

An Ethics and Professionalism Guide for Government Lawyering

September 5, 2023

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Acknowledgements

The *Ethics and Professionalism Guide for Government Lawyering* (“*Guide*”) was developed in fulfillment of the 2022/23 OBA Foundation Chief Justice of Ontario Fellowship in Legal Ethics and Professionalism Studies. The OBA Fellowship is intended to, among other things, promote ethical behaviour and professionalism in the legal profession, enhance the reputation and the esteem of the profession, and to encourage scholarship in legal ethics and professionalism in Canada.

I wish to extend my sincere thanks to the OBA Foundation for their support of this project, and for their commitment to the promotion of professionalism and ethics in the legal profession in Canada.

I am greatly indebted to Professor Andrew Flavelle Martin, Schulich School of Law, Dalhousie University, and to Professor Adam Dodek, Faculty of Common Law, University of Ottawa, whose support, encouragement, and guidance, made the development of the *Guide* possible. The *Guide* also benefitted from the insights provided by Professor John Keyes, Faculty of Common Law, University of Ottawa.

I am also grateful to my Research Assistant, Mr. Jonah Kahansky, for his contribution to the development of the *Guide*, and to Ms. Stacey Birtch, Faculty of Common Law, University of Ottawa, for her valuable assistance with the administration of this project.

How to use this Guide

This *Guide* is designed as an adaptable and accessible tool and resource for both law students and law school professors. It is intended to be read in conjunction with applicable provincial and territorial rules and codes of professional conduct and related authorities.

The *Guide* seeks to complement the valid regulatory objectives of Canadian law societies regarding the ethical conduct of lawyers, the protection of the public in the public interest, and the promotion of respect for the Rule of Law and the integrity of the legal profession.

The *Guide* is not designed to be exhaustive or definitive. Its focus is on a sub-set of the public sector bar, the ethical and professionalism obligations of lawyers employed by federal and provincial governments who provide legal services to the *Crown*. As such, all references in this *Guide* to “*government lawyering*” and “*government lawyers*”, should be read and understood in this context.

Although municipal and other similar types of government lawyers also form part of this sub-set, their ethical and professionalism obligations fall outside the scope of this *Guide*. Similarly, Crown prosecutors are not included in the definition of “*government lawyers*” used in this *Guide*, as they

face unique practice issues that are well-explored in the case law and literature and that tend to be adequately covered in contemporary legal ethics teaching.

Nevertheless, it is my contention that the ethical responsibilities of most government lawyers are similar, albeit with distinctive features that exist within each type of government practice. Consequently, in my view, many of the ethics and professionalism issues discussed in relation to government lawyers in the service of the *Crown*, are applicable to other types of government lawyers as well.

For students, this *Guide* provides an introduction into an often-underexplored area of ethics and professionalism - the unique context of government lawyering.

For professors, this *Guide* may provide the basis for a lecture or curriculum outline in conjunction with consultation of further readings/case law.

Moreover, this *Guide* will highlight some key ethical and professionalism differences between government and private sector lawyers. Each numbered section provides several statements on the basic academic and legal consensus regarding the highlighted topics, as well as noting areas of continuing debate. The end of this *Guide* also contains several case studies for illustrative purposes.

The *Appendices* section provides a more fulsome discussion on specific issues highlighted throughout this *Guide*, including identifying areas of continuing academic debate. The *Further Readings* section highlights some of the most relevant and authoritative cases and articles on specific topics.

The goal of the *Guide* project is to attempt to make a small contribution toward gaining a clearer understanding about what it means to be an “ethical government lawyer”. The *Guide* also seeks to encourage greater consideration and study of government lawyering generally by the regulator community, the Academy, and the legal profession, so that government lawyers can more clearly see themselves in the important work conducted by these entities, in particular, the legislation, codes, rules, by-laws, and other authorities that govern their professional conduct.

1. Introduction

“The incorporation of government lawyering into the teaching of legal ethics in law schools should be embraced by law teachers in order to better prepare their students for practice, given that ethics and professionalism lie at the core of the legal profession.” - Andrew Flavelle Martin & Leslie Walden ¹

The public sector bar is the largest single segment of the Canadian legal profession, employing approximately 15-25% of Canada’s lawyers.² The growth of the public sector bar reflects the rise of the administrative state over the past 60 years, that has resulted in the creation of numerous and varied public entities that employ public sector lawyers, such as, *inter alia*, school boards,

hospitals, commissions, legal aid clinics, Crown corporations, as well as the three levels of government (federal, provincial and municipal).

Despite their significant presence in the Canadian legal landscape, the reality of practicing law as a government lawyer is not well reflected in most provincial and territorial rules and codes of professional conduct or other authorities that govern their professional conduct. Professor Allan Hutchinson famously called government lawyers “the orphans of legal ethics”.³

Government lawyers form a sub-set of public sector lawyers, who are employed in federal, provincial, territorial, and municipal governments, as well as a vast number of public entities and Crown corporations. In their work, government lawyers may act as agents of the Attorney General and Ministers of Justice.⁴

This *Guide* will focus on the ethical and professionalism obligations of one of the sub-sets of the public sector bar, lawyers employed by federal and provincial governments who provide legal services to the *Crown*. Although municipal government lawyers and lawyers who are employed by federal and provincial regulatory bodies as well as courts administrations also form part of this sub-set, these groups are outside the scope of this *Guide*. As such, in this context, government lawyers in federal and provincial practice, are *Crown* agents of the Attorney General and Ministers of Justice.⁵

The underrepresentation of government lawyers in rules and codes of professional conduct may stem, in part, from their unique operating contexts. Government lawyers simultaneously work as public servants, licensed legal professionals, and delegates of the Attorney General.⁶ This multi-dimensional operating context may sometimes result in overlapping and potentially competing ethical and professional obligations.

The *Guide* seeks to examine the ethical and professionalism obligations of government lawyers to consider how this unique context impacts their overlapping ethical responsibilities. The material contained below is meant to be an introductory tool and resource for law professors and law students to facilitate the exploration and understanding of the ethical and professionalism responsibilities of government lawyers, and to encourage law students to hone their legal instincts to be able to identify and effectively address ethical dilemmas that they may encounter in their early legal careers, in both the private and public sector bar.

2. Who and What is a Government Lawyer?

- Government lawyers are “public servants practicing law in the service of the *Crown* within the federal Department of Justice or within provincial or territorial counterparts or within client departments.”⁷
- “Public sector” lawyers work for federal, provincial, and municipal governments, as well as a vast number of other public entities. Crown Government lawyers form a sub-set of “public sector” lawyers.⁸

- Government lawyers specifically work for the executive branches of the federal, provincial, or municipal governments. Government lawyers can fulfill many roles, such as: litigators, legislative drafters, policy counsel, legal advisors, and prosecutors.⁹
- Government lawyers are both salaried public servants and licensed lawyers.
- Government lawyers may also be members of a union or association, and therefore subject to compliance with a collective agreement. Alternatively, government lawyers may occupy positions that provide legal services to “management” exclusively (for example, on labour and employment matters), and therefore may be excluded from membership in a union or association.
- The multi-dimensional role of government lawyers may also be performed in bilingual, bijural, national and international contexts.
- In addition to sharing the same professional duties and obligations of private sector lawyers, government lawyers are also “officers of the *Crown*”, in addition to being “officers of the Court”, they provide legal services on behalf of one “client”, the “*Crown*”, consistent with a commitment to serve the “public interest”.
- Government lawyers employed by the provinces and territories, may also provide legal services on several other legal areas, including, administrative law, civil law, criminal law, family law, legislation, policy, legal aid, Indigenous issues, and access to justice.

