

IN THE SERVICE OF THE CROWN: ARE ETHICAL OBLIGATIONS DIFFERENT FOR GOVERNMENT COUNSEL?

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This article examines the traditional assumptions about the application of traditional professional ethical rules to government lawyers. As these rules have been developed largely with the needs of private practitioners and law firms in mind, it is suggested that there is a need to take into account the differences and similarities in the roles of private and government practitioners when the rules are interpreted and applied. Consequently, a contextual approach is useful to consider in coming to grips with ethical challenges faced by government practitioners.

Le présent article porte sur les principes classiques concernant l'application des règles de déontologie traditionnelles aux avocats œuvrant auprès du gouvernement. Comme ces règles ont principalement été élaborées pour répondre aux besoins des avocats exerçant en pratique privé et des cabinets juridiques, l'article suggère qu'il faut tenir compte des différences et des similarités des fonctions exercées par les avocats qui travaillent en pratique privée et ceux qui travaillent pour le gouvernement lors de l'interprétation et de l'application de ces règles. Il y aurait donc lieu d'adopter une approche contextuelle pour appréhender les problèmes éthiques auxquels font face les avocats qui travaillent auprès du gouvernement.

Introduction

It is presumed that the legal profession is homogeneous, and that all lawyers, whether with the public or private bar,¹ share the same professional ethics and values.² For the most part these ethics and values are enshrined in

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¹ There are no reliable statistics available on how many public sector lawyers currently practice in Canada. In 1996 it was estimated there were approximately 10,000: "Calling all public sector lawyers" *The National* 5:3 (May 1996) 38. See generally Deborah MacNair, "The Role of the Federal Public Sector Lawyer: From Polyester to Silk" (2001) 50 U.N.B.L.J. 125; Owen Lippert, "The Cost of Justice — The Department, that is" *Canadian Lawyer* 23:8 (August 1999) 14; Patrick J. Schiltz, "On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession" (1999) 52 Vand. L. Rev. 871.

² See generally James R. Harvey III, "Loyalty in Government Litigation: Department of Justice Representation of Agency Clients" (1996) 37 Wm. & Mary L. Rev. 1569;

written form in the various law society codes of professional conduct³ and the Canadian Bar Association's *Code of Professional Conduct*.⁴ While there may still be a core of commonality among members of the legal profession, as is evidenced by the key uniform provisions in codes of professional conduct, there is nevertheless a divergence in understanding by private and government counsel of their respective roles and, consequently, the interpretation of their ethical obligations.⁵ There is a need for the differences and similarities to be recognized so that the interpretation of the governing principles and standards is more contextual and driven by the operational needs for each.⁶ This may not necessitate any changes to existing policies, laws or codes, but it may require a change in traditional thinking and recognition that the ethical challenges are different.⁷ It is this issue which is the focus of this article.⁸

The duty to adhere to ethical standards is a fundamental tenet on which the professional standards of all lawyers are built. The independence of the

William Josephson & Russell Pearce, "To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients are in Conflict?" (1986) 29 *How. L.J.* 539.

³ The codes of professional conduct for law societies across Canada are available online: Federation of Law Societies <http://www.flsc.ca/en/lawSocieties/act_Regulations.asp>.

⁴ (Ottawa: Canadian Bar Association, 2006) [*CBA Code*], as adopted by Council, August 2004 and February 2006, online: <<http://www.cba.org/CBA/activities/code>>. The CBA Council adopted revisions to the *Code* in 2004 and 2006 as a result of consultations with the profession. See *Modernizing the CBA Code of Professional Conduct*, online: <<http://www.cba.org/CBA/EPIIgram/Mar2004/>>.

⁵ The term "public sector counsel" is often used interchangeably with "government counsel" and, for ease of reference, most of the references are to federal government counsel. As the focus of this article is primarily on government counsel, the term "government counsel" is used throughout.

⁶ Deborah MacNair, "Solicitor-Client Privilege and the Crown: When is a Privilege a Privilege?" (2003) 82:3 *Can. Bar Rev.* 213; Deborah MacNair, "Legislative Drafters: A Discussion of Ethical Standards from a Canadian Perspective" (2003) 24 *Stat. L. Rev.* 125.

⁷ The Government Lawyers' Committee of the Law Society of New South Wales issued guidelines, *Guidance on Ethical Issues for Government Solicitors*, in 2003, online: <http://www.lawsociety.com.au/uploads/filelibrary/1063349218109_0.6487510402009506.pdf>. It is non-binding but recognizes the unique role of government counsel. See also *W.R.D. v. Her Majesty The Queen*, [1995] 1 S.C.R. 758 (government counsel not in conflict of interest when one part of the justice department defends a civil action where a victim of sexual assault sues the provincial government for negligence resulting from the prosecution of the offence by that same department).

⁸ The role of the corporate counsel is not dealt with in this article. See Timothy P. Terrell, "Professionalism as Trust: The Unique Internal Legal Role of the Corporate General Counsel" (1997) 46 *Emory L.J.* 1005. See also Justice Dennis O'Connor, "The role of commission counsel in a public inquiry" (2003) 22:1 *Advocates' Soc. J.* 9.

legal profession is another one.⁹ Justice Rosalie Abella characterized the values of the legal profession as composing three commitments: competence, ethics and professionalism.¹⁰ Undoubtedly, all lawyers subscribe to these commitments and, in this respect, if reinforced as professional standards in addition to being part of the established culture and tradition, they are immutable.

However, in the past decade a growing number of lawyers have opted to practise law other than in private firms. The role of lawyers has evolved and so too has the nature of legal ethics and how it applies to different segments of the legal profession. Significant changes in the legal profession may go undetected and occur in a gradual, subtle fashion as a result of external, rather than internal, influences. These changes are not readily apparent from a reading of the codes of professional conduct, which are usually fixed in time and not easy to change quickly in response to current events. Trends or incidents of national import may not be readily apparent at first blush or concrete enough to be reduced in writing as an amendment to a code of professional conduct. In the past, examples have included new mechanisms for the delivery of legal services in the marketplace,¹¹ globalization, incidents of national and international import such as terrorism, the financial collapse of businesses,¹² natural disaster and war and those cases before the courts where the focus is on discrete issues but are found subsequently to have broad ethical implications.¹³ Other internal pressures occurred where the courts and law societies introduced conflict of interest rules for the transfer of lawyers between law firms,¹⁴ rules on mobility of lawyers to permit the provision of legal services across borders and enhanced access to licensing,¹⁵ and the

⁹ Janice Mucalov, "Self-governance" *The National* 13:6 (October 2004) 16.

¹⁰ Rosalie Silberman Abella, "The Law Society of Upper Canada, Professionalism Revisited" (Opening Address, Benchers' Retreat, 14 October 1999) [reprinted in *Ontario Lawyers Gazette* (November/December 1999) 20].

¹¹ Robert Orr, "Government Using Private Sector Lawyers: A Preview of Things to Come?" *The Public Lawyer* 8:1 (Winter 2000) 6.

¹² Jenny B. Davis, "Sorting Out Sarbanes-Oxley" *ABA Journal* 89:2 (February 2003) 44; Kaveh Noorishad, "The Sarbanes-Oxley Act and In-House Legal Counsel: Suggestions for Viable Compliance" (2005) 15 *Geo. J. Legal Ethics* 1041; Robert J. Wright, "Corporate Governance: More than More Rules" *In Brief* [Ottawa: Lang Michener] (Fall 2003) 1.

¹³ *Martin v. Gray*, [1990] 3 S.C.R. 1235 (conflict of interest implications as a result of the transfer of lawyers between law firms).

¹⁴ Canadian Bar Association, *Conflict of Interest Disqualification: Martin v. Gray and Screening Methods* (Ottawa: Canadian Bar Association, 1993).

¹⁵ For a discussion of the National Mobility Agreement, see Federation of Law Societies, *supra* note 3, online: <<http://www.flsc.ca/en/committees/mobility.asp>>. In the Commentary to National Mobility Rules dated 14 March 2003, the National Mobility Task Force recognized at page 5 that federal Department of Justice lawyers were in a unique

delineation of a “bright line” by the Supreme Court of Canada for the duties of loyalty and confidentiality.¹⁶ Since these changes first surfaced in the private bar, the impact on the public bar may not always be readily apparent.

The movement away now from the widely-held belief of common ethical identity based solely on a membership connection in the legal profession towards a different concept is not unexpected. There are a number of reasons for this, including the absence of public sector counsel in the past from governing bodies of law societies when decisions affecting the legal profession are made, the recent interest in joining the public bar for a full-time career, and the increased dissemination of knowledge about the work of government counsel.¹⁷

Inevitably, there is still a healthy tension in the understanding, interpretation and application of legal ethics given the established concept of the solicitor-client relationship, and other standards, from which the professional ethos has been cultivated. Government counsel practise on a national, provincial, regional or territorial, as opposed to a local basis, and they work in a larger institutional client setting where the demands are different. It is arguable that government practice follows a different model of “lawyering”¹⁸ than that which exists in the private sector. As the private practice of law has become more closely aligned with business practices, there has been a similar shift in public sector thinking and practice and an alignment with the private sector to bolster research and to benefit from their expertise.¹⁹ This trend has no doubt altered how government

situation.

