

# LOYALTY, LEGALITY AND PUBLIC SECTOR LAWYERS

John Mark Keyes\*

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*This article examines the duties of loyalty that public sector lawyers owe to their government clients and how considerations of legality limit this duty. It focuses on a recent decision of the Federal Court of Appeal in Schmidt v Canada involving a senior government lawyer's court challenge to the legal position of the Minister of Justice (in whose department he was employed) on the Minister's statutory obligation to report on the inconsistency of government bills with the Charter and the Canadian Bill of Rights. The article argues that, while loyalty and legality are both critically important elements that shape the role of government lawyers, neither should be pursued at all costs. Loyalty is essential for maintaining the respect and confidence of public officials in the lawyers who advise them. And although their essential role is to support government adherence to law, this role is tempered by the uncertainty inherent in many aspects of law relating to matters of public policy and the role of the courts to resolve these uncertainties. Public sector lawyers must respect and support the choices of the government officials they advise in all but the clearest circumstances of illegality. The threshold for publicly attacking the legality of government decisions is very high, mirroring the standard the Federal Courts have recognized in Schmidt: no credible argument to support legality. Anything less risks eroding the influence public sector lawyers have with the officials they serve, and ultimately eroding the rule of law itself.*

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*Cet article examine le devoir de loyauté que les avocats du secteur public ont envers leurs clients gouvernementaux et la façon dont il est restreint par les considérations de légalité. L'étude est axée sur l'arrêt récemment rendu par la Cour d'appel fédérale dans l'affaire Schmidt c Canada, dans laquelle un avocat chevronné du gouvernement avait contesté la position juridique du ministre de la Justice (qui était son employeur) à l'égard de l'obligation d'origine législative qui incombe à ce dernier de signaler les incohérences entre les projets de loi émanant du gouvernement d'une part, et d'autre part, la Charte et la Déclaration canadienne des droits. L'article affirme que malgré l'importance fondamentale de la loyauté et de la légalité en tant qu'éléments qui définissent les fonctions des avocats du gouvernement, ni l'une ni l'autre*

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\* Sessional Professor, Faculty of Law (Common Law), University of Ottawa and former Chief Legislative Counsel in the Department of Justice (Canada). The author acknowledges the very helpful comments of Amy Salyzyn, John Sims, Charles Feldman and the CBR peer reviewers on earlier drafts of this article. He also dedicates the article to the memory of Deborah MacNair who blazed a trail in professional ethics for public sector lawyers.

*ne devraient être poursuivies à tout prix. La loyauté est essentielle pour le maintien du respect et de la confiance accordés par les fonctionnaires aux avocats qui les conseillent. Et malgré leur rôle fondamental de soutien au respect de la loi par le gouvernement, il est tempéré par l'incertitude inhérente à maints aspects du droit liés aux enjeux de politique publique et par le rôle des tribunaux qui consiste à régler ces incertitudes. Les avocats du secteur public doivent respecter et appuyer les choix faits par les fonctionnaires du gouvernement qu'ils conseillent, sauf en cas d'illégalité flagrante. Le seuil de la contestation publique de la légalité des décisions du gouvernement est très élevé et reflète la norme reconnue par la Cour d'appel fédérale dans l'affaire Schmidt, à savoir l'absence de tout argument crédible étayant la légalité, sous peine de risquer de nuire à l'influence que les avocats du secteur public exercent sur les fonctionnaires qu'ils servent et, en fin de compte, de nuire à la primauté même du droit.*

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## 1. Introduction

Loyalty is generally regarded as a commendable virtue. It is also a defining feature of the relationships between lawyers and their clients and between public servants and the governments they serve. It arguably includes, or is the basis for, some of the other fundamental duties associated with these relationships, notably confidentiality and avoiding conflicts of interest.

The loyalty owed by public sector lawyers has recently been called into question in a court action brought by a senior lawyer in the Federal Department of Justice against the Minister of Justice. In *Schmidt v*

*Canada (AG)*,<sup>1</sup> the plaintiff, who was employed at the time as a general counsel in the Legislative Services Branch of the Department, sought a declaration that the Minister was not complying with his statutory duty to report to the House of Commons on the inconsistency of government bills and regulations with the *Canadian Charter of Rights and Freedoms*<sup>2</sup> (“the *Charter*”) and the *Canadian Bill of Rights*<sup>3</sup> (“the *Bill of Rights*”). The case also raised questions about the propriety of a public sector lawyer instituting legal proceedings against the Minister, in whose department he worked, in relation to a matter on which he had been involved in giving legal advice. Did the lawyer breach his duty of loyalty, or did he act properly in the interest of ensuring respect for the law and the protection of fundamental rights and freedoms?

The Minister’s statutory reporting duty and the public sector lawyer’s duty of loyalty are distinct, but they are related by the notion of legality. The reporting duty is concerned with the legality of proposed legislation, while the duty of loyalty is limited by considerations of legality. This article looks at both with a view to clarifying the professional responsibilities of public sector lawyers in relation to the legality of government action.<sup>4</sup> It considers their duty of loyalty founded on two distinct bases. One is the lawyer-client relationship, which forms the basis for the rules of conduct of professional regulatory bodies such as those that make up the Federation of Law Societies of Canada. The other is the employment relationship of public servants in an impartial and politically neutral public service.

After outlining the duty of loyalty on each of these bases, this article turns to the *Schmidt* decision to consider its implications for public sector lawyers, particularly in terms of their role in the preparation of government legislation. It concludes that the decision is solidly grounded in terms of the Minister’s statutory reporting duty, but it is incorrect in recognizing that the plaintiff had a sufficient interest to seek a declaration. It argues that the Court did not give due consideration to the plaintiff’s relationship to the government as both a lawyer and a public servant. While the loyalty this relationship entails is limited by considerations of legality relating to government action, these limits must respect the role of governments to decide what action to take and to defend their actions in court. The limits of this duty are reached only when there is no credible legal basis for

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<sup>1</sup> 2016 FC 269, 399 DLR (4th) 83 [*Schmidt* FC], aff’d 2018 FCA 55, 421 DLR (4th) 530 [*Schmidt* FCA], leave to appeal to SCC refused, 38179 (4 April 2019).

<sup>2</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

<sup>3</sup> SC 1960, c 44, reprinted in RSC 1985, Appendix III [*Bill of Rights*].

<sup>4</sup> This article does not, however, consider the quite distinctive duties of attorneys general who, in Canada, are generally Cabinet ministers. This article focuses on the lawyers who work in their departments.

defending their actions. Any lesser standard jeopardizes the respect and trust required to sustain an effective relationship between public sector lawyers and the governments they serve.

## 2. Lawyers' Duty of Loyalty

### A) Rationale and Basic Elements

The duty of loyalty owed by legal practitioners stretches back to the common law origins of the legal profession and the fiduciary relationship recognized between lawyers and their clients.<sup>5</sup> Both the courts and the bodies that regulate the legal profession have explained its rationale and content many times.

The courts have recognized this duty in the context of not only the supervision of fiduciary relationships, but also their “supervisory powers over litigation brought before them.”<sup>6</sup> Their purpose in the latter context “has traditionally been to protect clients from prejudice and to preserve the repute of the administration of justice.”<sup>7</sup> Justice Binnie expanded on this purpose in *R v Neil*, saying, “[the duty of loyalty] is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained.”<sup>8</sup> He went on to note that this duty entails confidentiality as well as three other dimensions: “(i) the duty to avoid conflicting interests, ... (ii) a duty of commitment to the client’s cause ... and (iii) a duty of candour.”<sup>9</sup>

More recently, the Supreme Court of Canada has characterized client confidence as the core of the duty of loyalty in *Canada (AG) v Federation of Law Societies of Canada*:

A client must be able to place “unrestricted and unbounded confidence” in his or her lawyer; that confidence which is at the core of the solicitor-client relationship is a part of the legal system itself, not merely ancillary to it: *Smith v. Jones*, [1999] 1 S.C.R. 455, at para. 45, citing with approval, *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644 (C.A.); *McClure*. The lawyer’s duty of commitment to the client’s cause, along with the protection of the client’s confidences, is central to the lawyer’s role in the administration of justice.<sup>10</sup>

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<sup>5</sup> *R v Neil*, 2002 SCC 7 at para 16, [2002] 3 SCR 631.