3. Are there a lot of Public Sector & Government Lawyers in Canada?

- While it is difficult to obtain accurate statistics about the public sector bar in general, and about government lawyers in particular, in my view, the provision of available statistics is helpful to gain a better, albeit incomplete, sense of the size and scope of the public sector bar.
- Public sector lawyers form a significant portion of the Canadian legal profession, which includes government lawyers employed in federal and provincial governments.
- Canadian public sector lawyers were 6.7% of total lawyers in 1960. By 2008/2009, they represented approximately 15-25%.¹⁰
- According to Law Society of Ontario figures, as of December 2022, it is estimated that government lawyers account for 14.45% of all lawyers in the province (6.27% federal, 6.13% provincial, 1.44% municipal, and 0.61% other).¹¹
- The latest statistics provided by the Law Society of Alberta, indicate that there are approximately 1,151 government lawyers practising law in that province, representing approximately 10% of Alberta’s lawyers.¹² However, it should be noted that these figures do not appear to clearly define “government lawyers”.
- In Nova Scotia, a Statistical Snapshot taken in 2021/22 of the Lawyer Annual Report by the Nova Scotia Barrister Society, noted that there were 116 lawyers employed by the federal government, representing 5.6% of all Nova Scotian lawyers, and 411 lawyers employed by the Province of N.S. / Legal Aid, representing 19.7% of all licensees in that jurisdiction.¹³
- In Québec, in a comprehensive statistical report titled, *Barreau-Mètre, La profession en chiffres*, the Barreau du Québec reported that for the year 2020-21, 22.94% of their members

were employed in “public or para-public organizations”, although it is not clear what this term includes.¹⁴

4. Where do Government Lawyers Work?

- Government lawyers act on behalf of the Minister of Justice or Attorney General, helping to exercise their statutory and constitutional duties (see *Appendix 1*).
- Government lawyers can be found working in every territorial, provincial, and federal government across Canada.
- Government lawyers work in the Department of Justice Canada or provincial/territorial equivalents, and numerous federal, provincial, and territorial departments, ministries and agencies.
- In the federal context, government lawyers for the Department of Justice Canada (Justice Canada) work in every territory and province across Canada, in six (6) regional offices, and in the National Capital Region.
- Justice Canada also employs “agents”, who are private sector lawyers who enter into an agreement to act on behalf of the *Crown* for particular legal matters involving the *Crown*. Such agents are often used in remote areas of Canada, and their role falls outside the purview of this *Guide*.
- Justice Canada lawyers provide dedicated legal services to approximately forty federal government departments and agencies, for example: Fisheries and Oceans Canada, Transport Canada, the Canada Border Services Agency, and the RCMP.
- In addition to receiving dedicated legal services from Justice Canada lawyers, some federal government departments also employ their own “legal advisors”, for example: Global Affairs Canada.
- “Arms-length” entities to the federal government, like Crown Corporations, may also employ their own lawyers, for example: the Canada Mortgage and Housing Corporation.
- It should be noted that crown corporations and regulatory agencies are quite different, for example, crown corporations are “agents” of “His Majesty”, whereas regulatory agencies like the Canadian Radio-Television and Telecommunication Commission is an “independent” entity and not a *Crown* agent.
- Lawyers employed by parliamentary bodies like the Senate of Canada, and the House of Commons of Canada, may not see themselves as being employed as “government lawyers”.
- Federal and provincial Crown government lawyers may also work in the international arena and provide legal services in support of Canadian international delegations to any number of countries around the world, where, for example, negotiations may take place for the purpose of concluding an international instrument, as well as a whole host of international entities and organizations to which Canada may belong to and have interests in, like the United Nations and the European Union.

5. What Does it Mean to be an Ethical Government Lawyer?

- Unlike private sector lawyers, government lawyers have multiple, overlapping sets of professional duties, which can include: (1) professional duties as licensed lawyers, (2) public law duties as extensions of the Attorney General where the lawyer is employed in a Justice or Attorney-General department/ministry context), and (3) public service duties as government employees.¹⁵ There is no clear hierarchy of these overlapping, and sometimes competing, duties.
- To be an ethical government lawyer, one must, like a private sector lawyer, comply with all professionalism and ethical duties and obligations and related authorities that form part of membership “in good standing” with provincial and territorial law societies.
- In the federal government context, for Justice Canada employees who occupy positions as government lawyers, membership “in good standing” with a provincial or territorial law society is a condition of employment with the Department.
- Government lawyers are also required to comply with the terms and conditions of their employment in the public sector where they are employed, which includes compliance with applicable codes of values and ethics.
- In the federal context, employees of federal government departments must adhere to the Values and Ethics Code for the Public Sector or to a customized version of the public sector code developed by the federal department, agency or other entity where they are employed.
- Justice Canada chose to develop its own customized code to meet the needs of its employees, titled, the Values and Ethics Code of the Department of Justice (“Code”), which came into effect on February 26, 2013.
 - The Code notes that its objective is to outline the “... *values and expected behaviours that guide public servants in the Department in all activities related to their professional duties. By committing to these values and adhering to the expected behaviours, public servants strengthen the ethical culture of the public sector and contribute to public confidence in the integrity of all public institutions.*”
 - The Code sets out the five (5) values of the federal public sector: Respect for Democracy; Respect for People; Integrity; Stewardship; and Excellence.
 - To illustrate the synergy between the values and expected behaviours set out in the Code, under the value titled, “Respect for Democracy”, the expected behaviors provide that, among other things, “*public servants shall uphold the Canadian parliamentary democracy and its institutions, by, respecting the rule of law and carrying out their duties in accordance with legislation, policies and directives in a non-partisan and impartial manner.*”
 - The Code also states that, in addition to the requirements set out in the Code, “*public servants must comply with any applicable specific codes and standards of their profession.*” This requirement would include membership “in good standing” with a provincial or territorial law society.
 - A breach of the values or behaviours stipulated in the Code, may result in disciplinary measures being taken, up to and including termination of employment.