¹⁶ *R. v. Neil*, [2002] 3 S.C.R. 631.

¹⁷ See generally *supra* note 1. See also Kirsten McMahon “Is Bay Street the Right Road to Choose?” *Law Times* (11 July 2005) 1.

¹⁸ See for example the role of the Chief Pensions Advocate and pensions advocates, *Department of Veterans Affairs Act*, R.S.C. 1985, c. V-1; for military lawyers see Major W. Fensom, “Claims Procedure and Natural Justice in the Balkans” *Sword & Scale [Ottawa: Canadian Bar Association, National Military Law Section]* (January 2001) 1; Gail J. Cohen, “Off on a new JAG” *Canadian Lawyer* 25:2 (February 2001) 32; for “notaries” see Jean-Benoît Legault, “Des Notaires dans les Services Publics” *Les Carrières du Droit* [Montreal: Éditions Jobboom] (2001) 59; with respect to Commission counsel, see Janet Scarfone, “Who are they anyway? Dissecting the multiple roles of commission counsel” *Administrative Law Section Newsletter [Ontario Bar Association]* 8:3 (May 2000) 1. See also Theodore C. Hirt, “The Public Lawyer and the Media” *Pass it On [Newsletter of the American Bar Association’s Government and Public Sector Lawyers Division]* 9:3 (Spring 2000).

¹⁹ See the website for the federal Department of Industry, online: <<http://www.ic.gc.ca>>. See also, Cathleen Flahardy, “Foretelling the Future” *Inside Counsel* 15:70 (1 January 2006), online: <http://www.insidecounsel.com/issues/insidecounsel/15_170/features/267-1.html>.

conducts its affairs and how government counsel provide legal services to government officials. This can be viewed as a positive development because it has allowed government practitioners to move out of the shadows, adopt a focus and create their own unique identity within the legal profession.

At the same time, government counsel are not alone in coming to grips with ethical challenges. The practice of law for private counsel in the corporate setting has undergone some dramatic changes, particularly as a result of the Enron affair.²⁰ By implication, these developments have affected law firms who must conduct their operations with the “bottom line” in mind rather than exclusively as a “profession,”²¹ which casts law firms in a different light within the profession.²² This has also forced law firms to come to grips with the inevitable tensions between profits and the “public interest,” as that term is understood by the private bar.²³

The focus of this paper is to identify some of the ethical challenges for government counsel. In order to do this I will first address the concept of public interest and the role it plays in the concept of public sector lawyering in Canada and the United States. This will be followed by an examination of the relevance of codes of professional conduct to government counsel. Lastly, I will examine the significant changes to the role of government counsel in recent years and the challenges they face in the public sector practice.

The Public Interest Factor

According to Jerome E. Bickenbach, there is a moral component to the profession of law which comprises the collective and individual ideals of its members.²⁴ This thinking is predicated on the widespread belief that it

²⁰ *Supra* note 12.

²¹ Since the fall of 2000 the Law Society of Upper Canada, Ontario law Schools and legal organizations are working together to look at professionalism as part of the Chief Justice of Ontario’s Advisory Committee on Professionalism, online: <<http://www.lsuc.on.ca/news/a/hottopics/committee-on-professionalism/>>. See also William J. Wernz, “Does Professionalism Literature Idealize the Past and Over-Rate Civility? Is Zeal a Vice or Cardinal Virtue?” *The Professional Lawyer [American Bar Association Center for Professional Responsibility]* 13:1 (Fall 2001) 1.

²² For a discussion on who is a professional see Beverley G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 1989) at 1; see also René Laperrière, “L’éthique et la responsabilité professionnelle des juristes en matière de compétence” (1995) 33 *Alta. L. Rev.* 882; Terrell, *supra* note 8.

²³ Harry W. Arthurs & Robert Kreklewich, “Law, Legal Institutions, and the Legal Profession in the New Economy” (1996) 34 *Osgoode Hall L.J.* 1.

²⁴ Jerome E. Bickenbach, “The Redemption of the Moral Mandate of the Profession

is in the public interest for a self-regulating profession to offer legal services to the public. He expresses this concept in the following terms:

...The profession of law is a public service, not merely a business. Lawyers are entrusted to serve their clients faithfully, loyally and competently; yet as professionals they also owe an equivalently onerous obligation to preserve and sustain the integrity of the legal system itself. The profession as an organization has an obligation to ensure that the preconditions of justice and civil society are preserved; and this obligation devolves to individual lawyers who, as officers of the court, must serve their client's interests in the spirit of, and wholly consistent with, the values inherent in the legal system. The moral mandate of the legal profession thus consists in the provision of the full panoply of legal services of advocacy, counselling, and representation, consistent with service to the public by way of genuine contributions to the social goals and norms implicit in the legal system.²⁵

This does not address the critical difference in the concept of “public service” for government counsel. Indeed, some would argue that for government counsel the concept of public service goes beyond the immediacy of the solicitor-client relationship, the courts and the legal profession, to the general public when framed as the public interest. Taken to its logical extreme, this creates the conundrum of government counsel serving themselves as a client. While the legal profession has been built largely on the model of the private practitioner – one lawyer, one client — government counsel, who now constitute a substantial part of the legal profession, may arguably use a different model.²⁶ The private counsel's public focus is different. It is directed instead to the legal system, including the importance of the courts and the rule of law. While the private lawyer model has served the profession well, not surprisingly, however, it has some limitations.

The uniqueness of the public bar is firmly rooted in history, tradition, statute and the common law. Unquestionably the employment relationship has influenced and framed “public service” for government counsel, who wear three hats: public servant, lawyer, and salaried employee. They work in different operational contexts — commissions, tribunals, agencies, Crown corporations and government departments — and their responsibilities are framed in job descriptions, classifications, and terms and conditions of employment issued by the employer. They serve one client exclusively. At the federal level of government, for example, a

of Law” (1996) 9 Can. J.L. & Juris. 51; see also Anne Giardini, “Ethics” *The National* 6:2 (March-April 1997) 31.

²⁵ Bickenbach, *ibid.* at 52.

²⁶ Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (Toronto: Thomson Carswell, 2005) ch. 21, Government Lawyers.

distinction is made between the core public service and the rest of government. For example, Department of Justice lawyers are hired to represent the interests of the Crown in accordance with the *Department of Justice Act*²⁷ and are viewed as the official lawyers representing the Minister of Justice and Attorney General of Canada. In the case of lawyers employed by a commission, for example, they are hired directly by the commission, tribunal or other entity and may not necessarily be subject to the same terms and conditions of employment. The common thread for government counsel, however, is that their salaries and benefits are paid from public funds, they are subject to terms and conditions set by the employer, and the “public interest” informs their duties, mission and vision.

Government counsel are viewed as lawyers dedicated to public service; the degree to which they share the same values as a distinct federal professional body, or with private counsel, may vary somewhat. The credo of the public service is built on the concept of unassuming, impartial service to others, the justification for which is now firmly embedded as a constitutional convention.²⁸ Morality and compassion are more likely to be attributed to their decision-making by the public and, in particular, how they exercise their discretion, because of their dedication to “public service” and the public or common good.

Public servants are governed by specific ethical codes which form part of their terms and conditions of employment. These codes are built on the requirements of avoidance and disclosure and they apply to counsel. At the federal level, the *Values and Ethics Code for the Public Service*,²⁹ for example, applies to all public servants employed by departments, agencies and entities prescribed in a schedule to the *Public Service Labour Relations Act*.³⁰ The Department of Justice also has its own mission and values.³¹ This *Values Code* formally articulates “Public Service Values” in the framework of public service values: democratic, professional, ethical and people values.³² The values are defined. Democratic values are “Helping Ministers, under law, to serve the public interest”; Professional values are “Serving with competence, excellence, efficiency, objectivity and impartiality”; Ethical values are “Acting at all times in such a way as

²⁷ R.S.C. 1985, c. J-2 [*Department of Justice Act*].

²⁸ *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69; *Fraser v. P.S.S.R.B.*, [1985] 2 S.C.R. 455.

²⁹ Online: <http://www.hrma-agrh.gc.ca/veo-bve/vec-cve/vec-cve_e.asp> [*Values Code*].

³⁰ S.C. 2003, c. 22, s. 2.

³¹ Online: <<http://www.justice.gc.ca/en/dept/mandate.html>>.

³² *Supra* note 29, online: <http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TB_851/vec-cve1_e.asp#_Toc46202803>.

to uphold the public trust”); and People values are “Demonstrating respect, fairness and courtesy in their dealings with both citizens and fellow public servants.” It is expressly recognized that certain public servants may have other professional obligations, although there is no guidance on how to handle competing obligations:

In addition to the stipulations outlined in this Code, public servants are also required to observe any specific conduct requirements contained in the statutes governing their particular department or organization and their profession, where applicable.³³

In contrast, codes of professional conduct promulgated by law societies have four main cornerstones: the primordial obligation of a lawyer to one client, respect for the administration of justice, public service to society, and a general duty of respect to peers. However, these notions are premised on the assumption that each individual client is entitled to legal representation.