<sup>6</sup> *Canadian National Railway Co v McKercher LLP*, 2013 SCC 39 at para 13, [2013] 2 SCR 649 [*McKercher*].

<sup>7</sup> *Ibid.*

<sup>8</sup> *Supra* note 5 at para 12.

<sup>9</sup> *Ibid* at para 19. See also *McKercher*, *supra* note 6 at para 19.

<sup>10</sup> 2015 SCC 7 at para 83, [2015] 1 SCR 401.

The duty of loyalty is also recognized by bodies that regulate the legal profession in Canada.<sup>11</sup> The *Model Code of Professional Conduct* (“*Model Code*”)<sup>12</sup> of the Federation of Law Societies of Canada mentions loyalty in relation to confidentiality,<sup>13</sup> conflict of interest<sup>14</sup> and the administration of justice.<sup>15</sup> The commentary on the rule prohibiting conflict of interest explains its basis in the duty of loyalty:

[5] The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is based on trust. It is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. 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.<sup>16</sup>

The Code is aligned with case law on a lawyer’s duty of loyalty, including duties to former as well as current clients.<sup>17</sup> Although these duties are not identical, they are largely the same in terms of the confidentiality and conflict of interest aspects of loyalty. They also survive the end of lawyer-client relationships and are owed to both current and former clients.<sup>18</sup>

<sup>11</sup> *McKercher*, *supra* note 6 at para 16. See also Adam Dodek, “Conflicted Identities: The Battle over the Duty of Loyalty in Canada” (2011) 14:2 Leg Ethics 193.

<sup>12</sup> Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: FLSC (as amended 14 March 2017) [*Model Code*]. The *Model Code* has been adopted by professional regulatory bodies throughout Canada, see e.g., The Law Society of Ontario, *Rules of Professional Conduct*, Toronto: LSO, 2000 (as amended 25 January 2018) [*LSO Code*]; The Law Society of Manitoba, *Code of Professional Conduct*, Winnipeg: Law Society of Manitoba, 2007 (adopted 17 June 2010). Since 1920 the Canadian Bar Association has also had a Code of Professional Conduct. However, its “Council has approved a resolution to discontinue the CBA Code once no Canadian law society uses it or incorporates it”: “[Codes of Professional Conduct](http://www.cba.org/Publications-Resources/Practice-Tools/Ethics-and-Professional-Responsibility-(1)/Codes-of-Professional-Conduct)”, online: <[www.cba.org/Publications-Resources/Practice-Tools/Ethics-and-Professional-Responsibility-\(1\)/Codes-of-Professional-Conduct](http://www.cba.org/Publications-Resources/Practice-Tools/Ethics-and-Professional-Responsibility-(1)/Codes-of-Professional-Conduct)>.

<sup>13</sup> *Model Code*, *supra* note 12, ch 3.3(3), commentary 1.

<sup>14</sup> *Ibid*, ch 3.4:

Duty to Avoid Conflicts

3.4-1 A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

<sup>15</sup> *Ibid*, ch 5.1(2A).

<sup>16</sup> *Ibid*, ch 3.4(1), commentary 5. See also *LSO Code*, *supra* note 12, ch 3.4(1), commentary 2.

<sup>17</sup> *McKercher*, *supra* note 6 at paras 23–26.

<sup>18</sup> *Model Code*, *supra* note 12 at 3.4(1), commentary 7:

[7] The lawyer’s duty of confidentiality is owed to both current and former clients, with the related duty not to attack the legal work done during a retainer

To summarize, the purpose of the duty of loyalty is to instill client trust in legal professionals in terms of both their present situation and for the future. It also transcends particular lawyer-client relationships and extends to trust generally in the legal profession and the legal system as a whole.

## B) Governmental Bodies as Clients

The duty of loyalty takes on another dimension when a client is an organization. Organizations may have legal personality, but they rely on individuals to act and speak on their behalf. When clients are organizations, a critical issue is who speaks for them.

The Supreme Court of Canada has recognized that lawyers advising government agencies can have relationships with those agencies that will attract solicitor and client privilege in relation to giving legal advice.<sup>19</sup> In addition, the codes of conduct of Canadian legal professional bodies clearly apply to public servants employed as legal professionals in departments headed by a Minister of Justice or Attorney General since the terms of their employment require them to be members of the bar of the province or territory in which they practice or, in Quebec, the *Chambre des notaires*.<sup>20</sup> The Supreme Court in *Krieger v Law Society of Alberta* held that public sector lawyers are subject to these codes,<sup>21</sup> and the *Model Code* defines “law firm” to include lawyers practising “in a government, a Crown corporation or any other public body.”<sup>22</sup> Finally, the *Model Code* recognizes governmental bodies as clients at various points,<sup>23</sup> as well as “organizations”, which presumably encompasses them as well.<sup>24</sup> However, there are no provisions relating generally to the conduct of public sector lawyers.<sup>25</sup>

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or to undermine the former client’s position on a matter that was central to the retainer.

<sup>19</sup> See e.g. *R v Campbell*, [1999] 1 SCR 565 at para 49, [1999] SCJ No 16 [*Campbell*]; *Pritchard v Ontario (Human Rights Commission)*, [2004] 1 SCR 809 at paras 14–21, 12 Admin LR (4th) 171 [*Pritchard*].

<sup>20</sup> See e.g. [Ministry of Attorney General \(Ontario\), “Current Job Opportunities”](http://www.attorneygeneral.jus.gov.on.ca/english/about/maglawyers/), online: <[www.attorneygeneral.jus.gov.on.ca/english/about/maglawyers/](http://www.attorneygeneral.jus.gov.on.ca/english/about/maglawyers/)>; [Alberta Learning Information Service, “Occupations in Alberta”](http://alis.alberta.ca/occinfo/occupations-in-alberta/occupation-profiles/lawyer/), online: <[alis.alberta.ca/occinfo/occupations-in-alberta/occupation-profiles/lawyer/](http://alis.alberta.ca/occinfo/occupations-in-alberta/occupation-profiles/lawyer/)>.

<sup>21</sup> 2002 SCC 65 at para 4, [2002] 3 SCR 372 [*Krieger*].

<sup>22</sup> *Supra* note 12, ch 1.1(1).

<sup>23</sup> *Ibid*, ch 3.2(8), commentary 6, 3.4(2)(b)(i), 3.4-18, commentary 3, 3.4(19), 3.4(20), commentary 2, 3.7B, 7.2(8), commentary 1, 7.4.

<sup>24</sup> *Ibid*, ch 3.2(3), 3.2(7), 3.2(8).

<sup>25</sup> Before the adoption of the current *Model Code*, the Law Society of Alberta had rules specifically addressing public sector lawyers: chapter 12 of its Code was entitled: “The Lawyer in Government or Corporate Service”: see John Mark Keyes, “Professional Responsibilities of Legislative Counsel” (2011) 5 JPPL 11 at 47–50.

The *Model Code* acknowledges the role of persons who act on behalf of organizations, but makes it clear that the lawyer's duty is to the organization itself:

3.2-3 Although a lawyer may receive instructions from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, the lawyer must act for the organization in exercising his or her duties and in providing professional services.<sup>26</sup>

The commentary on this rule goes on to emphasize the need to obtain instructions from individuals having authority to speak on the client's behalf.<sup>27</sup> But who speaks for a government client, and how are that client's interests determined?

As concerns federal, provincial and territorial governments, the client is an entity embodied by the head of state. In Canada, this is the Queen. However, she has no functional role in these governments apart from appointing the Governor General. All other regal powers have been delegated to the Governor General by the *Letters Patent* of 1947.<sup>28</sup> These powers are understood to be exercisable on the advice of government ministers or through delegation to office-holders who exercise the powers of the state in the Queen's name.<sup>29</sup> The choice of ministers is essentially democratic, founded on the periodic election of members to the House of Commons and the legislative assemblies, whose confidence in turn decides who is to form governments to exercise the powers of the state.<sup>30</sup> Finally, state power flows into the public service through the organization of government departments and agencies that exercise ministerial powers on behalf of the ministers or other office-holders they serve.<sup>31</sup>

Michael Morris and Sandra Nishikawa have also noted another critical aspect of government clients: the need for consistent positions on cross-cutting legal issues that affect distinct matters of government action.<sup>32</sup>

<sup>26</sup> *Supra* note 12, ch 3.2(3).

