA. However, suggesting that a minor and former student who was sexually assaulted at the school by an adult employee is not entitled to compensation raises cause for concern in that it relies on a technical and narrow interpretation of the terms of IRRSA; the goal being the limiting of claims rather than redress for victims.¹⁶⁰ Again, in such a case, pursuing justice may check the use of interpretive arguments that serve to limit legitimate payable claims at the expense of other objectives that the government is pursuing including, "right[ing] the wrongs that

157. It is the assertion of the independent counsel involved in St. Anne's that the government maintained positions respecting the applicability of settlement privilege and/or deemed undertakings that had little or legal basis (no legal authority or evidence of the examinations being for the purpose of settlement) and that such was acknowledged by the government in the course of the proceedings. See *Fontaine Cost Submissions*, *supra* note 92 at para 44.

158. See reference to the government position that there is no right to procedural fairness in IRSSA and no right of appeal from the decision of the Chief Adjudicator: *Fontaine MBQB*, *supra* note 98.

159. *Ibid* at paras 41-44.

160. *Ibid*.

were committed against to whom it [Canada] was in the relationship of a caregiver.”¹⁶¹

Conclusion

The delineation of appropriate ethical conduct based on a justice-seeking ethic disabuses government lawyers of a commitment to a private law adversarial approach to civil litigation. Moreover, by assessing objectives through a justice lens, a more ethically sustainable approach to professionalism that moves beyond a commitment to neutral partisanship and is more reflective of the government’s duty to its citizenry more broadly is developed.¹⁶² This approach needs to be supplemented by and be directed by a corresponding set of practical rules that take account of the operationalization of justice ethic in daily practice and different settings. While there remains much work to do in putting flesh on the bones of this ethical approach, the acknowledgement that a new approach is needed is a start. This is particularly so in circumstances like St. Anne’s. In many ways, a first step has been taken by former Attorney General Wilson-Raybould. She recognized the need for a new approach to the government’s engagement in litigation with Indigenous groups. This would be an excellent place to begin a much deeper and broader debate on the professional and ethical responsibilities of government lawyers.

161. *Ibid* at para 65.

162. Trevor CW Farrow, “Sustainable Professionalism” (2008) 46:1 Osgoode Hall LJ 51.