The large organizational structure in which government counsel practise is relevant for several reasons.³⁴ In civil matters, for example, the “client,” the Crown, is not limited to an identifiable individual as would be generally the case for a private lawyer. The “Crown” remains an abstract concept. Therefore, the act of giving instructions may be more diffuse, and for legitimate reasons. As a starting point, there may be a divergence of views between officials, understandably, on public policy issues in recognition of the different mandates for departments. Secondly, government counsel’s role is often misunderstood. The public may confuse their obligations with the public policy interests of the government of the day. Thirdly, the client does not retain counsel by choice and cannot represent the client’s personal, as opposed to public, interests. In other words, the relationship between the client and the government counsel is viewed through a radically distinctive lens. Fourthly, codes of professional conduct do not recognize the operational exigencies and workplace dynamic for government counsel in their organizational setting. Instead, they are built on a traditional law firm model of a retainer, instructions and payment. The initiation of the solicitor-client relationship for government counsel is seamless in the sense that the employer, who is someone other than the client, appoints counsel, determines their terms and conditions of employment and initiates termination. Moreover, there is continuity in the solicitor-client relationship which is largely beyond the control of the immediate client official. Lastly, government counsel are more likely to be

³³ *Ibid.*, online: <http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TB_851/vec-cve1_e.asp#_Toc46202805>.

³⁴ Steven K. Berenson, “Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?” (2000) 41 B.C.L. Rev. 789.

intimately involved in the daily operations of clients in the legal vetting of policy proposals and attending daily executive meetings for client officials.

There is no one public interest model that applies to all government counsel. Crown prosecutors have the most prominent and publicly visible role in the public eye, and receive the most attention in the cases, because of the close association with the public interest in the exercise of discretion to initiate a criminal prosecution. However, this barely touches the surface in understanding the ethical obligations at play for all government counsel. As an example, the difficulty in exercising the regulatory enforcement function is illustrated in the following example. The former Secretary of Labor in the Clinton administration, Robert Reich, learned from his inspectors that a young boy was working as a bat-boy for a baseball team but was doing so illegally because no one under the age of 15 was permitted to work. Government counsel advised him that permitting this boy to work would be an undesirable precedent. Mr. Reich declined to follow counsel's advice:

"I realized I could make this decision, not other people," Reich told the [Harvard Business School] students. "I didn't have to take their advice. The consequences would be on *my* head. So I looked at everyone, and said, 'This is stupid. This is dumb. The public will think we are a bunch of complete raving fools if we go after this boy. Congress did not say *bat-boys* could not be employed. We can make an exception. And that's it.[']"³⁵

So, if government counsel act in the public interest do they operate under a different model of lawyering? Recent thinking in the United States is split on this issue:

There are two traditional models of lawyers' ethics. The first conception, which may be called the "dominant" model, focuses on the first three duties [loyalty, zeal, confidentiality] to create a model in which the basis of ethical lawyering is fidelity to the client. This position informs the American Bar Association's *Model Rules of Professional Conduct*; it also enjoys a great deal of support among academic commentators. The prevailing concern of this model is that lawyers be constrained from using their power to dominate clients. The model begins from the libertarian premise that all client interests that are not illegal are legitimate, and that clients are entitled to legal representation to pursue those interests. The model avers that if lawyers were allowed to evaluate clients' objectives, then lawyers would position themselves to be the unelected governors of large spheres of private behaviour.

³⁵ Quoted from Martha Lagace, "Doing the Right Thing, the Hard Way" *HBS Working Knowledge* [Harvard Business School] (25 April 2000) [emphasis in original].

Alongside the dominant model, traditional conceptions of lawyers' ethics also recognize what might be called the "public interest" model. This model, although still adopting as central the duties of loyalty, zeal, and confidentiality, puts relatively greater emphasis on the duties of the lawyer to the court and to innocent third parties. Advocates of the public interest model argue that untrammel[ed] loyalty to the client's interests risks allowing lawyers to support manifest social injustice.³⁶

Unlike the situation in the United States, where there has been a more marked shift³⁷ in focus to a broader duty beyond the immediate client,³⁸ the traditional model is still accepted in Canada, albeit largely in the criminal law context. Under this approach obligations are prescribed internally by the employer as part of counsel's workplace standards rather than by external entities such as law societies, but there remain overarching public interest considerations that guide the direction of the work. These considerations, however, remain vague. The Supreme Court of Canada, in *R. v. Campbell*,³⁹ affirmed, for example, that Crown prosecutors "must uphold the same standards of honour and of etiquette."⁴⁰

There is an immediacy of public interest considerations for government counsel because their actions are constantly subject to public scrutiny and their work is more directly linked to the public's expectations of the justice system. This includes scrutiny of their personal financial situation and outside activities under the disclosure requirements of the *Values Code*. The appearance of conflict of interest, which is often associated with impropriety, is often the standard by which the conduct of all public officials is most likely to be judged. It is as vague a standard as that of the "public interest." Consequently, they may be caught in the expectation that they will act both within the letter of the law and the spirit of the law.⁴¹ An appearance of conflict of interest can be created even

³⁶ "Notes: Rethinking the Professional Responsibilities of Federal Agency Lawyers" (2002) 115 Harv. L. Rev. 1170 at 1171 [footnotes omitted, emphasis in original].

³⁷ *Gray Panthers v. Schweiker*, 716 F.2d 23 (D.C. Cir. 1983); *Douglas v. Donovan*, 704 F.2d 1276 (D.C. Cir. 1983). The issue was discussed in the context of the case involving the application of attorney-client privilege to discussions between First Lady Hillary Rodham Clinton and White House lawyers with respect to certain real estate transactions during the President's tenure in office. See *Re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998), cert. denied *sub nom. Office of the President v. Office of the Independent Counsel*, 525 U.S. 996 (1998); see also *Re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997).

³⁸ Berenson, *supra* note 34; Geoffrey P. Miller, "Government Lawyers' Ethics in a System of Checks and Balances" (1987) 54 U. Chicago L. Rev. 1293. See *Berger v. United States*, 295 U.S. 78 (1935); *Boucher v. The Queen* (1954), [1955] S.C.R. 16 at 23-24.

³⁹ [1999] 1 S.C.R. 565.

⁴⁰ *Ibid.* at para. 50 (quoting Lord Denning).

⁴¹ Beth Nolan, "Removing Conflicts from the Administration of Justice: Conflicts of

when not well founded at law and where ethical obligations have not been broken.⁴² The concept has been widely debated in the United States. When Mr. Starr, a Republican, was appointed as independent counsel⁴³ to investigate certain activities of President Clinton, he was still a member of a law firm. The office of independent counsel is governed by statute and was set up to “avoid conflicts of interests or appearances of impropriety that might arise if the Attorney General were charged with investigating possible criminal misconduct by top Administration officials.”⁴⁴ There is no equivalent public office in Canada. Mr. Starr represented clients who had dealings with the Executive and he had also served in the previous Bush and Reagan Justice Departments. Mr. Starr’s role raised the ire of the legal community⁴⁵ for two main reasons, both of which were rooted in appearances. It was believed that his clients could lobby for specific exemptions from government regulation or gain favours in litigation. Secondly, there was a fear that his partisan background would prevent him from being fair and unbiased. Although many states had barred part-time prosecutors from engaging in criminal defence work,⁴⁶ there was no specific ban for the independent counsel.⁴⁷ It was unclear if he must comply with Department of Justice guidelines, the *Independent Counsel Act*⁴⁸ and the *Ethics in Government Act*.⁴⁹ Interpretations of these provisions varied.⁵⁰ Mr. Starr maintained he was not in a conflict of interest and no wrongdoing was ever established.

The test for impropriety of public officials has also come under some scrutiny in Canada and, most recently, following the case of *Stevens v.*

Interest and Independent Counsels Under the Ethics in Government Act” (1990) 79 Geo. L.J. 1.

⁴² Monroe H. Freedman, *Understanding Lawyers’ Ethics* (New York: Matthew Bender, 1990) at 181.

⁴³ *Independent Counsel Reauthorization Act of 1994*, Pub. L. No. 103-270, 108 Stat. 732 [*Independent Counsel Act*].

⁴⁴ David Halperin, “Ethics Breakthrough or Ethics Breakdown? Kenneth Starr’s Dual Roles as Private Practitioner and Public Prosecutor” (2002) 15 Geo. J. Legal Ethics 231 at 268.

⁴⁵ Nolan, *supra* note 41.

⁴⁶ Halperin, *supra* note 44 at 271.

⁴⁷ *Ibid.* at 273. According to the *Department of Justice Appropriation Authorization Act, Fiscal Year 1980*, Pub. L. No. 96-132, 93 Stat. 1040 at 1044 (1979) a Department of Justice lawyer must “be duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia.” See also *United States v. Ferrara*, 847 F.Supp. 964 at 969 (D.D.C. 1993), *aff’d* 54 F.3d 825 (D.C. Cir. 1995).

⁴⁸ *Supra* note 43.

⁴⁹ *Ethics in Government Act*, Pub. L. No. 95-521, 92 Stat. 1824 (1978).

⁵⁰ Halperin, *supra* note 44 at 297-312.