<sup>27</sup> *Ibid*, commentary 1.

<sup>28</sup> *Letters Patent Constituting the Office of the Governor General of Canada, 1947*, reprinted in RSC 1985, Appendix II, No 31.

<sup>29</sup> Patrick J Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed (Irwin Law: Toronto, 2017) at 62–63 [Monahan, Shaw & Ryan].

<sup>30</sup> *Ibid* at 65ff.

<sup>31</sup> This is known as the alter ego doctrine recognized in *Carltona Ltd v Commissioner of Works*, [1943] 2 All ER 560 (CA); *Interpretation Act*, RSC 1985, c I-21, s 24(2).

<sup>32</sup> Michael H Morris & Sandra Nishikawa, "The Orphans of Legal Ethics: Why Government Lawyers Are Different—and How We Protect and Promote that Difference in Service of the Rule of Law and the Public Interest" (2013) 26:2 Can J Admin L & Prac 171 at 177 [Morris & Nishikawa].

Governments cannot take contradictory positions on legal issues and are generally expected to defend the legal validity of legislation.<sup>33</sup>

What then does the duty of loyalty mean for this type of client? Does its rationale support its application to governmental clients in the same way as individual, corporate or other private sector clients? It does. It is just as essential for those who speak on behalf of the state to have confidence in their legal advisors as it is for private sector clients.<sup>34</sup> There is no room for the trust and confidence that characterize a lawyer-client relationship if there is any possibility that government legal advisors can take disagreements about their advice outside the governmental clients they serve and pursue legal action themselves to protect what they think are the interests of the state. This would turn their legal advisors into just another voice in the broad public discourse about the issues involved. Ministers, their staff and government officials would be unable to explore the legal intricacies and possibilities of the matter at hand with candour and the legal advisor would lose the influence that comes from a position of trust and confidence. In effect, the government client would no longer have access to legal advice as it has come to be understood in our legal system. There is no justification for limiting in this way access to legal advice of government clients whose actions have pervasive effect throughout the country. If anything, legal advice is all the more required to ensure that the powers of government are exercised in conformity with the law.

But what about the possibility that those who have the authority to speak on behalf of the state might nevertheless take action that is not in the state's interest or the public interest more generally? Is a government legal advisor to stay silent? I would suggest the answer lies in the concept of wrongdoing that the *Model Code* recognizes as limiting the duty of loyalty.

### C) Wrongdoing Limits

The *Model Code* characterizes wrongdoing in terms of acting “dishonestly, fraudulently, criminally or illegally” and states what a lawyer must do when the lawyer “knows that the organization has acted, is acting or intends to act” in this manner.<sup>35</sup> The lawyer must advise that the action constitutes

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<sup>33</sup> See Lori Sterling & Heather Mackay, “The Independence of the Attorney General in the Civil Law Sphere” (2009) 34:2 Queen's LJ 891 at 909ff (discussing concessions of *Charter* violations). But see Ian G Scott, “The Role of the Attorney General and the Charter of Rights” (1987) 29:2 Crim LQ 187 at 196–97.

<sup>34</sup> See *Campbell*, *supra* note 19; *Prichard*, *supra* note 19.

<sup>35</sup> *Supra* note 12, ch 3.2-8:

**3.2-8** A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting

wrongdoing, advise against it (at increasingly higher levels if necessary) and, if the advice is not followed, withdraw services.

There are two points to note about these rules. First, the standard for assessing wrongdoing is high: “the lawyer *knows*” that the actions meet the threshold (“dishonestly, fraudulently, criminally or illegally”). Secondly, the action a lawyer is authorized to take in these circumstances is to withdraw from the retainer. These rules do not indicate what, if any, further action a lawyer may or should take. However, rules dealing with confidentiality allow disclosure when there is “an imminent risk of death or serious or bodily harm.”<sup>36</sup> In addition, rules dealing with incriminating physical evidence provide that the duty of loyalty is to be balanced against the duty to the administration of justice, but they stop short of counseling active assistance to investigations into a client’s conduct.<sup>37</sup>

Thus, like other members of legal professional bodies, public sector lawyers are required to withdraw from participating in activities they “know” constitute wrongdoing. The fraud, dishonesty and criminality aspects of wrongdoing are fairly straightforward in this regard, but what of “illegality”?

Presumably, this goes beyond the commission of criminal offences to include provincial offences as well.<sup>38</sup> But does it go further to encompass any government action that is not authorized by law? Given that the rule of law is generally recognized to require all government action to be

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or intends to act dishonestly, fraudulently, criminally, or illegally, must do the following, in addition to his or her obligations under rule 3.2-7:

(a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct is, was or would be dishonest, fraudulent, criminal, or illegal and should be stopped;

(b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct was, is or would be dishonest, fraudulent, criminal, or illegal and should be stopped; and

(c) if the organization, despite the lawyer’s advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with the rules in section 3.7.

<sup>36</sup> *Ibid*, ch 3.3(3).

<sup>37</sup> *Ibid*, ch 5.1(2A) commentary 4.

<sup>38</sup> See e.g. *Law Society of Upper Canada v Machado*, 2018 ONLSTH 10 (involving offences under the *Workplace Safety and Insurance Act*, SC 1997, c 16, Schedule A).

authorized by law,<sup>39</sup> there is enormous potential for illegality relating to virtually everything a government does.

The requirement that the lawyer “know” the conduct is illegal substantially narrows what qualifies as wrongdoing for the purposes of the *Model Code* and excludes illegality that is merely doubtful or not clear. In addition, there are presumptions of validity protecting government action from challenge on the basis of either failing to comply with procedural requirements or exceeding the scope of authority to take the action.<sup>40</sup> These presumptions place the burden on the challenger to demonstrate that the government action is illegal, presuming it to be legal until it has been successfully challenged in court.

The threshold of knowing that illegality exists, together with the presumptions of validity, allow public sector lawyers to work with their clients on matters involving a risk of illegality. If they were required to withdraw when there was any risk of *ultra vires* government action, they would not be involved in the very actions that most require their involvement. If public sector lawyers are to fulfill their role as legal advisors, they must be allowed to continue acting despite the risk that the action will be found to be illegal.

Finally, it should be noted that withdrawal of services by a public sector lawyer would amount to a refusal to continue working on an assigned file or with a particular government unit, which could have disciplinary consequences up to a termination of employment. This makes it a far more significant action than for a private sector lawyer having many other clients.

## **D) Higher Duty for Public Sector lawyers**

There has been some debate about whether public sector lawyers have a higher professional duty to uphold the rule of law than their private sector counterparts. Such a duty arguably provides greater scope for overriding the duty of loyalty.

The Ontario Divisional Court has said that public service lawyers are subject to the same standards as other lawyers:

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<sup>39</sup> Monahan, Shaw & Ryan, *supra* note 29 at 21.

<sup>40</sup> See JM Keyes, *Executive Legislation*, 2nd ed (Lexis Nexis: Markham, 2010) at 548ff. These presumptions have been more recently recognized in relation to making delegated legislation in *Katz Group Canada Inc v Ontario (Health and LongTerm Care)*, 2013 SCC 64 at para 25, [2013] 3 SCR 810.

Central to the conclusion of the learned judge was his view that lawyers employed by the government have a higher professional obligation than other lawyers to observe the Rules of Professional Conduct. There is no basis for this conclusion in the laws or traditions that govern the bar of this province.

All lawyers in Ontario are subject to the same single high standard of professional conduct. It is not flattering to the lawyers of Ontario to say that most of them are held to a lower standard of professional conduct than public sector lawyers.<sup>41</sup>

However, there is considerable commentary arguing that public sector lawyers, including legislative counsel,<sup>42</sup> have distinctive,<sup>43</sup> if not higher duties.<sup>44</sup> Adam Dodek, Dean of the Common Law Section of the University of Ottawa's Faculty of Law, is perhaps the most prominent proponent of higher duties for public sector lawyers "to ensure that all actions of government comply with all laws."<sup>45</sup> And although he has more recently acknowledged that there may be little practical difference between "a higher as opposed to a different duty,"<sup>46</sup> he continues to maintain there are areas—notably the conduct of prosecutions and public interest litigation—where the duty is or should be "higher".