- Justice Canada government lawyers who are members of a union or association, must also comply with the terms and conditions of the applicable collective agreement.
- Compliance with ethics codes, values and standards are also requirements for provincial government lawyers, as noted in the three examples set out below.
- **British Columbia:** public service employees must comply with the policy on Standards of Conduct for BC Public Service employees, which supports the core policy objective that public service employees exhibit the highest standards of conduct, that will instill confidence and trust and not bring the B.C. Public Service into disrepute.
 - The Policy notes that the honesty and integrity of the B.C. Public Service demands the impartiality of employees in the conduct of their duties.
- **Nova Scotia:** public servants must adhere to a Code titled, Values, Ethics, & Conduct.
 - The N.S. Code indicates that the values that provincial public servants must comply with are: Respect, Integrity, Diversity, Accountability and the Public Good.
- **Ontario:** the *Public Service of Ontario Act* provides that the “ethics executive” (Deputy Minister) of a provincial ministry or public ministry will:
 - Ensure that public servants who work in the ministry or public body are familiar with applicable conflict of interest rules; and
 - Promote ethical conduct by public servants who work in the ministry or public body.¹⁶
- In addition, federal and provincial government lawyers must also comply with statutory and regulatory requirements that apply to all public sector employees, for example, compliance with applicable privacy and access legislation.
- In the federal context, Justice Canada lawyers are required to “*speak with one voice*” in relation to the development and provision of legal advice, which means that legal advice must be consistent with the legal position of the Department.
- To achieve this consistency, Justice Canada lawyers engage in cooperative and collaborative internal consultations with colleagues, specific portfolios, policy, regional and national committees and internal subject-matter expert groups, they review precedential legal opinions, deskbooks, and departmental data-management databases, and they regularly share their legal opinions internally.
- Another feature of government lawyering at the federal level, requires Justice Canada lawyers to take on a “*whole of government*” approach to the development of legal advice. This requirement is met by reflecting on the impacts and risks of a request for legal advice, not only from the perspective of any individual federal government department or agency, but also from the broader perspective of the federal government as a whole. This approach is consistent with the fact that, ultimately, government lawyers only have one client, the *Crown*.

Reflection/Engagement

For **Students:** consider how a government lawyers’ overlapping ethical duties are similar and/or different from one another from one jurisdiction to another. Consider looking on various government websites to better understand the ethical duties expected of government employees. For example, see the Federal Government’s Values and Ethics Code for the Public Sector.

For **Professors**: consider how you approach this topic to emphasize the overlapping nature of a government lawyer's ethical duties. Students may be more familiar with duties from provincial law societies, but less familiar with other duties stemming from employment by the federal or provincial government.

For **Students** and **Professors**: consider when government lawyers comply with law society requirements as “members in good standing” and their respective code of values and ethics, whether they are lawyers first or public servants first, with regards to their overlapping professional and public sector responsibilities. What are the implications of your answer for how a government lawyer should act?

5.1 Duties from Regulators of the Legal Profession

- All government lawyers are subject to regulation by their respective provincial and territorial law societies. Some of the foundational ethical and professionalism responsibilities of licensed lawyers include, *inter alia*:
 - The duty of Loyalty (including the **4 Cs** that flow from this duty):
 - Confidentiality,
 - Candour,
 - Avoidance of Conflicts of interest, and
 - Commitment to the client's cause.
 - Competence.
 - Quality of Service.
 - The duty to encourage public respect for the administration of justice.
 - A special responsibility to uphold human rights law and avoid discrimination in their ethical relationships with law students, employees, other lawyers, and members of the public.

5.2 Duties as Government Employees

- Key **duties** applicable to all government employees include:
 - The duty of loyalty to the *Crown*.
 - The duty of political neutrality.
- Key **values** applicable to all government employees include:
 - Respect for democracy.
 - Respect for people.
 - Acting with integrity.
 - Stewardship of public resources.
 - Excellence in their work.
 - Serving the public interest.

5.3 Public Law Duties

- Some key public law duties of government lawyers include:¹⁷
 - Support the Minister's role as the official legal advisor of the Governor General or Lieutenant Governor.
 - Support the Minister's role as the legal member of the Queen's Privy Council for Canada (for federal lawyers) or for the province.
 - Assisting the Minister in their statutory and common law duty to see that the administration of public affairs is in accordance with the law, as "guardian of the rule of law".
 - Advise the *Crown* and heads of several departments on all matters of law.
 - Assisting the Minister in ensuring that government bills and proposed regulations are consistent with the *Canadian Charter of Rights and Freedoms [Charter]* and the *Bill of Rights* and provide the Minister their assessment of an inconsistency.
 - Support the Minister's role, should he or she conclude it necessary, to report such an inconsistency.
 - Regulate and conduct all litigation for or against the government. It is worthwhile to note that the government does sometimes retain private counsel, as "agents" of the *Crown*. While retained by the *Crown* in this capacity, "agents" are subject to compliance with ethics and professionalism requirements like government lawyers.
 - Draft all government legislation and statutory instruments.

5.4 Obligations to the Judiciary

- All lawyers owe the courts a duty of candour, fairness, courtesy, and respect. Government lawyers also have a duty to see that the administration of public affairs is in accordance with the law.¹⁸ This may suggest a duty that is different from simply upholding the rule of law.
- Like all lawyers, government lawyers also have a duty to defend the courts as institutions.¹⁹

5.5 Obligations to Parliament and the Legislature

- These obligations do not apply to every government lawyer. Obligations and responsibilities vary based on each lawyer's role. Obligations can include:
 - to defend Parliament's laws.
 - to act as the "guardian of the statute book".²⁰
 - For Justice Canada government lawyers only - to report to the House of Commons regarding inconsistencies between enacted/proposed legislation and the *Charter* and *Bill of Rights*.
 - to explain the government's legal position when challenged.

- It should be noted that the obligation to defend Parliament's laws is a debatable point and there are examples where government lawyers may challenge a law. For example, see *Reference re: Genetic Non-Discrimination Act*.²¹

6. What are Sources of Government Lawyers' Professional & Public Sector Obligations?

- Government lawyers have multiple sources of ethical and professional responsibilities that are interconnected and apply together.
- **Law of Lawyering:**
 - Jurisprudence.
 - Legislation (for example, provincial or territorial law society acts).
 - Provincial and territorial rules and codes of professional conduct.
 - Law society by-laws, practice directives, and legal opinions.
 - Law society disciplinary decisions.
 - Principles and norms of the legal profession.
 - *Model Code of Professional Conduct* of the Federation of Law Societies of Canada (non-binding Code), complements the mandatory codes and rules of professional conduct a lawyer is required to comply with as a member of a provincial or territorial law society, through useful commentaries that facilitate greater understanding and interpretation of applicable rules and codes of professional responsibility.
- **Law of Public Sector Employees:**
 - Jurisprudence.
 - Legislation.
 - Directives & policies.
 - Public sector employee codes of values, ethics, and expected behaviours.

Examples:

➤ **Law of Lawyering:**

Provincial & Territorial Law Society Rules and Codes of Professional Conduct: Government lawyers must be members of their respective provincial and territorial law societies, and therefore must abide by the codes and rules of professional conduct of the jurisdiction where they are licensed.²² The rules and codes of professional conduct apply with equal force to government lawyers. However, rules and codes of professional conduct may be applied differently for government lawyers. For example, the duty of loyalty, present in all provincial rules, should be adapted to account for loyalty duties of public servants, public interest responsibilities etc.