Canada.⁵¹ Mr. Stevens had resigned as a Minister of the Crown following allegations of conflict of interest, which resulted in the establishment of a Commission of Inquiry, the “Parker Inquiry.”⁵² The inquiry had before it the issue of whether or not Mr. Stevens’ conduct had created a real or apparent conflict of interest under the conflict of interest regime and, specifically, the then *Conflict of Interest and Post Employment Code for Public Office Holders*.⁵³ Mr. Justice Parker concluded that, although there had been no actual wrongdoing, Mr. Stevens had been in a real conflict on six occasions. Mr. Stevens successfully challenged Mr. Parker’s findings. The Federal Court concluded that the Commissioner did not have jurisdiction to create his own definitions. In addition, there had been a breach of procedural fairness. The definition of the appearance of conflict was not dealt with, which still leaves a lacuna in the law.⁵⁴ In the case of lawyers, Gavin MacKenzie indicates that Canadian courts do still resort to the test of the appearance of an impropriety in resolving conflict of interest matters in litigation.⁵⁵

In the United States the use of “public interest” as the governing approach for a model for government counsel has its detractors. There are three main arguments. As “public interest” is often equated with the “public good,” it remains ill-defined and amorphous as a concept and impractical to interpret and apply in a legal operational setting.⁵⁶ Even if there is some basic understanding of the concept, others argue that it would lead in the criminal context to misguided and contrived attempts to serve the public directly. Similarly, in the civil context, there are concerns that unelected lawyers would interfere with the balance in the system whereby elected officials set and defend policy. Lastly, there is concern that individual counsel cannot block their biases and values, with the risk that they will be encouraged to advance their own self-interest rather than act for the greater public good.⁵⁷

⁵¹ *Stevens v. Canada (Attorney General)*, 2004 FC 1746 (T.D.).

⁵² The Honourable William D. Parker, *Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair M. Stevens* (Ottawa: Minister of Supply and Services, 1987). See also the *Inquiries Act*, R.S.C. 1985, c. I-11.

⁵³ Parker, *ibid.* App. F.

⁵⁴ See *Threader and Spinks v. Her Majesty The Queen* (1986), 68 N.R. 143 (F.C.A.).

⁵⁵ MacKenzie, *supra* note 26 at 5.1-5.4.

⁵⁶ Fred C. Zacharias, “Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?” (1991) 44 Vand. L. Rev. 45.

⁵⁷ George T. Felkenes, “The Prosecutor: A Look at Reality” (1975) 7 Sw. U.L. Rev. 98; Jonathan R. Macey & Geoffrey P. Miller, “Reflections on Professional Responsibility in a Regulatory State” (1995) 63 Geo. Wash. L. Rev. 1105.

It is arguable that the values of government counsel are shaped by different assumptions.⁵⁸ The centric focus of private lawyers to their client allows them to advance their interests unhampered by broader concepts of public interest. Rather than using individual choice and individual autonomy as a starting point, government counsel's values are built on community interest, consultation and collective interests, which are reflected in the public policy nature of their work. Government counsel are called upon to provide advice and representation in a number of areas, often controversial, and with a high public policy content. Some examples of their different roles may be useful at this point, beginning with the Crown prosecutor.

The work of Crown prosecutors is driven by public interest imperatives.⁵⁹ Historically, the public interest role has been hived out from others as deserving of special attention and it stands apart historically. Unfortunately, it can also be used as a stereotype and applied to other government counsel unreservedly without any further analysis. Indeed, the *CBA Code* refers to the "Duties of Prosecutor" in Chapter IX, The Lawyer as Advocate:

When engaged as a prosecutor, the lawyer's prime duty is not to seek a conviction, but to present before the trial court all available credible evidence relevant to the alleged crime in order that justice may be done through a fair trial upon the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to the accused or defence counsel (or to the court if the accused is not represented) of all relevant facts and known witnesses, whether tending to show guilt or innocence, or that would affect the punishment of the accused.⁶⁰

However, codes are often not enough on their own. The Federal Prosecution Service has developed the *Federal Prosecution Service DeskBook*⁶¹ to set out basic information and standards, with case annotations, for prosecutors to enable them to exercise their discretion on behalf of the Attorney General of Canada. The *DeskBook* has been

⁵⁸ Berenson, *supra* note 34 at 793.

⁵⁹ Deborah MacNair, "Crown Prosecutors and Conflict of Interest: A Canadian Perspective" (2002) 7 Can. Crim. L. Rev. 257. See also Graeme G. Mitchell, "'No Joy in This for Anyone': Reflections on the Exercise of Prosecutorial Discretion in *R. v. Latimer*" (2001) 64 Sask. L. Rev. 491; Monroe H. Freedman, "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions" (1966) 64 Mich. L. Rev. 1469.

⁶⁰ *CBA Code*, *supra* note 4, c. IX at Commentary 9 [footnotes omitted].

⁶¹ (Ottawa: Department of Justice, March 2005), online: <<http://www.justice.gc.ca/en/dept/pub/fps/fpd/index.html>> [*DeskBook*].

distributed widely in the legal profession and to members of the judiciary, thereby providing evidence of accountability and transparency. In essence, federal prosecutors perform two crucial functions for the Attorney General. They provide “legal advice to investigative agencies on the criminal law implications of investigations and prosecutions.”⁶² Secondly, the Attorney General is vested with the authority “to institute, continue or terminate criminal proceedings.”⁶³ From a rather vague concept of “doing justice” or “acting in the public interest” the *DeskBook* sets out more concretely how prosecutors fulfill their public interest obligations by working to a set of specific standards: convicting those who commit crimes, recognizing the presumption of innocence, and affording a fair process. Attorneys General have also gone further by adopting specific disclosure processes in response to what is perceived as an imbalance of power between the state and the accused.⁶⁴ It is recognized that their daily decisions are made on the basis of a number of complex, and often competing considerations not faced by defence counsel: the victim, general policies on crime and enforcement, procedural fairness, societal interest to convict those who commit crimes, the duty to act with impartiality and so on.

The courts impliedly rely on prosecutors to be even-handed and to act to what appears to be a higher duty. Consequently, 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. Is their office a sword or a shield? The “win at all costs” philosophy is not accepted as the prime motivator for their professional actions and has been discredited. In the United States case of *Wheat v. United States*⁶⁵ federal prosecutors objected to the addition of an attorney to the defence team on grounds of conflict of interest for several accused charged with conspiracy to import illegal narcotics. The prosecution decided to call one of the accused as a witness just prior to trial. Although the accused waived the conflict of interest, the U.S. Supreme Court and the lower courts agreed with the prosecutor’s arguments and the accused were convicted. In their dissent, Justices Brennan and Marshall expressed concern that the prosecutor tried to manufacture the conflict. The decision has been criticized on the basis that the prosecutor’s decision to call the witness at the last moment, which ultimately swayed the court to agree to disqualify the new attorney, was a “win at all costs” philosophy not in keeping with the public interest.⁶⁶ Moreover, there have been other instances where the courts have suggested that government counsel should provide citations for inconsistent rulings

⁶² *Ibid.* at 3.5.1.

⁶³ *Ibid.* at 3.5.2. “Prosecutor” is defined in section 2 of the *Criminal Code*.

⁶⁴ *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 [*Stinchcombe*].

⁶⁵ 486 U.S. 153, reh’g denied 487 U.S. 1243 (1988).

⁶⁶ Berenson, *supra* note 34 at 839.

in their briefs and disclose developments when private counsel fail to do so.⁶⁷

So, to what extent can government counsel pursue certain litigation strategies and still act in the public interest?⁶⁸ The American courts have been quick to rebuke government counsel for egregious conduct.⁶⁹ There has been considerable discussion on this matter in the United States in the context of covert operations,⁷⁰ and the obligation to follow state bar rules. In 1999 federal prosecutors were made subject to the rules of the state where they worked.⁷¹

The situation in Canada is somewhat different. As a general rule the courts address ethical obligations for Crown prosecutors in cases involving abuse of process or allegations of improper conduct. The duty on the Crown to call certain witnesses was at issue in *R. v. Campbell*.⁷² In that case the Supreme Court reaffirmed the widely held principle that Crown prosecutors wield a lot of power, which does not offend the principles of fundamental justice under the *Charter*,⁷³ but when exercising their

⁶⁷ Catherine J. Lanctôt, “The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions” (1991) 64 S. Cal. L. Rev. 951 at 990.

⁶⁸ Donna C. Morgan, “Controlling Prosecutorial Powers – Judicial Review, Abuse of Process and Section 7 of the Charter” (1986-87) 29 Crim. L.Q. 15; M. Blake & A. Ashworth, “Some Ethical Issues in Prosecuting and Defending Criminal Cases” (1998) Crim. L. Rev. 16; Stanley Z. Fisher, “In Search of the Virtuous Prosecutor: A Conceptual Framework” (1987-88) 15 Am. J. Crim. L. 197.

⁶⁹ *Bulloch v. United States*, 763 F.2d 1115 (10th Cir. 1985), cert. denied, 474 U.S. 1086 (1986) (per McKay J., dissenting, government counsel have a higher responsibility to seek justice); *Douglas v. Donovan*, *supra* note 37 (government counsel have a duty to the immediate client agency and to the public at large); *EEOC v. Waterfront Commission of New York Harbor*, 665 F. Supp. 197 (S.D.N.Y. 1987) (government counsel are not exempt from the federal rules of civil procedure); *Braun v. Harris*, (CCH) para. 17,070 (E.D. Wis. 1980) (government attorneys are in a unique position and they owe a greater responsibility to the system of justice).