The case for distinctive or higher duties for public sector lawyers is grounded in their role as both public servants and guardians of the rule of law.<sup>47</sup> This role is encapsulated in departmental legislation such as the *Department of Justice Act*, which states the Minister of Justice is to "see that the administration of public affairs is in accordance with law."<sup>48</sup> The

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<sup>41</sup> *Everingham v Ontario* (1992), 8 OR 3d 121, 1992 CarswellOnt 421 at paras 17–18 (Div Ct).

<sup>42</sup> See e.g. Deborah MacNair, "Legislative Drafters: A Discussion of Ethical Standards from a Canadian Perspective" (2003) 24:2 Stat L Rev 125; Roger Purdy, "Professional Responsibility for Legislative Drafters: Suggested Guidelines and Discussion of Ethics and Role Problems" (1987) 11:1 Seton Hall Legis J 67; David A Marcello, "The Ethics and Politics of Legislative Drafting" (1996) 70:6 Tul L Rev 2437.

<sup>43</sup> See J Tait, "The Public Service Lawyer, Service to the Client and the Rule of Law" (1997) 23:1 Commonwealth L Bull 542 at 543 [Tait]; Morris & Nishikawa, *supra* note 32 at 174ff.

<sup>44</sup> See Allan C Hutchinson, "'In the Public Interest': The Responsibilities and Rights of Government Lawyers" (2008) 46:1 Osgoode Hall LJ 105 at 114; Adam M Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law" (2010) 33:1 Dal LJ 1 [Dodek, "Public Law and Legal Ethics"]; Adam Dodek, "The 'Unique Role' of Government Lawyers in Canada" (2016) 49:1 Israel LR 23 [Dodek, "Unique Role"].

<sup>45</sup> Dodek, "Public Law and Legal Ethics", *supra* note 44 at 21–22.

<sup>46</sup> Dodek, "Unique Role", *supra* note 44 at 28.

<sup>47</sup> See Dodek, "Public Law and Legal Ethics", *supra* note 44 at 6–7; Morris & Nishikawa, *supra* note 32 at 174.

<sup>48</sup> RSC 1985, c J-2, s 4(a) [*Justice Act*].

distinctiveness of their duties may have much to do with the tension that can exist between these two bases. This tension is considered further in the next section dealing with the public service duty of loyalty. But what of advancing the rule of law? Does it shift the duties of public sector lawyers beyond merely advising on the legality of government action to something more? And if so, what more?

Dean Dodek has argued that the duty of public sector lawyers is based not only on the rule of law, but also on their exercise of public power, which he suggests lies in the “significant discretion in providing legal advice” that results from the indeterminacy of law.<sup>49</sup> He illustrates this by commenting on the interpretation of the *Charter* reporting provision at the heart of the *Schmidt* case:

Here my point is that every time a decision is made not to make a report to the House of Commons, there has obviously been an act of interpretation. Indeed, this was made clear when a Department of Justice lawyer disclosed at a house committee that the standard used to trigger the reporting requirement was “manifestly unconstitutional.” This phrase is itself an act of legal interpretation and a highly discretionary one at that. If lawyers in the Department had chosen a standard of “arguably unconstitutional,” it is likely that many more bills would have been reported under these provisions. This could have had a very different effect on legislation and the relationship between the courts, the legislature and the executive, to say the least of the potential impact of such legislation on affected groups.<sup>50</sup>

The suggestion that departmental lawyers exercise power is debatable.

First, extra-judicial interpretation is at best an opinion about what a court would decide. It is difficult to see how a lawyer’s opinion on the meaning of legislation can amount to an exercise of power, particularly when there may be competing interpretations. Power is exercised by those who rely on the opinions. Legal advice, like other forms of advice, stops short of dictating what the person receiving the advice must do.

Secondly, the interpretation of legislation is not a matter of simply choosing a meaning; it involves assessing the text, context and purposes of legislation in light of judicially established interpretive techniques.<sup>51</sup> Although interpretation involves a degree of discretion, it is fundamentally about someone else’s exercise of power: the law-maker’s. And, in relation to the example Dean Dodek gives, the Federal Court of Appeal in *Schmidt*

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<sup>49</sup> Dodek, “Public Law and Legal Ethics”, *supra* note 44 at 23.

<sup>50</sup> *Ibid* at 25 [footnotes omitted].

<sup>51</sup> *Ibid.*

has now refuted the argument that there was any other reasonable interpretation in this case.<sup>52</sup> In a well-reasoned exercise of statutory interpretation, the Court challenged the notion that words can be made to mean whatever the interpreter wants them to mean,<sup>53</sup> and concluded that the interpretation advanced by the Department of Justice was not only reasonable, but also correct.<sup>54</sup>

Public sector lawyers should unquestionably seek to advance the values of the rule of law and the legality of government action. This may qualify as a “higher duty”, as John Tait has suggested,<sup>55</sup> but it is surely one that is shared by all members of the legal profession. The issue is how far public sector lawyers can and should go to fulfill this duty, and whether they should in some sense do more than their private sector counterparts. Characterizing them as exercising power to do so both distorts and overstates their role as legal advisors. It confuses power with influence.<sup>56</sup> There is a world of difference between the two. Influence operates within a legal services model involving a relationship of mutual respect; power entails control and making decisions. And in the world of government, ministers and other delegates of state power make decisions. Indeed our administrative law makes it clear that discretionary decisions must be made by those who are authorized to make them and cannot be fettered by dictation from others.<sup>57</sup>

A public sector lawyer’s duty to advance the rule of law is to provide solid advice on the legality of government action, including legislative action; it is to encourage decisions that not only minimize the risk that the action may be challenged legally and found to be outside the law, but also advance constitutional values, including the rule of law.<sup>58</sup> This requires cultivating the confidence of those being advised: they must be able to fully trust their legal advisors and be prepared to fully disclose to them the intentions and purposes underlying the action they propose to take.

Dodek also argues on the basis of the rule of law that private sector lawyers must have a certain independence from both the state and their own clients, somewhat akin to that of the judiciary.<sup>59</sup> This independence has been clearly recognized in relation to public sector

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<sup>52</sup> *Supra* note 1.

<sup>53</sup> *Ibid* at paras 25–27.

<sup>54</sup> *Ibid* at para 41. See also the discussion below at pages 18ff.

<sup>55</sup> Tait, *supra* note 43 at 548.

<sup>56</sup> Morris & Nishikawa, *supra* note 43 at 176.

<sup>57</sup> See e.g. *Stemijon Investments Ltd v Canada (AG)*, 2011 FCA 299 at paras 21–24, 341 DLR (4th) 710.

<sup>58</sup> Tait, *supra* note 43 at 547–48.

<sup>59</sup> Dodek, “Public Law and Legal Ethics”, *supra* note 44 at 22–23.

lawyers who conduct criminal prosecutions. They do not advise or take instructions from ministers or other government officials in the exercise of prosecutorial discretion,<sup>60</sup> and courts will only review its exercise for “‘flagrant impropriety’ or in actions for malicious prosecution.”<sup>61</sup>

Independence has also been recognized more generally in the organization of government legal services. In most Canadian jurisdictions, legal services are provided by legal professionals employed by a central legal department such as a department of Justice or a ministry of the Attorney General. This structure can be traced back to the Royal Commission on Government Organization (Glassco) in the early 1960s.<sup>62</sup> Its report catalogued the extent to which individual departments and agencies in the federal government at that time employed their own legal staff<sup>63</sup> and recommended an integrated legal service centralized in the Department of Justice. This recommendation was based on a variety of reasons having to do with staffing, career development and retention.<sup>64</sup> A second set of reasons had to do with independence:

Among the more important tasks of the lawyer in public service, the initial framing of bills and regulations and advising on their application in individual cases demand a special degree of independence for the lawyer, setting him somewhat apart from the “line” activities of his department. Lawyers often find themselves drawn into the policy-making machinery of their departments, thereby becoming so closely identified with departmental management that their capacity to provide impartial advice becomes impaired.<sup>65</sup>

The Glassco recommendations for the centralization of legal services were implemented and are largely still intact today through departmental legislation,<sup>66</sup> thereby recognizing the independence of public sector lawyers from the departments they serve and, as John Tait has noted, reinforcing the “authority” of the Minister of Justice or Attorney General as the chief law officer of the government.<sup>67</sup> However, the degree of independence is arguably more limited than that associated with prosecutors or private sector lawyers. Other public sector lawyers have neither power akin to

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<sup>60</sup> *Krieger, supra* note 21 at paras 43–45.