Model Code of Professional Conduct (non-binding): To harmonize rules and codes of professional conduct across Canada, provincial and territorial law societies collaborate, through the Federation of Law Societies of Canada, and in particular, the Standing Committee on the *Model Code*, whose membership includes representatives from all provincial and territorial law societies in Canada, on the development and regular update of the Model Code.

Although the Model Code is not binding on Canadian lawyers, it plays a key role in complementing and clarifying the wording of provincial and territorial rules and codes of professional conduct. This is because despite an effective drive by the Federation of Law Societies to promote uniformity in the wording of provincial and territorial rules and codes of professional conduct, there remain many differences among individual rules and codes. As such, referring to applicable sections of the rules and codes that a lawyer must comply with, as well as the equivalent sections in Model Code, often facilitates greater understanding and clarity about their meaning and interpretation.

The Model Code also sets out statements of principle followed by exemplary rules and commentaries, which contextualize the principles enunciated therein. The principles are important statements of the expected standards of ethical conduct for lawyers and inform the more specific guidance in the Rules and commentaries. The Model Code assists in defining ethical practice and in identifying what is questionable ethically. The Model Code is helpful in guiding Crown and other government lawyers whose work impacts multiple provincial and territorial jurisdictions.

➤ ***Law of Public Sector Employees:***

Duties of Public Servants - Departmental Codes of Values, Ethics & and Behaviours: Government lawyers are bound by the ethics codes of government departments. For example, federal government lawyers are bound by the *Values and Ethics Code of the Department of Justice Canada*. This Code is based on a framework of values that prioritizes democratic, professional, ethical, and people values. Moreover, the Code aims to preserve public confidence in the integrity of the public service. Public service employees who do not comply with the Code are subject to disciplinary action, which can include termination of employment. Moreover, government lawyers are also bound by statute and common law regarding the duties of public servants.

Reflection/Engagement

For Students: consider how the Model Code is both similar to, and different from, the law society rules in your relevant jurisdiction. This may spur questions for your professor, or research topics of interest. Does the Model Code contain any different Rules that you think would be useful in your jurisdiction?

For Professors: note that the Model Code is not a binding source of ethical obligations. Ensure that Students understand this. However, the Model Code may serve as a useful teaching tool, especially where students may be working in various jurisdictions.

7. Who are Government Lawyers Loyal to and Why?

- A government lawyer's sole client is the *Crown* (see *Appendix 2*).
- Government lawyers serve the executive branch of government.²³ However, a government lawyer's duties are to the current elected government, not a particular political party.²⁴ John Keyes writes that:
*"Loyalty to an individual client cannot be replicated in the context of a complex government client that acts through a variety of individuals who may shift over time as members and governments are elected and defeated"*²⁵
- The *Crown* is a single client, who should speak with one voice.²⁶ Government lawyers therefore, require a "government-wide perspective, beyond the individual department mandates", in order to effectively serve their client.²⁷ To speak with one voice, government lawyers should avoid adversarial positions with their legal colleagues in other departments, and seek to maintain consistency in legal advice across the government.²⁸

Reflection/Engagement

For Students: consider reading John Tait's "The Public Service Lawyer, Service to the Client and the Rule of Law"²⁹. While this is an older piece, it conveys many seminal ideas regarding the duty of loyalty and insight into the experience of being a government lawyer. Mr. Tait provides a number of useful insights as a former practicing government lawyer with the Justice Department.

For Professors: consider how the lawyer-client relationship for government lawyers is similar to in-house counsel. This may provide an interesting comparator for students. You may also ask students whether they *should* be treated similarly or not.

7.1 Determining the Client's Interests

- One of the primary responsibilities of a government lawyer, like all other lawyers, is to protect and advance their client's interests. However, defining the government's interests are often more challenging than doing so for a private sector client. The *Crown* represents the interests of Canadian society, unlike a private client with a singular interest.³⁰ Both the government itself, as well as the government lawyer as a public servant, have a role in defining the government's interests.
- Determining and advancing the client's interests in the case of government lawyers who do not represent the *Crown*, that is, lawyers who work for municipalities, regulatory bodies, legislative and judicial bodies, would be different than for government lawyers, and may involve consideration of different or additional interests.

- The government has a primary role in defining its interests, through its policies, mandates, stated objectives, and explicit instructions given to lawyers from appropriate officials. Government lawyers are primarily responsible for legal matters, but they also help to define the government interest by ensuring government action is “lawful, ethical, respectful of due process, and of the constitution”.³¹

7.2 Serving the Public Interest

- The public interest is not a monolithic concept and considers a variety of factors.
- Government lawyers, as extensions of elected officials, work in support of the public interest. For high profile matters, the Minister of Justice/Attorney General likely defines which legal strategies are in the public interest. However, the Minister of Justice/Attorney General does not define the public interest in a vacuum, rather, they take a ‘whole-of-government’ approach in their work.³²
- Government lawyers do not define the public interest, nor is the public considered a client.
- Government lawyers do not put their own views of the public interest ahead of those of elected officials.³³
- A government lawyer’s work does consider the public interest. However, government lawyers serve as advisors, not decision makers regarding what types of government action best serve the public.
- Government lawyers serve an important function in the Canadian democracy. First, they ensure policies and legislation are lawful and consistent with the constitution.³⁴ Second, they “promote and uphold the rule of law”.³⁵ John Tait writes that:

“The duty to promote and uphold the rule of law means that there is a quality of objectivity in the interpretation of the law that is important to the public service lawyer. There must be a fair inquiry into what the law actually is. The rule of law is not protected by unduly stretching the interpretation to fit the client’s wishes. And it is not protected by giving one interpretation to one department and another to another department. The rule of law applies to the government as a whole”.³⁶

8. Do Government Lawyers Have Higher Ethical Obligations than Private Sector Lawyers?

- Canadian law does not require a higher level of ethical obligations for government and government lawyers as compared to private sector lawyers. However, the context of ethical challenges for all government lawyers is different from private sector lawyers.
- Rules and Codes of professional conduct for lawyers across Canada’s provinces and territories do not mandate a higher ethical obligation for Crown or any other type of government lawyers.

- Canadian jurisprudence does not mandate a higher ethical standard for government lawyers.³⁷
- Because a government lawyer's duties stem from their public office, they may be expected to conduct themselves to the highest standard.³⁸ Importantly, being held to a high standard does not connote a *higher* standard than the entire class of private lawyers.³⁹ Government lawyers should be cognizant of how their conduct reflects on the justice system and the legal profession.
- Nonetheless, there remains an on-going debate regarding whether government lawyers *should* have higher ethical obligations than private sector lawyers. (See *Appendix 3*)

Reflection/Engagement

For Students: consider how the information above is different from your previous understanding with regards to government lawyers. Have your class discussions changed your perspective regarding the expectations of government lawyers?

For Professors: this is often a major point of discussion with students. Professors may wish to engage in a normative debate with students regarding whether they think Crown and other government lawyers *should* or *should not* have higher ethical duties than private sector lawyers. *Everingham v Ontario* is likely a case relevant for discussion.