⁷⁰ Jesselyn Alicia Radack, “The Big Chill: Negative Effects of the *McDade Amendment* and the Conflict Between Federal Statutes” (2001) 14 Geo. J. Legal Ethics 707. In 2002, following rulings by many state courts indicating that investigatory exceptions would not be accepted to the rules on misrepresentation, the Utah State Bar’s Ethics Advisory Opinion Committee issued an advisory opinion in which it concluded that “A governmental lawyer who participates in a lawful covert governmental operation that entails conduct employing dishonesty, fraud, misrepresentation or deceit for the purpose of gathering relevant information does not, without more, violate the Rules of Professional Conduct.” (Opinion No. 02-05 (18 March 2002), online: <http://www.utahbar.org/rules_ops_pols/ethics_opinions/op_02_05.html>).

⁷¹ Radack, *ibid*.

⁷² *Supra* note 39.

⁷³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*,

discretion they are subject to the supervisory jurisdiction of the courts. Although no specific reference was made to legal ethics, the Court mentioned that prosecutors perform a “special function” in the justice system⁷⁴ and that they cannot adopt a “purely adversarial” role in the litigation.⁷⁵ Madame Justice L’Heureux-Dubé described this adversarial role as that of a “strong advocate.”⁷⁶ The Court also noted that the promulgation of rules on disclosure, in light of *Stinchcombe*,⁷⁷ provided sufficient balance to what may have been regarded as “trial by ambush” if certain witnesses were not called by the Crown. The Court confirmed that the Crown must still bring to the court’s attention every relevant fact whether or not it is favourable to the accused. Limits to the onus on the Crown were found to be acceptable, including flexibility for Crown counsel to remain part of an adversarial process as an officer of the court, with no need to “act as defence counsel.”⁷⁸ This requires a fair balance between the interests of the accused and society.⁷⁹

Unfortunately, obligations for government counsel are on occasion improperly characterized as ethical ones, given the amorphous nature of public interest obligations for all public officials.⁸⁰ Arguably, however, their obligations, particularly in a civil context, must be interpreted in light of how a bureaucracy functions. Rather than viewing the matter as arising solely in the solicitor-client context, which is more suitable for private counsel, the starting point for the determination of public interest obligations is instead the authority of a public official to make decisions.⁸¹ In other words, the direct relationship to the public is really between public officials and the Minister, who is then accountable to the public. Although the law societies have introduced rules relating to organizational clients in the codes of professional conduct, this does not assist government counsel in understanding their role or the ethical dilemmas they would normally face in this situation.⁸² In essence, the government counsel’s ultimate “human” client will be the public official who has the legal authority to decide the Crown’s interest in the matter.

being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; see generally *R. v. T. (V.)*, [1992] 1 S.C.R. 749.

⁷⁴ Berenson, *supra* note 34 at para. 21.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Supra* note 64.

⁷⁸ *Ibid.* at 341.

⁷⁹ *Ibid.*; see *R. v. Swain*, [1991] 1 S.C.R. 933; *R. v. Levogiannis*, [1993] 4 S.C.R. 475; *Cunningham v. Canada*, [1993] 2 S.C.R. 143.

⁸⁰ Margaret Colgate Love, “Outside Authority” *ABA Journal* 90:1 (January 2004) 53.

⁸¹ Berenson, *supra* note 34 at 827.

⁸² See for example Rule 2.02 (1.1), *Rules of Professional Conduct*, Law Society of Upper Canada, online: <<http://www.lsuc.on.ca/regulation/a/profconduct/>>.

In assisting public officials, therefore, government counsel may fulfil multiple roles. They can act as advisor, lawyer or advocate. In practice this means identifying the appropriate officials to provide instructions. These officials may have legitimate, differing interests. As advocates in civil litigation matters government counsel are usually acting as defendant's counsel; in criminal matters, there is no identifiable client and they are seeking justice.⁸³ Secondly, in providing a professional service, counsel balance the role of government lawyer with their duties as a public servant. The differences and similarities may not always, at first blush, be easily discernable. While the *Values Code* recognizes that one professional obligation may in the end prevail over another, this juggling is left to the discretion of counsel. Thirdly, the reasonable person might expect government counsel to behave with higher ethical standards, although there is little to support this theory in the courts. This may leave counsel with a constant quandary about how best to fulfill the obligations while acting in the public good, which is an ill-defined concept. Ethical codes set out general principles — the articulation and interpretation of them is left to the discretion of the government counsel. These codes are, at best, a starting point, and must be viewed in context with the personal values of the individuals expected to follow them and the organizations in which they are implemented.⁸⁴ In the next part of this article the impact of codes of professional conduct on government counsel is explored in more detail to bring out the differences in ethical obligations with those of private counsel.

Do Ethical Codes Play A Role?

The current rules issued by law societies and other bodies provide a general framework which is supplemented from time to time with guidelines, case annotations and notices to the profession.⁸⁵ Counsel are largely left to their own devices in the exercise of their profession in the interpretation of these codes. This can result in the inadvertent creation of double standards for government and private counsel. Established norms for one may not be the same for the other. One prevailing norm is that all parties come to court with equal bargaining power and resources. The case

⁸³ Sandra Caron George, "Prosecutorial Discretion: What's Politics Got to Do with it?" (2005) 18 *Geo. J. Legal Ethics* 739.

⁸⁴ Canadian Centre for Management Development, *Research Paper No. 19: The Ethics Era in Canadian Public Administration* by Kenneth Kernaghan (Ottawa: Minister of Supply and Services Canada, 1996), online: <<http://www.myschool-monecole.gc.ca/Research/publications/pdfs/p63e.pdf>>.

⁸⁵ See for example the discussion of the "no-contact" rule in *Robb Estate v. St. Joseph's Health Care Centre*, [1999] O.J. No. 734 (Ct. J.) (QL) with respect to interviewing clients in large organizations.

of *R. v. Stinchcombe*⁸⁶ suggests the court felt there was an imbalance of power between the Crown and the accused with respect to disclosure, with the result that attorneys general adopted new disclosure policies for the Crown across the country. Another norm is that all litigants in civil matters have the same advantages with the benefit of counsel so clients do not suffer a disadvantage. The development of class actions suggests that the legislatures and the courts felt that the threshold procedure for redress in public interest litigation needed to be changed.

Consequently, codes of professional conduct and other rules cannot level the playing field for all matters and for all counsel. Codes, however, have an ambiguous character, as is evidenced in the following comments by J.D. Ground, Q.C., Chairman of the Professional Conduct Committee for the Law Society of Upper Canada from 1979 to 1983:

Law, and to some extent religion, functions through “external” rules. Ethics operates through “internal” choices.

Professional conduct rules are external commandments. Several are drafted in the form of ethical rules. This, however, is a contradiction in terms, as the basic and central concept is choice and not rules. As a consequence, “ethical rules” of professional conduct are difficult both to define and apply. They are nevertheless the rock upon which all other professional rules are built.

...

Thus, in the profession, there is the anomalous situation where there is a legal rule, in the form of a professional conduct rule, requiring members to obey an ethical “rule”. This in turn is no more than a duty to make moral judgments based upon sound, but undefined moral principles. The failure to do so is a disciplinary offence.⁸⁷

The legal status of codes, and the interplay with the law, has received very little attention in the courts. The rules set out in codes of conduct do not, for example, have the same status as regulations or statutes.⁸⁸ The codes of

⁸⁶ *Supra* note 64. The *Stinchcombe* disclosure obligation became part of the Alberta Law Society’s Code of Professional Conduct and was interpreted in *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372 [*Krieger*].

⁸⁷ Professional Responsibility, *Law Society of Upper Canada Bar Admission Program*, 1996 (Toronto: Law Society of Upper Canada, 1996) at 1-1 to 1-3. See Marvin J. Huberman, “Integrity Testing for Lawyers: Is it Time?” (1997) 76 Can. Bar Rev. 47; Roger S. Fisher, “Shared Values as an Alternative to ‘Integrity Testing’ for Family Lawyers” *Matrimonial Affairs [CBAO Family Law Section Newsletter, Ontario Bar Association]* 9:6 (May 1998) 7.

⁸⁸ *Enerchem Ship Management Inc. v. The Coastal Canada*, [1988] 3 F.C. 421 at 435, 83 N.R. 256 (C.A.) [*Enerchem*]; *A.G. (Canada) v. Law Society of B.C.*, [1982] 2 S.C.R. 307

law societies prevail over other voluntary codes.⁸⁹ However, the codes do set acceptable standards for lawyers which may lead to sanctions by a law society.⁹⁰

The interpretation of codes, and the extrapolation of relevant information, can be problematic to the extent that they are seen as the exclusive source for ethical obligations or what constitutes the public interest. The difficulty with any code is that it becomes fixed in time and separate from the evolving, dynamic relationship between the lawyer and client. In addition, codes do not take into account the different adversarial and advisory roles played by government counsel and the time devoted to non-adversarial matters. This may lead to misperceptions by those who enforce ethical obligations if they draw heavily on the private sector model.⁹¹ Unlike the private sector lawyer, the operational landscape for government counsel is changing constantly as a result of new directions in administration, amendments to legislation or the introduction of new policies.