<sup>61</sup> *Ibid* at para 49 [footnotes omitted].

<sup>62</sup> Canada, Privy Council Office, *The Royal Commission on Government Organization*, No Z1-1960/4 (Ottawa: Queen’s Printer, 1962).

<sup>63</sup> Notably, of the 330 lawyers employed in the federal government, only 42 were employed by the Department of Justice: *ibid*, vol 2 at 393–94.

<sup>64</sup> *Ibid* at 412.

<sup>65</sup> *Ibid* at 412–13.

<sup>66</sup> See e.g. *Justice Act, supra* note 48; *Ministry of the Attorney General Act*, RSO 1990, c M-17.

<sup>67</sup> *Supra* note 43 at 544.

prosecutorial discretion nor as much control over who they work for: as public servants, they are bound to serve the elected government of the day. And, by the same token, elected and governmental officials have little choice over who will serve them. The lawyer-client relationship is imposed by organizational arrangements requiring government ministers and public servants to obtain legal advice from public sector lawyers. Outside legal advice is not prohibited, but it constitutes a relatively small proportion of the legal services provided to government.<sup>68</sup> Although employment in a central legal services department affords greater independence from other departments, it is still employment within the government and the ultimate client is the same, which brings us to the second basis for their duty of loyalty: as employees in a public service.

### 3. Public Service Duty of Loyalty

#### A) Rationale and Basic Elements

Public servants have a duty of loyalty, but it has a different foundation from that of the legal profession. It is rooted in the establishment of a professional public service that is politically impartial and non-partisan. In Canada, the origins of such a public service can be traced back to the Federal Civil Service Commission. It was created in 1908 with the aim of replacing employment practices based on political patronage with a system of appointment on the basis of merit.<sup>69</sup> Luc Juillet and Ken Rasmussen have described these origins as follows: “the history of the Commission can be understood as an evolving struggle to achieve a balance among three competing, and, at times, contradictory sets of values at the heart of public service staffing in a liberal democracy: political neutrality and independence; fairness and democratic equality; and competence and managerial efficiency.”<sup>70</sup>

Today, legislation like the federal *Public Service Employment Act*<sup>71</sup> continues to apply the merit principle for staffing public service positions

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<sup>68</sup> For example, the total expenditure for legal agents by the Federal Department of Justice in 2015–16 was about \$15M out of total legal services spending of about \$200M: see “[Disclosure of Contracts for Legal Services: Annual Legal Agent Expenditures 2015–16](http://www.justice.gc.ca/eng/trans/pd-dp/contr_legal/2015_2016.html)”, online: *Department of Justice* <[justice.gc.ca/eng/trans/pd-dp/contr\\_legal/2015\\_2016.html](http://www.justice.gc.ca/eng/trans/pd-dp/contr_legal/2015_2016.html)>; “[2015–16 Departmental Performance Report](http://www.justice.gc.ca/eng/rp-pr/cp-pm/dpr-rr/2015_2016/dpr-rmr/p4.html#sec21)”, online: *Department of Justice* <[www.justice.gc.ca/eng/rp-pr/cp-pm/dpr-rr/2015\\_2016/dpr-rmr/p4.html#sec21](http://www.justice.gc.ca/eng/rp-pr/cp-pm/dpr-rr/2015_2016/dpr-rmr/p4.html#sec21)>.

<sup>69</sup> SC 1908, c 15.

<sup>70</sup> Luc Juillet & Ken Rasmussen, *Defending a Contested Ideal: Merit and the PSC of Canada 1908–2008*, (Ottawa: University of Ottawa Press, 2008) at 5.

<sup>71</sup> SC 2003, c 22, ss 12–13. See also *Public Service of Ontario Act*, SO 2006, c 35, Schedule A; *Public Service Act*, CQLR c F-3.1.1 [Quebec *Public Service Act*]; *Public Service Act*, RSBC c 385.

and public servants are expected not only to be politically impartial, but also capable of serving the government of day regardless of its political affiliation.

A duty of loyalty underpins the political neutrality of modern public services and is stated in some public service legislation.<sup>72</sup> It is also expressed in documents such as the *Values and Ethics Code for the Public Sector*<sup>73</sup> issued by the Federal Treasury Board in its capacity as public service employer under the *Financial Administration Act*.<sup>74</sup> This Code is supplemented by departmental codes, notably the Values and Ethics Code of the Department of Justice.<sup>75</sup> Loyalty is one of the “expected behaviours” listed in the Code under the heading of “Respect for Democracy” under both of these codes:

1.2 Loyally carrying out the lawful decisions of their leaders and supporting ministers in their accountability to Parliament and Canadians.<sup>76</sup>

It is also implicit in another expected behaviour under the heading “Integrity”:

3.4 Acting in such a way as to maintain their employer’s trust.<sup>77</sup>

The reference to “lawful decisions” in section 1.2 of both the Public Sector Code and Department of Justice Code qualifies the duty of loyalty, but the codes provide no further detail on this qualification.

The public service duty of loyalty has also been recognized by the Supreme Court of Canada in *Fraser v Public Service Staff Relations Board*, involving the disciplinary action imposed on a public servant for making comments critical of government policies.<sup>78</sup> Although the case was not decided on the basis of the *Charter*, the Court nevertheless considered

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<sup>72</sup> See e.g. Quebec *Public Service Act*, *supra* note 71, s 5.

<sup>73</sup> Government of Canada (Treasury Board Secretariat), *Values and Ethics Code for the Public Sector*, Ottawa: Government of Canada, 2011. See also Government of Canada, “[The Duty of Loyalty](http://www.canada.ca/en/treasury-board-secretariat/services/values-ethics/code/duty-loyalty.html)”, online: <[www.canada.ca/en/treasury-board-secretariat/services/values-ethics/code/duty-loyalty.html](http://www.canada.ca/en/treasury-board-secretariat/services/values-ethics/code/duty-loyalty.html)>; British Columbia, “[Standards of Conduct for Public Service Employees: Human Resources Policy 09](http://www2.gov.bc.ca/gov/content/careers-myhr/about-the-bc-public-service/ethics-standards-of-conduct/standards-of-conduct)”, online: <[www2.gov.bc.ca/gov/content/careers-myhr/about-the-bc-public-service/ethics-standards-of-conduct/standards-of-conduct](http://www2.gov.bc.ca/gov/content/careers-myhr/about-the-bc-public-service/ethics-standards-of-conduct/standards-of-conduct)>.

<sup>74</sup> RSC 1985, c F-11, s 7(1)(e).

<sup>75</sup> Department of Justice (Canada), *Values and Ethics Code of the Department of Justice*, Ottawa: Department of Justice, 2016 [Department of Justice *Ethics Code*].

<sup>76</sup> *Ibid*, s 1.2.

<sup>77</sup> *Ibid*, s 3.4.

<sup>78</sup> [1985] 2 SCR 455 at 470–71, 23 DLR (4th) 122 [*Fraser*].

freedom of speech as “a deep-rooted value in our democratic system of government”<sup>79</sup> and struck a balance between it and the public service duty of loyalty:

[A] public servant is required to exercise a degree of restraint in his or her actions relating to criticism of government policy, in order to ensure that the public service is perceived as impartial and effective in fulfilling its duties. It is implicit throughout the Adjudicator’s reasons that the degree of restraint which must be exercised is relative to the position and visibility of the civil servant.<sup>80</sup>

Thus, there is no single standard for judging the required degree of restraint. Much depends on an individual employee’s position and the degree to which criticism of the government would undermine their ability to discharge that position. The Court went on to explain this further in terms of the basis for the requirement of restraint, including the duty of loyalty:

The federal public service in Canada is part of the executive branch of Government. As such, its fundamental task is to administer and implement policy. In order to do this well, the public service must employ people with certain important characteristics. Knowledge is one, fairness another, integrity a third. ... a further characteristic is loyalty. As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty owed is to the Government of Canada, not the political party in power at any one time ... there is a powerful reason for this general requirement of loyalty, namely the public interest in both the actual, and apparent, impartiality of the public service.<sup>81</sup>

And, like the restraint on criticism itself, the duty of loyalty is variable as well, and has limits:

A public servant need not vote for the governing party. Nor need he or she publicly espouse its policies. And indeed, in some circumstances a public servant may actively and publicly express opposition to the policies of a government. This would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others, or if the public servant’s criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability.<sup>82</sup>

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<sup>79</sup> *Ibid* at 462.