9. How Do Government Lawyers Respond to Conflicts of Interest?

- Both government and private sector lawyers are precluded from acting for a client where they have a conflict of interest, except as permitted under applicable rules and codes of professional conduct.
- Avoiding conflicts of interest is a key facet in preserving a lawyer's loyalty to their client(s).
- Government lawyers face unique conflict of interest challenges because they work in various government departments, ministries, crown corporations, and other public entities, each with their own mandates and objectives.
- For example, government lawyers can face a unique challenge in providing sound legal advice to various government departments and ministries, while simultaneously maintaining a unified and consistent legal position with all other government lawyers. Yet, government lawyers are required to speak with 'one voice', which requires them to work collaboratively to resolve inconsistencies in legal positions, interests of the client, etc.
- In addition, government lawyers, like many other lawyers, often become involved in activities outside of the workplace context. They may have moral or religious views that conflict with those of the client on a given matter, and should accordingly not act in that matter (for example, views on abortion or medical assistance in dying).
- For government lawyers, involvement in such activities may require careful consideration to ensure that such activities do not place them in an apparent or actual conflict of interest

situation vis à vis their public sector employer, in conformity with their ethical and other obligations as public sector employees.

Reflection/Engagement

For **Students** and **Professors**: consider how do you think a government lawyer should approach a potential conflict of interest situation compared to a private sector lawyer? What are the similarities and differences? How would the approach of a government lawyer differ from an in-house lawyer?

10. How are a Government Lawyer's Duties of Loyalty Different than a Private Sector Lawyer?

- Loyalty is an essential ethical obligation for all lawyers in order to foster trust with their clients, and trust in the legal system as a whole.⁴⁰
- All provincial and territorial law societies' rules and codes of professional conduct (as well as the Model Code of Professional Conduct), stipulate that a duty of loyalty is the foundation of the solicitor-client relationship. The duty extends to both current and former clients.
- Like private sector clients, the *Crown* requires full confidence and trust in their legal advisors.
- Government lawyers face unique loyalty obligations because they are bound by both their respective codes and rules of professional conduct, as well as their duty of loyalty as civil servants.
- Lord Brougham famously wrote that a lawyer "*knows but one person in the world, and that person is his client*".⁴¹ Lord Brougham continued that a lawyer should "*save that client by all means and expedients, and at all hazards and costs*".⁴² However, a government lawyer's resolute advocacy should be moderated by their responsibility to consider the public interest.
- The duty of loyalty is based on the fiduciary relationship between lawyers and their clients. As highlighted in the Model Code, "arising from the duty of loyalty are other duties, such as a duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the duty to avoid conflicting interests".⁴³

10.1 Duty of Loyalty for Public Servants

- Public service codes of conduct codify the duty of loyalty for public servants separately from a lawyer's professional duties from law societies' rules of professional conduct. However, the two distinct duties of loyalty co-exist (although not always seamlessly).
- Public service employees have a duty of loyalty to the *Crown*. The duty of loyalty is to the Government of Canada, and not to the political party currently in power.⁴⁴ A public servant's duty of loyalty is primarily seen as a duty of political neutrality. The duty of loyalty is an essential part of effective governance.⁴⁵

- An essential part of a public servant's duty of loyalty is to refrain from public criticism of the government. For public servants, the duty of loyalty is not absolute, and public criticism may sometimes be justified in three primary situations.⁴⁶
 - First, where the government is engaged in illegal acts.
 - Second, where a government policy jeopardizes life, health, or safety.
 - Third, where the criticism does not impact the public servant's ability to perform their duties effectively and does not impact the public perception of their duties.⁴⁷
- However, government lawyers should be cognizant of how exercising their *Charter* rights of freedom of expression can impact their duties of loyalty as lawyers and perceived conflicts of interest.⁴⁸

11. How Do Government Lawyers Maintain Confidentiality?

- Solicitor-client privilege is an essential requirement for the administration of justice.⁴⁹ Just like private sector clients, the government requires confidence in the protection of its open communication with government lawyers.
- Government lawyer-*Crown* relationships do attract solicitor-client privilege and rules of professional conduct regarding privilege apply to government lawyers. However, privilege may be subject to slightly different constraints in the public sector.⁵⁰
- Some scholars analogize the application of solicitor-client privilege in the context of government lawyering to that of private sector in-house corporate counsel. In-house counsel provides both legal and non-legal advice to their client.
- In this context, the duty of loyalty is owed to the *Crown* as client, and not to the individual from whom the lawyer takes instructions.
- First, privilege only applies to work produced in the lawyer's legal capacity.
- Second, privilege only applies to communication with the substantial purpose of providing legal advice.⁵¹

Reflection/Engagement

For **Students** and **Professors**: consider who the duty of confidentiality applies to for government lawyers? For example, consider a situation in which a government lawyer is asked to disclose documents to a law society investigator in the midst of a litigation. A government lawyer does not own litigation documents. Rather, litigation documents belong to the *Crown* and may only be disclosed with its consent. In addition, a government lawyer must be cognizant of other applicable federal or provincial legislation that may apply to the documents, for example, access and privacy legislation.

Both students and professors may want to explore broader case law on the issue of confidentiality and privilege to develop their understanding of this topic (i.e. not limited to facts

specifically regarding government lawyers). In this context, recognition must also be given to applicable Crown disclosure requirements in criminal and civil proceedings.

11.1 Types of Communication Subject to Privilege

- Solicitor-client privilege attaches to legal advice and opinions given by government lawyers.⁵²
- Privilege may attach to communications between government employees and government lawyers if the communication is in relation to legal advice.
- Draft legislation that contains comments from a government lawyer may be subject to privilege.⁵³ Nonetheless, there is authority for the view that all legislation drafted by lawyers is subject to solicitor-client privilege, on the basis that draft legislation itself is a legal opinion and that its text legally implements the client's instructions.⁵⁴
- Privilege may extend to communications written by non-lawyers if it contains a government lawyer's legal advice.⁵⁵
- Documents may not lose their privilege when shared between government departments.⁵⁶
- However, I note that Professor John Keyes, in reviewing the above point, argues that, if documents are shared with the *Crown* (among its departments), how can this amount to waiver privilege anymore than other internal document sharing.
- Privilege typically does not cover:
 - Policy advice.⁵⁷
 - Communications where a government lawyer is not contacted in their legal capacity.⁵⁸
 - The end-product of a government lawyer's legal advice.⁵⁹

11.2 Consent to Disclosure of Privileged Information/Documents

- A client may consent to the disclosure of privileged information/documents.⁶⁰ For government lawyers, privilege belongs to the *Crown*, not an individual department.⁶¹ Waiver of privilege likely requires a higher level of departmental authorization. This generally means the Cabinet advising the Governor General, although there is some caselaw suggesting that it can be waived by lower-level officials.⁶²
- Parliamentary privilege takes precedence over solicitor-client privilege. This also applies to provincial legislatures and their committees.⁶³
- Parliament and provincial legislatures can require the production of any paper or records without restriction, including those that are subject to solicitor-client privilege, and it is a matter of parliamentary discretion whether to respect the solicitor-client privilege or not.⁶⁴ However, Professor John Keyes argues that this position is based on a ruling of the Speaker of the House of Commons and has not yet been accepted by a court of law.
- Disclosure within a government department does not constitute a waiver of privilege.
- Where statute requires disclosure of information, this does not amount to waiver of privilege.⁶⁵