At least one American commentator suggests that government and private counsel are on an even ethical playing field and that government counsel seized with a matter should not first judge the “justness” or “fairness” before proceeding to provide advice or acting as an advocate:

The ethical codes therefore do not impose a duty on the government lawyer to behave differently than a private lawyer.... The central principle that purportedly underlies the adversary system is that “justice” can best be achieved by the battle of two zealous advocates before a neutral decision maker. Allowing a government lawyer to sit in judgment of the justice of a client’s cause would be inconsistent with the fundamental principles underlying the adversary system. If the adversary system is truly the best way to achieve fair results in court, a proposition that is dubious to many, then presumably the government lawyer should zealously advance the agency client’s goals in court in the same way that a private practitioner would. The court, not the government lawyer, will decide what “fairness” and “justice” require.

Government lawyers should not ignore the questions of justice or fairness inherent in the cases they handle. The *Model Rules* require a lawyer to render “candid advice” and permit a lawyer to “refer not only to law but to other considerations as well, such as

at 339, 5 W.W.R. 289; *Martin v. Gray*, [1990] 3 S.C.R. 1235. See also *Re Klein and Law Society of Upper Canada* (1985), 16 D.L.R. (4th) 489 (Ont. H.C.J.) (the Law Society’s Rules and Commentaries in the *Code of Professional Conduct* are part of the law of Ontario and are subject to *Charter* scrutiny).

⁸⁹ *Essa (Township) v. Guergis; Membery v. Hill* (1993), 15 O.R. (3d) 573 (Div. Ct.).

⁹⁰ *Enerchem*, *supra* note 88.

⁹¹ See *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113. See *Krieger*, *supra* note 86.

moral, economic, social and political factors, that may be relevant to the client's situation." Moreover, the duty to consider the public good is a duty of all public servants, not just lawyers. But in the American political system, the responsibility to decide which government policy will serve the public good ordinarily rests with elected officials, not with government lawyers. Ultimately, the agency's decision whether or not to assert the technical defense is a matter of government policy, not of legal ethics.⁹²

There are obvious benefits for government counsel to continue to share ethical obligations with the private bar. Codes of professional conduct encourage uniformity and consistency in approach, which promotes predictability for clients. As an example, they underscore the importance of the client in the solicitor-client relationship, the duty of confidentiality, acting with integrity and the avoidance of conflicts of interest. Secondly, these codes help to draw distinct boundaries around professional responsibilities of government counsel and the duties of client officials who are responsible for the development of public policy or the implementation of government programs.

Do government counsel have a higher ethical duty? The codes of professional conduct do not provide for such a higher duty. They may operate under different constraints, which are provided by statute or the common law. Nevertheless, comments surface from time to time that government counsel should have a higher ethical duty than do private counsel. This is based on the assumption that the public at large is a client and that their salaries derive from public funds. While in the United States there are several judicial pronouncements to the effect that government counsel in civil contexts have special responsibilities to the court, and to the public, which are different than those of private counsel, such is not the case in Canada, where judicial statements are more guarded.⁹³

Current Canadian cases and codes remain largely silent on the point, which makes the extrapolation of guiding principles difficult, if not impossible. In those cases where codes do address the issue, the focus is on the single-entity client rather than how to extrapolate the relevant standards.⁹⁴ While the courts have implied that in some cases government counsel owe a higher duty of candour,⁹⁵ the American courts have been

⁹² Lanctôt, *supra* note 67 at 985-86 [footnotes omitted].

⁹³ *Supra* note 19.

⁹⁴ See for example the Law Society of Alberta, *Code of Professional Conduct* (Calgary: Law Society of Alberta, 1995) c.12, online: <<http://www.lawsocietyalberta.com/resources/codeProfConduct.cfm>>.

⁹⁵ *Ibid.* at 14-17.

more explicit.⁹⁶ In some cases American courts have chastised counsel who failed to make full disclosure during discovery⁹⁷ or failed to disclose the existence of a settlement on the basis that government counsel owe a different or higher duty.⁹⁸

The American Federal Bar Association has drafted specific ethical considerations for government counsel to fill the void but they are not mandatory. As an example, Ethical Consideration 7-14 provides guidance on the use of discretionary authority of government counsel in civil litigation:

A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.⁹⁹

Codes do not help for every situation. Legislative drafters provide an example of where the divergence in roles is evident and where their responsibilities do not fit neatly within an existing code. Drafters convert government policy into law, whether in the form of statutes or regulations. The ultimate product, the law, is passed by Parliament but the shaping of the language and the law is in the drafter's domain and is at their discretion. Under section 4 of the *Department of Justice Act*, the Minister of Justice is responsible for advising "on all matters of law referred to the Minister by the Crown" and is the official legal advisor to the Governor General and the legal member of the Queen's Privy Council for Canada. In this respect the Attorney General is a gatekeeper to ensure that meritorious cases proceed and that cases are advanced where they can be supported at law.¹⁰⁰

Federal drafters have two unique responsibilities by virtue of section 4.1 of the *Department of Justice Act* and the *Canadian Charter of Rights and Freedoms Examination Regulations*.¹⁰¹ Drafters must be aware of drafting practices, the state of federal and private law and the

⁹⁶ Robert P. Lawry, "Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question" (1978) 37 Fed. B.J. 61.

⁹⁷ *Bulloch v. United States*, *supra* note 69.

⁹⁸ *Douglas v. Donovan*, *supra* note 37.

⁹⁹ Cited in Lanctôt, *supra* note 67 at 968.

¹⁰⁰ In the United States, the Solicitor General determines if a case should be considered by the Supreme Court.

¹⁰¹ S.O.R./85-781.

substantial advisory position of the Minister within government. Under section 3 of the *Statutory Instruments Act*,¹⁰² the Clerk of the Privy Council must examine every proposed regulation in consultation with the Deputy Minister of Justice for the purpose of ensuring that the regulation is authorized by statute, that it does not evidence an unusual or unexpected use of authority, it does not intrude on the *Charter* or the *Bill of Rights*,¹⁰³ and that it follows established drafting standards. A similar duty exists in relation to the review of draft bills. A bill is examined to ascertain its consistency with the *Charter* and the *Bill of Rights*.¹⁰⁴ These reviews necessitate the exercise of discretion and Legislative Services, like the Federal Prosecution Service, have developed standards for guidance in the exercise of the discretion.¹⁰⁵

Codes of professional conduct sometimes contain provisions with which public servants are already familiar. Whistleblowing is an example. However, provisions for private counsel do not address the myriad obligations related to confidentiality in a government setting.¹⁰⁶ Federal government counsel can therefore use the provisions in the law society codes for guidance, to the extent they may apply, or follow existing policies or law which provide for whistleblowing for all public servants.¹⁰⁷ American government counsel can rely on ethics opinion 73-1, which provides for disclosure to an agency in the case of a possible act of illegality “about which the lawyer may hold a firm position as to its illegality but which he nevertheless recognizes is in an area subject to reasonable differences of professional opinion as to its legality.”¹⁰⁸

There may be legitimate reasons for treating private and public counsel on an equal ethical playing field. If government counsel have a higher duty this can place them in conflict with members of the executive, legislative and judicial branches, who have separate, well-defined functions. For instance, government counsel hired to defend the government’s interests in civil litigation cannot at the same time have a

¹⁰² R.S.C. 1985, c. S-22.

¹⁰³ *Canadian Bill of Rights*, S.C. 1960, c. 44.

¹⁰⁴ *Ibid.*; *Canadian Bill of Rights Examination Regulations*, C.R.C., c. 394.

¹⁰⁵ *Guide to Making Federal Acts and Regulations*, 2d ed. (Ottawa: Privy Council Office: Dept. of Justice, 2001), online: <http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=Publications&doc=legislation/lmg_e.htm>.

¹⁰⁶ Roger C. Cramton, “The Lawyer as Whistleblower: Confidentiality and the Government Lawyer” (1991) 5 *Geo. J. Legal Ethics* 291.

¹⁰⁷ At the federal level public servants are governed by the *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace*, online: <http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/tb_851/idicww-diicaf_e.asp> and the *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46.

¹⁰⁸ Lanctôt, *supra* note 67 at 1011.

higher, different legal standard to the judiciary or Parliament while at the same time representing the Crown. Codes cannot be written to rectify every injustice by providing for exemptions and exceptions. Otherwise they would be impossible to apply and enforce.

Ethical Choices: Are They Different for Government Counsel?

Ethical choices for government counsel may be different simply because of the operational context in which they practice, the organizational nature of a state client and the application of different employment standards.