<sup>80</sup> *Ibid* at 466.

<sup>81</sup> *Ibid* at 470.

<sup>82</sup> *Ibid*.

## B) Illegality Limits

In addition to the decision in the reference in *Fraser* to “illegal acts”<sup>83</sup> as limits on public service loyalty, the federal public service codes qualify the duty of loyalty in terms of “lawful decisions”.<sup>84</sup> These limits have much in common with wrongdoing discussed above in relation to the lawyers’ duty of loyalty.<sup>85</sup> They are also reflected in public service legislation such as the federal *Public Servants Disclosure Protection Act* (“the Act”) along with limits relating to life, health and safety.<sup>86</sup> This Act frames them within the concept of “wrongdoing” and provides processes for public servants to disclose it.<sup>87</sup> Most of the acts defined as wrongdoing are of a serious nature, but the first one (contravention of an Act or regulations) encompasses a wide array of actions of varying degrees of gravity. The range of possible contraventions is wide and includes many matters of a relatively minor nature, such as parking regulations.<sup>88</sup> However, the processes the Act puts in place for dealing with wrongdoing are largely internal to the Government, rising up to disclosure to the Public Sector Integrity Commissioner. And a notable limit on disclosure to the Commissioner is the exclusion of information protected by solicitor and client privilege.<sup>89</sup> This limit does not appear to apply to disclosures to senior officials within the units concerned, presumably because they are part of the government

<sup>83</sup> *Ibid.*

<sup>84</sup> Department of Justice *Ethics Code*, *supra* note 75.

<sup>85</sup> See Part 2(C), *above*, on Wrongdoing Limits.

<sup>86</sup> SC 2005, c 46 [*Disclosure Protection Act*]. See also *Public Interest Protection Act*, SBC 2018, c 22 [*BC Protection Act*]; *Public Interest Disclosure (Whistleblower Protection) Act*, CCSM, c P217 [*MN Protection Act*].

<sup>87</sup> *Public Interest Protection Act*, *supra* note 86. “Wrongdoing” is defined as:

8. This Act applies in respect of the following wrongdoings in or relating to the public sector:

(a) a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act, other than a contravention of section 19 of this Act;

(b) a misuse of public funds or a public asset;

(c) a gross mismanagement in the public sector;

(d) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of a public servant;

(e) a serious breach of a code of conduct established under section 5 or 6; and

(f) knowingly directing or counselling a person to commit a wrongdoing set out in any of paragraphs (a) to (e).

<sup>88</sup> See e.g. *Airport Parking Charges Regulations*, SOR/87-543.

<sup>89</sup> *MN Protection Act*, *supra* note 86; *Disclosure Protection Act*, *supra* note 86, s 13(2); *BC Protection Act*, *supra* note 86, s 5.

apparatus dealing with the matters protected by privilege. In contrast, the Commissioner is independent of the government and reports to the Senate and the House of Commons.<sup>90</sup>

Section 16 of the Act allows public disclosure in circumstances beyond those allowed by the professional rules of conduct. And while information protected by solicitor and client privilege is not entirely excluded, these circumstances are quite limited, involving “a serious offence” or “imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment.”<sup>91</sup> Lesser forms of illegality or danger are to be addressed internally by senior departmental officials or by the Public Sector Integrity Commissioner, although their decisions are judicially reviewable under the *Federal Courts Act*.<sup>92</sup>

There is little case law on the illegality threshold for publicly disclosing wrongdoing in the federal public service.<sup>93</sup> However, in *Read v Canada (AG)*, the Federal Court of Appeal considered the disclosure of possible illegality in relation to an RCMP officer’s duty of loyalty and whether the officer had a higher duty of loyalty than other members of the public service.<sup>94</sup> The Assistant RCMP Commissioner whose decision was under review had considered there was a higher duty because of the RCMP mandate to enforce laws, their powers of arrest and detention, the sensitive nature of their investigations and “that discretion was at the forefront of all of their activities.”<sup>95</sup> The Commissioner went on to uphold an internal adjudication board’s finding that the disclosure of classified information about a criminal investigation constituted disgraceful conduct and its recommendation that the officer be dismissed.

<sup>90</sup> *Disclosure Protection Act*, *supra* note 86, ss 38(3.3), 39.

<sup>91</sup> *Ibid*, s 16:

16 (1) A disclosure that a public servant may make under sections 12 to 14 may be made to the public if there is not sufficient time to make the disclosure under those sections and the public servant believes on reasonable grounds that the subject-matter of the disclosure is an act or omission that constitutes a serious offence under an Act of Parliament or of the legislature of a province; or

constitutes an imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment.

See also *BC Protection Act*, *supra* note 86, c 22, s 16; *MN Protection Act*, *supra* note 86, s 14.

<sup>92</sup> RSC 1985, c F-7. See e.g. *Gupta v Canada*, 2016 FCA 50, 395 DLR (4th) 575.

<sup>93</sup> It has been raised but not substantiated in *Grahn v Canada (Treasury Board)* (1987), 91 NR 394, 1987 CarswellNat 1125 (FCA); *Stenhouse v Canada (AG)*, [2004] 4 FCR 437, 12 Admin LR (4th) 299 (FC).

<sup>94</sup> 2006 FCA 283, 272 DLR (4th) 300, leave to appeal to SCC refused, 2007 CanLII 16766 (SCC).

<sup>95</sup> *Ibid* at para 114.

The Court of Appeal upheld the Assistant Commissioner's decision. Justice Nadon commented as follows on the duty of loyalty:

[115] Hence, in the Assistant Commissioner's view, the public expected a high standard of the duty of loyalty from RCMP officers and relied on their discretion in regard to the investigations which they carried out and in regard to the confidential information which they were privy to.

[116] I am not prepared to say, as the Assistant Commissioner and the Board do, that RCMP members must be held to a standard higher than other public servants. However, I agree entirely with the Assistant Commissioner and for the reasons that he gives, that RCMP officers must necessarily be held to a very high standard of the duty of loyalty. Whether or not that standard is higher than that imposed on other public servants will, in my view, depend on the circumstances of the case in addition to, as Dickson C.J. held in Fraser "the position and visibility of the civil servant."<sup>96</sup>

If there is a "very high standard of the duty of loyalty" for RCMP officers, what of public sector lawyers? They do not have the public visibility, or exercise the discretionary powers, of RCMP officers, but those to whom they provide legal services have expectations associated with solicitor and client relationships. Public criticism of a government decision by a lawyer who had provided advice on the decision would fundamentally undermine the trust and confidence of government clients in the lawyer, if not public sector lawyers generally.

Although legality unquestionably limits a public sector lawyer's duty of loyalty, legality is also at the heart of their client relationship. It is often difficult to determine whether a course of action will incur illegality and legal advice is often framed in terms of risk rather than in absolute terms of legal or not. If government action were restricted to action that was legally risk-free, it would be substantially limited and prevent action that might otherwise turn out to be authorized on judicial review. Canadian courts have recognized the propriety of legislative bodies testing the limits of legality<sup>97</sup> and indeed engage in a dialogue with them on these

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<sup>96</sup> *Ibid* at para 115–16.

<sup>97</sup> See *Schmidt* FCA, *supra* note 1 at para 87. Also note the refusal of the Supreme Court to consider *Charter* values in the interpretation of legislation when the text is "unambiguous": see *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 66, [2002] 2 SCR 559; John Mark Keyes & Carol Diamond, "Constitutional Inconsistency in Legislation: Interpretation and the Ambiguous Role of Ambiguity" (2017) 48:2 *Ottawa L Rev* 319 at 330–33.

issues.<sup>98</sup> 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. As discussed above, this standard is recognized both in the legal profession<sup>99</sup> as well as in the public sector codes and legislation on the disclosure of wrongdoing.<sup>100</sup> The circumstances warranting disclosure under public service legislation are somewhat broader than those under the law society codes,<sup>101</sup> but they entail the same standard of clear illegality.