11.3 Privilege and Illegal Acts

- Lawyers cannot knowingly assist or encourage illegal conduct by their clients. Like private sector lawyers, government lawyers are required to withdraw from representing their client if they are participating in illegal activity or acting dishonestly.
- The limit on the duty of loyalty should be reached only in the most compelling circumstances when there is no basis for believing there is a legal argument to support government action.⁶⁶
- In the federal government context, minor illegal actions may be addressed internally by senior departmental officials or by the Public Sector Integrity Commissioner.⁶⁷
- In this same context, government lawyers may make public disclosure of illegal actions if there is an imminent risk of substantial and specific danger to life, health and safety of persons.
- Privilege does not prevent a government lawyer from disclosing illegal action within their department.⁶⁸

12. How Does a Government Lawyer Withdraw from Representing the Crown?

- A lawyer should only withdraw from representing a client with a justifiable cause, and with reasonable notice to the client.
- Government lawyers only serve a single client, the *Crown*, and therefore withdrawal from representation can be more complicated than for private sector lawyers with several client files.
- If a government lawyer feels unable to continue representing a particular government department or ministry, or is unable to continue working on a specific file, such an issue is usually brought to the attention of the lawyer's immediate supervisor / manager for further discussion, consideration, and depending on the significance of the issue/file involved, potentially consultation with senior management, to determine whether a file may be reassigned to a different lawyer within the particular legal team or unit.
- The process of withdrawal for government lawyers is comparable to that of private sector or in-house lawyers. However, unlike private sector lawyers who serve many clients, government lawyers serve a single client, the *Crown*. Therefore, the only means of withdrawal from representing the *Crown* as a client is to resign. However, resignation is often an "untenable position for many government lawyers".⁶⁹ Actual resignation from employment in the public sector as a consequence of a withdrawal from representation will be an extremely rare occurrence for government lawyers.
- Such a rare situation may occur when a lawyer's concerns go beyond a particular file or department and embrace the government as a whole.

Reflection/Engagement

For **Students**: consider how you would approach dealing with ethical dilemmas if you were a government lawyer? Does resignation seem like a tenable approach for you?

For **Professors**: consider a discussion on how in-house counsel and government lawyer withdrawal obligations/procedures are both similar and different. Consult both the relevant law society rules as well as the Model Code.

13. How Does a Government Lawyer Take Instructions from Their Client?

- The way that government lawyers take instructions from their clients is highly context specific and is not always comparable to taking instructions from an individual private sector client. However, there are some similarities between the solicitor-client relationship for government lawyers and for in-house counsel.
- Government lawyers work for various government departments and ministries, yet their sole client is still the *Crown*. Therefore, there may be an “institutional tension” in “determining a single, overall *Crown* position” and determining the appropriate course of action.⁷⁰
- The *Crown’s* authority is exercised by government ministers or government public office holders. Ministers and public office holders then exercise power through public service employees.⁷¹ Government lawyers are required to ensure that they take instructions from individuals with the authority to decide the *Crown’s* interests on a specific matter.⁷²
- Often, an individual minister or department official is “the relevant emanation of the *Crown*” and the client from whom a government lawyer takes instructions.⁷³
- In the criminal context, the Attorney General and *Crown* litigators have sole responsibility for making prosecutorial decisions.⁷⁴
- Government lawyers must remain aware that their client, the *Crown*, is distinct from the public servants who often give instructions to counsel. A government lawyers’ ultimate duty is still to the *Crown*, not the individual government official providing instructions. Government lawyers must ensure that the *Crown’s* interests are being served and protected. In practice, this objective is accomplished by raising the matter with instructing officials and if concerns persist, to raise the issue with higher level officials.

14. How are Government Lawyers Impacted by Principles of Reconciliation?

- The government has a unique relationship with the Indigenous peoples in Canada. This relationship is recognized in the constitutional principle of the honour of the *Crown*.
- The Honour of the *Crown* is a fundamental part of Canada’s unique relationship with Indigenous peoples, and a core tenant of the reconciliation process.⁷⁵ The Honour of the *Crown* “guides the conduct of the *Crown* in all of its dealing with Indigenous peoples”.⁷⁶
- In their outward conduct, government lawyers have a duty to act with “honour, integrity, good faith, and fairness” when dealing with Indigenous peoples, both in their legal positions and in their expressions.⁷⁷
- For government lawyers working in an advisory capacity, legal opinions should be consistent with the honour of the *Crown*.⁷⁸

- A private sector lawyer’s typical approach to “zealous advocacy” for their client, might undermine the duty to uphold the honour of the *Crown* for government lawyers.⁷⁹
- In the federal context, government lawyers consult the Attorney General of Canada’s “*Directive on Civil Litigation Involving Indigenous Peoples*” for further guidance concerning this issue.⁸⁰

Reflection/Engagement

For **Students**: remember your professional duties regarding reconciliation. Consult the Truth and Reconciliation Commission’s 2015 Calls to Action, review the *United Nations Declaration on the Rights of Indigenous Peoples Act (UNDRIP)*, which was implemented in Canada in 2021.

For **Professors**: the topic of reconciliation may warrant a stand-alone lecture/seminar. Consider assigning readings from the Directive highlighted above. You may also want to discuss Calls to Action #27 and #28 from the Truth and Reconciliation Commission of Canada.

For **Professors** and **Students**: Consider whether a government lawyer can apply a “zealous advocacy” litigation approach and still comply with their duty to uphold the Honour of the *Crown*, as discussed in *Attawapiskat First Nation v Ontario*.⁸¹

Appendices

Appendix 1: The Dual Role of the Federal Minister of Justice and Attorney General of Canada

The Minister of Justice is *ex officio* (as a result of their position) the Attorney General of Canada.⁸² Therefore, one individual holds both positions. The Minister of Justice is an elected member of parliament, with their seat in cabinet “anchored to matters concerning the law”.⁸³ It is often said that this elected individual wears two “hats”.

Professor Adam Dodek describes one “hat” as political, and the other as constitutional. In their political role, the Minister of Justice is a member of cabinet, and a member of the governing political party. In their constitutional role, the Attorney General advises the executive branch of government and represents the *Crown* in both criminal and civil litigation.⁸⁴

The Minister of Justice is the official legal advisor of the Governor General and is responsible for seeing “that the administration of public affairs is in accordance with the law”.⁸⁵ It is important to note that the Minister, in their role as Attorney General is the federal government’s chief legal

advisor, however, they are not the chief decision maker.⁸⁶ Government ministers make the final decisions for the federal government.