The starting point for government counsel is normally the identification of the Crown as the client, but this is not always determinative of the ethical issues at play. Unquestionably, private counsel are also faced with difficult choices, which call into question their ethical obligations that are fundamental to maintaining confidence in the system of the administration of justice.¹⁰⁹ They may need to advise clients on whether they are breaking the law if they pursue a particular course of action.¹¹⁰ Clients may seek advice on how to comply with the law, such as occurs in tax matters.¹¹¹ Defence counsel in criminal matters may need to consider difficult moral choices when asked to reveal confidential information to help police locate victims or evidence helpful to the prosecution's case.¹¹²

On the other hand, government counsel provide legal advice in unique forums, including theatres of war, and confront issues with huge public policy overtones, such as the global outbreak of disease.¹¹³ This means it may be more difficult to draw lines between the role of counsel as legal advisors and the decision-makers whose public duties require them to act in the public interest. The stakes are high in terms of the policy and the financial implications. Government counsel appear frequently before the courts, especially the Supreme Court of Canada, where the *Charter* figures significantly. Consequently, they play a delicate role as they are often defending government policies with significant financial consequences,¹¹⁴ or they are intervening in criminal cases on issues of significant public

¹⁰⁹ *R. v. Murray* (2000), 48 O.R. (3d) 544 (Sup. Ct. J.).

¹¹⁰ See *CBA Code*, *supra* note 4, c. III "Advising Clients" at Commentary 7 (Dishonesty or Fraud by Client).

¹¹¹ *Ibid.* at Commentary 8 (counsel can legitimately pursue test cases).

¹¹² *Ibid.* c. IV at Commentaries 11-14 (Disclosure to Prevent a Crime, Disclosure Required by Law). See Law Society of Upper Canada, *Special Committee on Lawyers' Duties with Respect to Property Relevant to a Crime or Offence* (21 March 2002), online: <http://www.lsuc.on.ca/media/convmar02_physicalevidence.pdf>.

¹¹³ William C. Smith, "Lawyers at War" *ABA Journal* 89:2 (February 2003) 14.

¹¹⁴ In *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40, which is still

import.¹¹⁵ The volume of public policy litigation is staggering. According to one commentator, the Supreme Court of Canada released 72 decisions in 2003, which break down as follows: 57 involved “some level of government” as a party; government was an intervener in 15 of the cases; statutory interpretation was at issue in 4 cases; only 3 cases were traditional cases involving private parties.¹¹⁶

Terrorism has renewed the debate about the role of government counsel in the United States. Jay S. Bybee, former Assistant Attorney General in the Office of Legal Counsel, United States Department of Justice, was asked to provide advice on the definition of torture in August 2002. The Bush administration was subjected to harsh public criticism when the contents of the memorandum became public. Mr. Bybee advised that “only physical pain as intense as that accompanying organ failure or death qualified as torture.”¹¹⁷ Following this revelation there was an extended debate¹¹⁸ on how broad or narrow a government counsel could go in providing legal advice on such public policy issues. Some argued that his task was to look at what the law required and not whether the law was effective or moral. In this case, they reasoned, the lawyer had simply voiced the intentions of the administration to justify torture. Others argued that the Bybee memorandum was appropriate because it discussed torture in concrete terms consistent with needs of operational setting, the theatre of war. This led to the submission to the President on August 4, 2004 of the “Lawyer’s Statement on Bush Administration’s Torture Memos” of 130 lawyers. It was alleged that the Office of Legal Counsel had prepared memoranda which “ignore and misinterpret the U.S. Constitution and laws, international treaties and rules of international law.”¹¹⁹ It was also alleged that government counsel had failed to meet their professional

being litigated before the Ontario courts, the amount claimed against the Crown for disabled veterans was \$4.6 billion. On February 3, 2006 the *London Free Press* reported that the federal government will appeal the ruling.

¹¹⁵ The issue in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* ([2004] 1 S.C.R. 76) was the use of spanking by parents and whether section 43 of the *Criminal Code* was unconstitutional. In *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink* ([2002] 3 S.C.R. 209) the issue was whether the seizure of documents under section 488.1 of the *Criminal Code* was contrary to section 8 of the *Charter*. This section sets out a procedure for claiming solicitor-client privilege.

¹¹⁶ Karen Selick, “Fighting the ‘immoral’ mindset” *Canadian Lawyer* 28:10 (October 2004) 54.

¹¹⁷ Adam Liptak “Torture and Legal Ethics: How Far Can a Government Lawyer Go?” *The New York Times* (27 June 2004) 4-3.

¹¹⁸ Julie Angell, “Ethics, Torture, and Marginal Memoranda at the DOJ Office of Legal Counsel” (2005) 18 *Geo. J. Legal Ethics* 557.

¹¹⁹ Cited in Angell, *ibid.* at 558.

obligations by failing to follow the U.S. Constitution, the rule of law and the wishes of the American people. This position was controversial. According to the American Bar Association's *Model Rules of Professional Conduct*¹²⁰ an attorney has the duty to assist the client accomplish lawful objectives; moreover, a lawyer cannot counsel a client to engage in conduct which the lawyer knows to be fraudulent or criminal.¹²¹ There is little American case law to address the issues raised in the Bybee memorandum. Rulings in both American and Canadian jurisprudence would suggest that a lawyer, as a minimum, cannot counsel a client to break the law.¹²² Alleging a breach of a professional obligation is probably not appropriate as there is not only the issue of who is the client — the government, the public, the particular agency, the responsible official — but it is equally difficult to hold counsel accountable for a vague public standard.¹²³ In fact, it is even acknowledged in the *ABA Model Rules* that it is difficult for counsel to identify the client.¹²⁴

A recent article underscores the ambiguity for the government counsel as legal advisor. There are two possible roles in these circumstances according to Randolph D. Moss in his article on the role of the U.S. Department of Justice Office of Legal Counsel:

Under the first model [policy-advocate], the executive branch lawyer acts as advocate, proffering any reasonable argument in support of his client's policy objectives. Only when no reasonable argument may be formed should the lawyer opine that action should not be taken. The lawyer may candidly assess the relative merits of competing arguments for his client, but ultimately should not stand as a roadblock to the effectuation of administration policy unless the legal hurdles are clearly insurmountable. Under the second model [neutral expositor], the executive branch lawyer acts more as a judge than as an advocate. He rejects legal arguments, even if reasonable, that do not represent the *best* view of the law. Like a judge, the lawyer shuns consideration of his client's desired policy goals and acts instead with complete impartiality.¹²⁵

The way in which public officials choose to exercise their functions may have the unintended effect of drawing government counsel into an ethical dilemma. The dividing line is drawn between the model of the lawyer who is a technician and the lawyer who provides advice on the wisdom of an option or choice. It is the latter area which often engenders the most

¹²⁰ (Chicago: American Bar Association, 2004) [*ABA Model Rules*].

¹²¹ In Canada see *CBA Code*, *supra* note 4, c. III at Commentary 7; in the U.S. see *ABA Model Rules*, *ibid.* at Rule 1.2.

¹²² *Re Scionti*, 630 N.E.2d 1358 (Ind. 1994).

¹²³ Angell, *supra* note 118 at 564.

¹²⁴ *ABA Model Rules*, *supra* note 120 at Rule 1.13 (Government Agency).

¹²⁵ Randolph D. Moss, "Executive Branch Legal Interpretation: A Perspective from

thought and controversy because it treads on what the public would likely construe as “doing the right thing.” For the counsel who is directly involved in the matter it may also mean being prepared to say no to certain courses of action even though it may be difficult to do so. During the Second World War, for example, the then Attorney General, Francis Biddle, disagreed publicly with President Franklin Roosevelt over his position on the imprisonment of American citizens of Japanese ancestry. President Roosevelt proceeded with this policy.¹²⁶

There are other challenges. The courts may respond to civil claims against the Crown by appearing to take, in the view of some, a more liberal interpretative approach in significant public policy cases. This can raise difficulties for counsel who must decide whether to pursue certain arguments for fear of these being viewed as heavy-handed or technical. In *Williams v. The Attorney-General of Canada*,¹²⁷ for example, the plaintiffs sued the federal and provincial governments and the City of Toronto by way of class action for negligence arising out of the outbreak of SARS. The defendants brought motions to strike the claim. The federal Crown argued that neither vicarious liability nor personal liability of the Crown servants had been specifically pleaded and specific employees had not been identified who could be said to have a duty of care. In permitting the federal Crown’s motion on other grounds the court noted that it was clear from the statement of claim what the plaintiffs had pleaded and that “I believe it is sufficiently clear from the contents of the statement of claim, read generously, that the duties of care asserted against the Crown are to be found from a consideration of the provisions of statutes conferring powers, and imposing responsibilities, on particular Ministries or Ministers.”¹²⁸

Similarly, some of the roles performed by government counsel do not fit any preconceived notion of traditional roles and it is difficult to attach traditional ethical duties to them. As noted previously for legislative counsel,¹²⁹ they certify that the law is in accordance with the *Charter*. They also review regulations under the *Statutory Instruments Act*¹³⁰ to ensure they are not *ultra vires*.

In some other cases the interests of government counsel, as members of the legal profession, appear to be pitted against those of private counsel

the Office of Legal Counsel” (2000) 52 Admin. L. Rev. 1303 at 1305 [footnotes omitted, emphasis in original].

¹²⁶ *Ibid.* at 1317.

¹²⁷ (2005), 76 O.R. (3d) 763 (Sup. Ct. J.).

¹²⁸ *Ibid.* at para. 41.

¹²⁹ See above text accompanying notes 94-105.