Requiring, or indeed authorizing, public sector lawyers to publicly expose or challenge government action that can be legally defended would undermine the confidence of ministers and government officials in public sector lawyers; it would encourage them to seek legal advice elsewhere from those they can trust to look for legal arguments to support for their chosen courses of action rather than sitting in judgment on them.

#### 4. Schmidt, Loyalty and Legality at Odds

Mr. Schmidt was a lawyer in the Federal Department of Justice in December of 2012 when he commenced an action against the Attorney General of Canada in the Federal Court. He was also a member of the Law Society of Manitoba. His statement of claim sought declarations relating to the interpretation and application of statutory provisions involving the examination of proposed bills and regulations for inconsistency with the *Charter*<sup>102</sup> and the *Bill of Rights*.<sup>103</sup> The statement of claim also noted that “[t]he duties of the plaintiff have included and continue to include participation in the carrying out, on behalf of or in the name of the Minister and the Deputy Minister, of examinations of proposed legislation under [*the statutory examination provisions*].”<sup>104</sup>

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<sup>98</sup> See Peter W Hogg & Allison A Bushell, “The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn’t Such a Bad Thing After All)” (1997) 35 *Osgoode Hall LJ* 75.

<sup>99</sup> See part 2(C), *above*, 1 on Wrongdoing Limits.

<sup>100</sup> See note 86, *above*, and the accompanying text.

<sup>101</sup> For example, section 16 of both the federal (*Disclosure Protection Act*, *supra* note 89) and BC (*BC Protection Act*, *supra* note 86) disclosure legislation, go beyond risk of bodily harm to persons to encompass the commission of serious offences and environmental danger as well. This raises questions about a potential conflict relating to situations where the public service duty allows disclosure but the legal professional duty does not. This issue is important, but it need not be addressed in this article given its focus on publicly challenging government action as opposed to disclosing confidential information.

<sup>102</sup> *Supra* note 2.

<sup>103</sup> *Supra* note 3.

<sup>104</sup> *Schmidt FCA*, *supra* note 1 (Statement of Claim), Court File No T-2225-12 at para 3.

This case raises issues about public sector lawyers relating to both their duty of loyalty to their client-employers as well as the legality of government legislation (both primary and delegated).

Mr. Schmidt brought his action after having raised his concerns within the Department of Justice up to the level of the Deputy Minister.<sup>105</sup> His action was founded on three statutory provisions imposing requirements to examine proposed legislation and report on the results of the examination.<sup>106</sup> These provisions require government bills and regulations to be examined for “inconsistency” with the *Charter* and the *Bill of Rights*. They also require reports of inconsistency with “the purposes and provisions” of the *Charter* and the *Bill of Rights*. The action focused on the standard for reporting an inconsistency. The plaintiff did not challenge the sufficiency of the examinations that had been conducted or the application of the reporting standard to any specific piece of legislation.<sup>107</sup>

The standard used since 1982 by the Minister of Justice and departmental officials was framed in terms of the existence of a “reasonable” or, more recently, a “credible” argument that the legislation is consistent with the *Charter* and the *Bill of Rights*.<sup>108</sup> Under this standard, a report is required only if there is no such argument. This standard has been the subject of academic commentary,<sup>109</sup> as well as testimony before

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<sup>105</sup> *Ibid* para 26.

<sup>106</sup> *Justice Act, supra* note 48, s 4.1; *Bill of Rights, supra* note 3, s 3; *Statutory Instruments Act, RSC 1985, c S-22, s 3*. Section 4.1(1) of the *Justice Act, supra* note 48, reads as follows:

Examination of Bills and regulations

4.1 (1) Subject to subsection (2), the Minister shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and every Bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity.

<sup>107</sup> *Schmidt FC, supra* note 1.

<sup>108</sup> *Ibid* para 241ff.

<sup>109</sup> See James B Kelly, “Bureaucratic activism and the Charter of Rights and Freedoms: The Department of Justice and its entry into the centre of government” (1999) 42:4 *Can Public Administration* 476 [Kelly]; Janet L Heibert, “Rights-Vetting in New Zealand and Canada: Similar Idea, Different Outcomes” (2005) 3:1 *New Zealand J Public Intl L* 63 [Heibert]; Grant Huscroft, “Reconciling Duty and Discretion: The Attorney General in the *Charter* Era” (2009) 34:2 *Queen’s LJ* 773 [Huscroft]; Julia Rendell, “The Attorney General’s Obligation to Report Breaches of Rights in Proposed Legislation: How the Canadian and New Zealand Reporting Cultures Differ” (LLM Thesis, University of

parliamentary committees.<sup>110</sup> The competing standard advanced by the plaintiff was that a report is required when the legislation is “more likely than not inconsistent” with the *Charter* or the *Bill of Rights*.<sup>111</sup>

The arguments about the reporting standard turned on the meaning of the legislative provisions in question. Despite the variation in wording, the Federal Court of Appeal interpreted the three statutory provisions as imposing the same standard for reporting an inconsistency.<sup>112</sup> It agreed with the Federal Court and concluded that the departmental standard represented a correct interpretation.<sup>113</sup> Both courts advanced a range of reasons to support this conclusion beginning with a textual analysis of the provisions, attaching particular significance to the verbs used (“ascertain” and “ensure” in the English version) and their objects (“whether any of the provisions thereof are inconsistent with the purposes and provisions of [the *Charter* or Part I of the *Canadian Bill of Rights*]”).<sup>114</sup> The courts also examined the corresponding terminology in the French version and concluded that it rendered the same standard involving a high degree of certainty that the proposed legislation is “inconsistent” (“*incompatible*” in French).<sup>115</sup> The Court of Appeal also contrasted section 4.1 with a proposed amendment to the *Department of Justice Act* introduced in Parliament in 2017.<sup>116</sup> The amendment, which was subsequently enacted in 2018, requires the Minister of Justice to table for every government bill “a statement that sets out potential effects of the Bill on the rights and freedoms that are guaranteed by the *Canadian Charter of Rights and Freedoms*.”<sup>117</sup> This requirement, which reflects a practice already being

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Toronto Faculty of Law, 2011) [unpublished]; Jennifer Bond, “Failure to Report: The Manifestly Unconstitutional Nature of the *Human Smugglers Act*” (2014) 51:2 Osgoode Hall LJ 377 at 384–85 [Bond].

<sup>110</sup> See e.g. House of Commons, Legislative Committee on Bill C-2, *Evidence*, 29-2nd on Bill C-2, at 10:25ff.

<sup>111</sup> *Schmidt* FCA, *supra* note 1 at para 4.

<sup>112</sup> *Ibid* at para 74.

<sup>113</sup> *Ibid* at para 41.

<sup>114</sup> *Ibid* at para 13.

<sup>115</sup> *Ibid* at paras 50–52.

<sup>116</sup> *Ibid* at para 43.

<sup>117</sup> Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, 1st Sess, 42nd Parl, 2018, cl 73 (assented to 13 December 2018), SC 2018, c 29 [Bill C-51], adds section 4.2 to the *Justice Act*, *supra* note 48, in the following terms:

Charter statement

4.2 (1) The Minister shall, for every Bill introduced in or presented to either House of Parliament by a minister or other representative of the Crown, cause to be tabled, in the House in which the Bill originates, a statement that sets out potential effects of the Bill on the rights and freedoms that are guaranteed by the *Canadian Charter of Rights and Freedoms*.

implemented by the current government,<sup>118</sup> would go much further than section 4.1 in terms of shedding light on the Minister's views about government bills.