Appendix 2: The Crown as a Client

Unlike most private sector clients, the *Crown* can be a difficult entity to clearly define. The *Crown* is a “social construct”, and “the supreme executive power of the state, above the structure of government in the state, and designed as a point in the constitution from which other powers are measured, created, and controlled.”⁸⁷

The *Crown* is a symbol, unlike many private-sector clients who are real persons or groups of persons. For government lawyers, it is difficult to take instructions from a symbol. Rather, government lawyers need more specific representatives of the *Crown* from whom to take instructions. Therefore, government lawyers most practically take instruction from representatives of a minister. Sometimes, more senior authorization is required.⁸⁸

Government lawyers must also bear in mind the distinctions between the executive branch of government (their client), and other quasi government agencies (not their client). Many quasi-government agencies have legal counsel that is distinct from the Department of Justice or Ministries of the Attorney General.⁸⁹

Appendix 3: Should Government Lawyers Have a Higher Ethical Obligation Than Private Sector Lawyers?

A higher ethical obligation for government lawyers is not the law in Canada. Both provincial rules of professional conduct, as well as Canadian jurisprudence both explicitly and implicitly suggest that government lawyers are not held to different ethical standards than private lawyers.

Many scholars, such as Deborah MacNair, highlight the additional duties of government lawyers. However, those additional duties are not necessarily higher duties. MacNair writes:

“There is no doubt that government counsel face different policy and operational concerns, which may give rise to other duties: a duty to use government litigation and other resources efficiently and to avoid waste of public funds; a duty to ensure that their 'representation before the courts is fair and accurate; a duty to avoid letting personal values and biases override the public policy choices of client officials and the Crown; a duty to respect the public interest role in their work where it is appropriate to do so. None of these, however, can fairly be said, according to the courts or the law societies, to translate into enforceable higher or special ethical duties.”⁹⁰

Nevertheless, there remains a live academic debate regarding whether government lawyers *should* have a higher level of ethical obligations.⁹¹ Some prominent scholars such as Adam Dodek argue that government lawyers should be held to a higher ethical standard because they exercise public power when they interpret and advise on the powers and duties of the government.⁹²

Others suggest that government lawyers do not wield any decision-making powers, and only provide legal advice to decision-makers. Professor John Keyes warns not to confuse power with influence.⁹³ Overall, the question of whether government lawyers *should* have a higher ethical obligation than private lawyers remains unsettled.

Case Studies

This section highlights some key jurisprudence that illustrates the unique contextual challenges of being a government lawyer.

Case 1: *Schmidt v Canada (Attorney General)*, 2018 FCA 44

Schmidt v Canada highlights the intersection of government lawyers' duties of loyalty, public law duties, and constitutional duties.

In this case, the Plaintiff was employed as General Counsel for the Department of Justice. He raised concerns within the Department, up to the level of the Deputy Minister, as well as the Public Service Integrity Commissioner, that a proposed legislation was inconsistent with the *Canadian Charter of Rights and Freedoms*. The Department has a statutory duty to examine proposed legislation for inconsistencies with the Charter, and to report those inconsistencies to the House of Commons. The Plaintiff sought a court declaration that the threshold for triggering the reporting obligation was too high. The Federal Court of Appeal held that the existing departmental standards were correct.

Schmidt is a prime example of the tensions between a government lawyer's duty to their client and their duties as extensions of the Attorney General. Typically, a lawyer's duty of confidentiality and loyalty to their client is paramount- and Schmidt's public confrontation of his Client (the *Crown*) could be seen as in violation of his duty of loyalty. The case also demonstrates that these tensions are not easily resolved and can be highly controversial.

Case 2: *Everingham v Ontario*, (1992), 8 OR (3d) 121, DLR (4th) 755 (Div. Ct.), *aff'd on other grounds* (1991) 84 DLR (4th) 354, 3 CPC (3rd) 87 (Ont Gen Div)

Everingham v Ontario highlights the debate regarding whether government lawyers have a higher ethical duty than private sector lawyers.

In this case, the Attorney General for Ontario appealed an order to disqualify a *Crown* solicitor from involvement in a lawsuit. The application was brought against the *Crown* solicitor by a patient at a psychiatric hospital. The *Crown* solicitor was touring the psychiatric hospital before he was scheduled to cross examine an applicant on his affidavit. The solicitor spoke to the witness he was set to examine. The motions judge determined that the meeting and subsequent conversation was purely coincidental. Information about the legal proceeding was not discussed.

The motion judge originally ruled against the solicitor, finding that he had breached the Rules of Professional Conduct by talking to a vulnerable witness without legal representation and outside the courtroom. The judge also asserted that government lawyers have a higher professional obligation than other lawyers.

However, that finding and holding were overturned and the Ontario Divisional Court instead held that government lawyers do not owe a higher duty than other lawyers. The Divisional Court found that government lawyers “stand on exactly the same footing as every member of the bar”. Nonetheless, the Divisional Court still removed the lawyer from the record in “the interests of justice”.

Everingham is often cited in support of the argument that government lawyers do **not** have a higher ethical duty than private sector lawyers. However, this 1992 decision is only binding in Ontario.

Case 3: Compliance with Law Society Requirements by Government Lawyers

Where a complaint is filed against a licensee of a provincial or territorial jurisdiction, the law society where the lawyer is licensed, has the discretion to determine that it will investigate that complaint. In the pursuit of that investigation, a law society may obtain files, communications and other documents that are subject to privilege, from a licensee.

In this context, where the law society makes such a demand from a licensee who is a government lawyer, and the files involved are privileges governmental records, the government lawyer could find him or herself in an ethical dilemma. This is because, if the government lawyer discharges his or her duty, as a member in good standing of provincial or territorial law society, and complies with the valid regulatory requirement of that law society to co-operate with the investigation, and discloses privileged government records that belong to the *Crown*, the government lawyer may be in breach of applicable and equally valid government access and privacy legislation, that the lawyer must also comply with, in their capacity as a public sector employee.⁹⁴

How would you resolve this ethical dilemma?

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¹¹ Statistics provided by the Law Society of Ontario in June 2023 are estimates only and not to be relied on by anyone for any purpose.

¹² Statistics on the number of government lawyers in Ontario and Alberta were provided via email communication from the Law Society of Ontario and the Law Society of Alberta respectively.