¹³⁰ *Supra* note 102.

with respect to the application of ethical principles. In the United States, for example, this occurred in the context of the interception of privileged attorney-client communications for the monitoring of inmates' conversations with their attorneys. Under the *Foreign Intelligence Surveillance Act of 1978*¹³¹ the government can obtain a court order which authorizes surveillance in those cases where the target is an agent of a foreign power and acknowledges that the significant purpose of the interception is to obtain foreign intelligence. In order to overcome the problem of prosecutors having access to the communications, "taint teams" of government employees were set up to screen the information.¹³² In Canada there have also been professional responsibility issues that arose in the context of the introduction of money-laundering regulations which imposed disclosure obligations on lawyers regarding their clients' affairs, and private counsel expressed concern about the impact on the application of solicitor-client privilege and the independence of the profession.¹³³

The Supreme Court of Canada looked at the different roles for government and private counsel. In *R. v. Campbell*¹³⁴ the appellant accused, charged with conspiracy to traffic cannabis resin and to process it, wanted access to Department of Justice legal advice provided to the RCMP in the course of a reverse sting operation. The appellants argued that the police had acted illegally in participating in the reverse sting in a manner "that shocked the conscience of the community," thus violating well-established constitutional principles and substantiating a conclusion for abuse of process. The Crown, in reply, argued that even if the RCMP was itself prohibited by the *Narcotic Control Act*,¹³⁵ the RCMP did not commit an offence because the RCMP were either to be considered as part of the Crown or as agents of the Crown and consequently that they were entitled to public interest immunity. The Court rejected this argument and instead looked at several overarching principles. The Court confirmed the well-accepted principle that the RCMP is entitled to receive legal advice from government counsel. Mr. Justice Binnie pointed out that, even if it was established that the RCMP had not followed the legal advice, this did not necessarily lead to the conclusion that anything improper had occurred on the part of the police. The Court confirmed that solicitor-client communications between the RCMP and Department of Justice counsel were indeed protected as solicitor-client communications. In fact, the Court took into consideration that the Crown referred to the advice in its

¹³¹ 50 U.S.C. § 1801.

¹³² Charlie Cassidy & Cassandra Porsch, "Government Monitoring of Attorney-Client Communications in Terrorism-Related Cases: Ethical Implications for Defense Attorneys" (2004) 17 *Geo. J. Legal Ethics* 681.

¹³³ Mucalov, *supra* note 9.

¹³⁴ *Supra* note 39.

¹³⁵ R.S.C. 1985, c. N-1.

factum and the RCMP officer referred to the communication with counsel in his testimony.

Conclusion

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. It is equally difficult to conclude that the ethical obligations are different unless they are provided for elsewhere or impossible to interpret in counsel's operational setting, or the codes are silent or simply do not apply or are overridden by employment standards.

It is perhaps simplistic to view the government counsel's ethical duties as uniquely based on the identification of the client. This is but one element to consider among the complex array of considerations in the determination of their ethical choices. While government counsel may have the Crown as a client, they must balance this relationship with other policies, laws and standards set by the employer or the government of the day. As pointed out earlier, the *Values Code* recognizes that public servants are expected to adhere to other obligations and maybe even one in preference to the other. However, it does not define "conflict of interest." Government policies also impose additional duties on government counsel in the conduct of their work. In addition to a lawyer's duty of confidentiality, for example, government counsel must conform to the government's policy on security with respect to the handling and classification of confidential government information.¹³⁶ Moreover, the oath of loyalty that each public servant takes on appointment to office ensures that they will keep confidential information obtained through the course of employment with the Crown and only disclose it when they have authority to do so. There are also laws that limit or extend traditional duties to which private counsel are subject. Undertakings are required under the *Income Tax Act*,¹³⁷ to ensure the confidentiality of information provided by taxpayers to

¹³⁶ Online: <http://www.tbs-sct.gc.ca/pubs_pol/ciopubs/TB_GIH/mgih-grdg_e.asp>.

¹³⁷ R.S.C. 1985 (5th Supp.), c. 1.

government. The *Security of Information Act*¹³⁸ protects certain information from disclosure under the threat of prosecution. There are also statutes which permit public interest considerations to prevail and which put government counsel in a much different position than private counsel in undertaking their work: the *Access to Information Act*,¹³⁹ for example, underscores the general policy of openness and transparency in government decision-making; the *Privacy Act*¹⁴⁰ recognizes the importance of personal information to the public. Lastly, there are limitations on the activities of public servants, including restrictions on participation in political activities¹⁴¹ that serve to confirm the public interest context in which government counsel are expected to do their jobs.

As a result, government counsel must balance many considerations in the course of doing their work, some of which would be foreign to the operational environment of private counsel. These considerations vary considerably. Government counsel are employees and public servants and in some cases they may need to assess whether or not they can comply.¹⁴² There are rules for their departure from the public service, which include cooling-off periods, and which can affect their re-entry to private practice.¹⁴³ The ethical duty to keep information confidential as a lawyer is different from the duty to keep government information confidential.¹⁴⁴ In the former case, the duty arises because of confidential communications between a lawyer and client; in the latter case, the duty flows from the office of being a public servant. It is not always clear when one duty trumps another. Government operates on the principle of disclosure, and therefore this public policy can affect the conduct of litigation, including the role of the Crown prosecutor in criminal litigation.¹⁴⁵ This may result in some dissonance between obligation and duty, in cases, for example, of determining the application of solicitor-client privilege exemptions under the *Access to Information Act* or where a waiver of solicitor-client privilege becomes a disclosure issue. Public policy brings a different perspective to how government counsel carry out their duties and how they interpret and

¹³⁸ R.S.C. 1985, c. O-5.

¹³⁹ R.S.C. 1985, c. A-1.

¹⁴⁰ R.S.C. 1985, c. P-21.

¹⁴¹ Robert G. Vaughn, "Restrictions on the Political Activities of Public Employees: The Hatch Act and Beyond" (1976) 44 Geo. Wash. L. Rev. 516.

¹⁴² An example is whistleblowing.

¹⁴³ *Values Code*, *supra* note 29, c. 3 "Post-Employment Measures".

¹⁴⁴ John Gibeaut, "Telling Secrets" *ABA Journal* 90:11 (November 2004) 38 (suits by lawyers against an employer). See *Spratley v. State Farm Mutual Auto Ins. Co.*, 78 P.3d 603 (Utah SC 2003) (use of confidential information by employees to prove case against employer).

¹⁴⁵ *ABA Model Rules*, *supra* note 120 at Rule 1.13 (recognizes that a government

extrapolate the relevant ethical principles. There is a careful line to draw between the counsel's own personal views, the "morality and compassion" of the situation, and the public interest. In this regard they may need to override the wishes of some in the client hierarchy when proceeding with litigation. For example, section 5 of the *Department of Justice Act* recognizes this obligation on the Attorney General for the conduct of litigation.¹⁴⁶ In the event of an unresolved disagreement with superiors, the options of resignation, dismissal or going to the media are not the most desirable.¹⁴⁷ Legal agents can be appointed, however, to address the conflict.¹⁴⁸

It is easy to confuse the ethical obligations of government counsel with the legal obligations of clients.¹⁴⁹ There is no doubt a certain amount of ambiguity attached to their role. Determining who the government counsel serves is not always an easy task when there are also competing obligations to the courts and to third parties which are tempered by the public interest. While counsel may be vested with the ethical dilemma, it may more properly lie within the authority of the public servant. Therefore, it is important to first establish if the matter is one of exercise of authority by the public servant. This can obviate the need to establish a duty to the public as a client.

While the American rules do establish a separate ethical standard for government lawyers in at least one case,¹⁵⁰ law societies in Canada have generally refrained from doing so and have instead concentrated their efforts on providing guidance on the different consequences linked to roles.¹⁵¹ The areas of most concern in this regard involve the interpretation of conflicts of interest, the disclosure of confidential information and the influence of personal and public values on how they practise law. However, the codes of professional conduct are one source among many to help inform the government counsel about their ethical

lawyer may have authority by law to question in more detail the conduct of government officials, which is not the case for private counsel).

¹⁴⁶ For U.S. Department of Justice lawyers see 28 U.S.C. § 516.

¹⁴⁷ In their article, "Some Reflections on Conflicts Between Government Attorneys and Clients," Jack B. Weinstein & Gay A. Crosthwait ((Spring 1985) 1 *Touro L. Rev.* 1 at 4) indicate that a number of lawyers resigned from the Civil Rights Division of the U.S. Department of Justice during the Reagan administration.

¹⁴⁸ For federal public servants see the Treasury Board *Policy on the Indemnification of and Legal Assistance for Crown Servants*, online: <http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TB_851/pila_e.asp>.

¹⁴⁹ Love, *supra* note 80.

¹⁵⁰ *ABA Model Rules*, *supra* note 120 at Rule 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees).

¹⁵¹ An example is Crown prosecutors.

choices and, for those who are in litigation, how to conduct themselves and advise.

In assessing what obligations arise for government counsel, it still makes sense to establish where there is common ground within the legal profession, to build on that principle, to the extent this meets client exigencies, and to recognize the differences with private counsel through the development of supplementary standards and policies in their operational setting while still recognizing the employer's needs to regulate professional conduct. A contextual approach helps counsel to exercise their professional judgment and to fulfill their duties to their client in their operational setting. Undoubtedly, this requires a delicate balancing of the different ethical considerations.