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- ³² Sanderson *supra* note 4 at 133.
- ³³ Hutchinson *supra* note 3 at 119.
- ³⁴ Michael Morris & Sandra Nishikawa, “The Orphans of Legal Ethics: Why government lawyers are different – and how do we protect and promote that difference in service of the rule of law and the public interest” 26 CJALP 171 at 176 [Morris and Nishikawa].
- ³⁵ Tait *supra* note 26 at 543; see also Morris and Nishikawa *supra* note 34 at 175.
- ³⁶ Morris and Nishikawa *supra* note 34 at 174, quoting Tait *supra* note 26 at 543.
- ³⁷ In *Everingham v Ontario*, (1992), 8 OR (3d) 121, 88 DLR (4th) 755 (Div Ct), *aff’d* on other grounds (1991) 84 DLR (4th) 354, 3 CPC (3d) 87 (Ont Gen Div) [Everingham].
- ³⁸ *Everingham supra* note 27; Sanderson *supra* note 4 at 14.
- ³⁹ Sanderson *supra* note 4 at 14.
- ⁴⁰ John Mark Keyes, “Loyalty, Legality, and Public Sector Lawyers” (2019) 97:1 Can Bar Rev 129 at 132 [Keyes “Loyalty, Legality”], quoting *R v Neil*, 2002 SCC 70; see also *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7.
- ⁴¹ *R. v Neil*, 2002 SCC 70 at 12 [Neil]; see also Dodek “The Unique Role” *supra* note 2 at 35.
- ⁴² *Neil supra* note 41 at para 12.
- ⁴³ Federation of Law Societies of Canada, “Model Code of Professional Conduct”, online: FLSC < <https://flsc.ca/what-we-do/model-code-of-professional-conduct/> > at 3.4-1, commentary 5.
- ⁴⁴ *Fraser v Canada (Public Service Staff Relations Board)*, [1985] 2 SCR 455, 23 DLR (4th) 122 [Fraser].
- ⁴⁵ *Fraser supra* note 44.
- ⁴⁶ *Fraser supra* note 44; “Duty of Loyalty”, online: Government of Canada <https://www.canada.ca/en/treasury-board-secretariat/services/values-ethics/code/duty-loyalty.html#p01> [Duty of Loyalty].
- ⁴⁷ “Duty of Loyalty” *supra* note 46.
- ⁴⁸ Sanderson *supra* note 4 at 235.
- ⁴⁹ *R. v Campbell*, [1999] 1 SCR 565, 171 DLR (4th) 193 at para 49 [R v Campbell].
- ⁵⁰ Sanderson *supra* note 4 at 143; *R v Campbell supra* note 49 at para 52.
- ⁵¹ Deborah Macnair, “Solicitor-Client Privilege and the Crown: When is a Privilege a Privilege” (2003) 82:2 Can Bar Rev 213 at 222 [Macnair “Solicitor-Client Privilege”].
- ⁵² Sanderson *supra* note 4 at 143; Adam Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis Canada, 2014) [Dodek “Solicitor-Client Privilege”] at para 6.47; *Idziak v Canada (Minister of Justice)*, [1992] 3 SCR 631, 97 DLR (4th) 577.
- ⁵³ Dodek “Solicitor-Client Privilege” *supra* note 52; *British Columbia Teachers’ Federation v British Columbia*, 2016 SCC 49; *Robin Quinn v Canada (Justice)*, 2008 FC 376.
- ⁵⁴ See *British Columbia Teachers’ Federation v British Columbia*, 2010 BCSC 961, at para 42.
- ⁵⁵ Dodek “Solicitor-Client Privilege” *supra* note 52.
- ⁵⁶ Sanderson *supra* note 4 at 145.
- ⁵⁷ *R v Campbell supra* note 49; Dodek “Solicitor-Client Privilege” *supra* note 52.
- ⁵⁸ *R v Campbell supra* note 49.
- ⁵⁹ Dodek “Solicitor-Client Privilege” *supra* note 52.

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- ⁶⁰ Dodek “Solicitor-Client Privilege” *supra* note 52.
- ⁶¹ Sanderson *supra* note 4 at 147.
- ⁶² See *Peach v Nova Scotia (Transportation and Infrastructure Renewal)*, 2010 NSSC 91, at para 38.
- ⁶³ Dodek “Solicitor-Client Privilege” *supra* note 52.
- ⁶⁴ Dodek, “Solicitor-Client Privilege” *supra* note 52.
- ⁶⁵ *Stevens v Canada (Prime Minister)*, [1998] 4 FC 89, 161 DLR (4th) 85 (CA); Macnair “Solicitor-Client Privilege” *supra* note 51 at 228.
- ⁶⁶ Keyes “Loyalty, Legality” *supra* note 40 at 140.
- ⁶⁷ Keyes “Loyalty, Legality” *supra* note 40 at 149.
- ⁶⁸ Dodek “Solicitor-Client Privilege” *supra* note 52.
- ⁶⁹ Jennifer Leitch, “A Less Private Practice: Government Lawyers and Legal Ethics” (2020) 43:1 Dal LJ 315 at 324 [Leitch].
- ⁷⁰ Sanderson *supra* note 4 at 136.
- ⁷¹ Keyes “Loyalty, Legality” *supra* note 40 at 136.
- ⁷² Deborah MacNair, “In the Service of the Crown: Are Ethical Obligations Different for Government Counsel” (2005) 84:3 Can Bar Rev 502 at 516 [MacNair “In the Service of the Crown”].
- ⁷³ Tait *supra* note 26 at 545.
- ⁷⁴ Sanderson *supra* note 4 at 245.
- ⁷⁵ 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 444 [Martin and Telfer]; 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 (Winnipeg: The Commission, 2015) at 6.
- ⁷⁶ Canada, Department of Justice, *The Attorney General of Canada’s Directive on Civil Litigation Involving Indigenous Peoples*, (Directive), (2018), online: <<https://www.justice.gc.ca/eng/csj-sjc/ijr-dja/dclip-dlcpa/litigation-litiges.html>> [Directive on Civil Litigation Involving Indigenous Peoples].
- ⁷⁷ Directive on Civil Litigation Involving Indigenous Peoples; Sanderson *supra* note 4 203.
- ⁷⁸ Martin and Telfer *supra* note 75 at 467.
- ⁷⁹ Leitch *supra* note 69 at 321-322.
- ⁸⁰ Directive on Civil Litigation Involving Indigenous Peoples *supra* note 76.
- ⁸¹ *Attawapiskat First Nation v Ontario*, 2022 ONSC 1196 at para 9 (Div Ct).
- ⁸² *Department of Justice Act* *supra* note 18 at s 4.
- ⁸³ Sanderson *supra* note 4 at 31; *Department of Justice Act* *supra* note 18 at s 4.
- ⁸⁴ Dodek “The Unique Role” *supra* note 2 at 29.
- ⁸⁵ *Department of Justice Act* *supra* note 18, at s 4(a).
- ⁸⁶ Dodek “The Unique Role” *supra* note 2 at 31.
- ⁸⁷ Dodek, “Lawyering at the Intersection” *supra* note 6 at 12.
- ⁸⁸ Dodek “Lawyering at the Intersection” *supra* note 6 at 12-13.
- ⁸⁹ Sanderson *supra* note 4 at 102.
- ⁹⁰ MacNair “In the Service of the Crown” *supra* note 72.
- ⁹¹ See for example Martin and Telfer *supra* note 75.
- ⁹² Dodek “Lawyering at the Intersection” *supra* note 6.
- ⁹³ Keyes “Loyalty, Legality” *supra* note 40 at 143.
- ⁹⁴ See for example Andrew Flavelle Martin, “Legal Ethics for Government Lawyers: Confronting Doctrinal Gaps” (2022) 60:1 Alta L Rev 169 at 191-196.