Justice Stratas, for the Federal Court of Appeal, commented on the text of section 4.1 of the *Department of Justice Act* as follows:

[45] Implicit in this is the idea that a positive finding must be made, to some degree of certitude, that the legislation is inconsistent before a report can be made. The shared meaning of the words “ascertain” and “ensure” and “*rechercher*” and “*vérifier si*” require a person to be satisfied that a state of affairs exists. Thus, under the examination provisions, either the Minister is satisfied that a provision is “inconsistent” or she is not.<sup>119</sup>

He went on to conclude:

[66] The credible argument standard employed by the Minister of Justice allows the Minister of Justice to fulfill her obligations under the examination provisions. If the Minister of Justice believes that there is a *bona fide* argument based on the current state of the law that a court will accept that the proposed legislation passes muster—that it is arguably compliant with both the *Canadian Bill of Rights* and the Charter—she *cannot* come to the conclusion that the proposed legislation is inconsistent with guaranteed rights. The Minister will not be required to report. The credible argument standard allows the Minister to answer the only question asked of her.<sup>120</sup>

Justice Stratas also considered the context and purpose of the provisions in question, including the fact that only one report had ever been made about a government bill. He considered this to confirm the high standard for reporting in that Parliament could have adjusted the standard if it had wanted a lower one.<sup>121</sup> Indeed, this matter has now been very recently considered by Parliament in the form of the amendments to the *Department of Justice Act*.<sup>122</sup> It should also be noted that the paucity of reports does not necessarily demonstrate the ineffectiveness of the examination provisions. Rather, these provisions, including the prospect of reports to the House of Commons, have arguably provided a solid foundation for the bill review process and the absence of reports in fact demonstrates the effectiveness

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<sup>118</sup> See Department of Justice, “[Charter Statements](http://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/index.html)”, online: <[www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/index.html](http://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/index.html)>.

<sup>119</sup> *Schmidt FCA*, *supra* note 1 at para 45.

<sup>120</sup> *Ibid* at para 66 [emphasis in original].

<sup>121</sup> *Ibid* at para 79.

<sup>122</sup> See Bill C-51, *supra* note 117.

of these provisions in injecting rights considerations into the preparation of government bills.<sup>123</sup>

Justice Stratas also considered the relationship between the executive, Parliament and the judiciary, noting that the Minister of Justice was the legal advisor to the Government, and not to members of Parliament.<sup>124</sup> The reporting requirements were not intended to change this by requiring the Minister to report more often. They were also not intended to blunt the Government's ability to introduce legislation that might infringe individual rights given that constitutional requirements are often highly complex and debatable, and continue to evolve,<sup>125</sup> particularly as section 1 of the *Charter* leaves open the possibility of justifying the infringement of rights as a reasonable limit in a free and democratic society.<sup>126</sup> He concluded pragmatically:

[103] ... I ask this question: given the nature of constitutional law and litigation and the practical obstacles facing the Department of Justice, what is more likely? That the examination provisions require the Minister to reach a definitive view, settle upon probability assessments and report when she concludes that proposed legislation is "likely" unconstitutional? Or that the examination provisions require the Minister to report whenever there is no credible argument supporting the constitutionality of proposed legislation?

[104] I would suggest the latter. Given the uncertain, difficult jurisprudential terrain of constitutional law and the time when the Minister is expected to assess proposed legislation, the only responsible, reliable report that could be given under the examination provisions is when proposed legislation is so constitutionally deficient, it cannot be credibly defended. I consider the Minister's view of what the examination provisions require to be acceptable and defensible. Indeed, as I have said earlier, I consider the Minister's view to be correct.<sup>127</sup>

Justice Stratas's reasoning is consistent with the political implications of the reporting requirement. If a Minister were to report, it would mean that he or she had been unable to convince the Prime Minister and the rest of the Cabinet to back down on the potentially inconsistent provisions. Publicly exposing them through a report would imperil the Minister's position

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<sup>123</sup> Bond, *supra* note 109 at 385ff provides a good commentary on the debate about this issue. Support for the view that section 4.1 is effective despite the absence of reports is found in Kelly, *supra* note 109 at 502–03; Heibert, *supra* note 109 at 72–73; Huscroft, *supra* note 109 at 794. For a contrary view, see Kent Roach, "Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law" (2006) 31:2 *Queen's LJ* 598 at 625.

<sup>124</sup> *Schmidt FCA*, *supra* note 1 at para 82.

<sup>125</sup> *Ibid* at para 90–99.

<sup>126</sup> *Ibid* at para 87.

<sup>127</sup> *Ibid* at paras 103–04.

in the Cabinet. It is difficult to see how the Minister could continue in office.<sup>128</sup>

It is also difficult to see how such a reporting requirement could be reconciled with the ministerial and departmental role of legal adviser to the Government. In 1999, James Kelly published a public management study about the evolution of the Federal Department of Justice from the enactment of the *Charter* in 1982, including the enactment of examination and reporting requirements of section 4.1 of the *Department of Justice Act*.<sup>129</sup> He chronicled the significant increase in the involvement of Justice lawyers in government policy-making through the institution of *Charter* screening processes, such as those described in some detail in the *Schmidt* trial decision.<sup>130</sup> He also observed that the Minister's reporting requirement

[I]s counterproductive to the elaborate process that Justice has established with line departments and central agencies to filter policies through a Charter screening process: it works against the partnership developed between Justice and line departments and it encourages resistance to a Charter review at the departmental level. Indeed, if this power were used, it would illustrate that the Department of Justice has failed to discipline the administrative state to the policy requirements of the Charter and that the department's claim to being a executive-support agency is based largely on its control function.<sup>131</sup>

Thus, while the statutory examination and reporting requirements have contributed to strengthening the advisory role of departmental lawyers in the federal government, there is also a risk of the reporting requirement being transformed into an exercise of power that would ironically undermine the objectives of the statutory requirements. By accepting the high standard for reporting, the Federal Court of Appeal has left more discretion for the Minister and the Department to manage the review and reporting function in a way that most effectively advances its objectives. Indeed, the Court said as much in commenting on the public service context. Justice Stratas cited the *Fraser* decision<sup>132</sup> on political neutrality to assert it as an additional basis for his decision: “[t]his neutrality supports the threshold for reporting that the respondent urges upon us: one that supports the Minister in performing her duties and not one that purports to dictate how she should exercise her powers: see the evidence at appeal book, vol. 3 at pp. 1128-1129.”<sup>133</sup>

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<sup>128</sup> Kelly, *supra* note 109 at 502.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Schmidt* FC, *supra* note 1 at para 15ff.

<sup>131</sup> Kelly, *supra* note 109 at 502–03.

<sup>132</sup> *Supra* note 78.

<sup>133</sup> *Schmidt* FCA, *supra* note 1 at para 89.

However, the Court did not connect *Fraser* to the issue of Mr. Schmidt's standing to bring his action and the duty of loyalty he owed as a public sector lawyer. In fact, at the beginning of his decision, Stratas, JA relied on Schmidt's status as "a former examiner of proposed legislation" to conclude that he had "a sufficient interest to bring this challenge in the Federal Court and seek the declarations."<sup>134</sup> He went on to state that "to find the appellant does not have standing to seek the declarations is to render the examination provisions immune from challenge."<sup>135</sup> Both of these statements are questionable.

In the *Canada (AG) v Downtown Eastside Sex Workers Against Violence Society*, Cromwell, J noted that principle of legality has been central to the development of public interest standing.<sup>136</sup> But the quest for legality has been tempered by considerations involving the availability of judicial resources, ensuring that contending points of view are presented to the courts and the proper role of the courts in relation to other branches of government.<sup>137</sup> Thus, discretion to allow standing has been exercised on the basis of three factors: the existence of a serious justiciable issue, the nature of the plaintiff's interest, and other reasonable and effective means to bring a legal challenge.

What then was it about the nature of Mr. Schmidt's interest that supported his standing to bring the action? He was in a lawyer-client relationship with the Government he was challenging. His work involved examining draft legislation, the very matter forming the substance of his challenge. His standing should have been assessed taking into account his duty of loyalty both as a lawyer and as a public servant and the high standard of illegality and wrongdoing for overcoming these duties.<sup>138</sup>

In terms of the third factor, other reasonable and effective means to bring a legal challenge, the issues in the case had been raised many times before by academics and members of Parliament.<sup>139</sup> How then could they have been immune from challenge without his action? The reporting standard of the Department of Justice was not secret. It had been discussed

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<sup>134</sup> *Ibid* at para 8.

<sup>135</sup> *Ibid* at para 9.

<sup>136</sup> 2012 SCC 45 at para 31, [2012] 2 SCR 524 [*Downtown Eastside*].

<sup>137</sup> *Ibid* at para 25.

<sup>138</sup> See the discussion of illegality and wrongdoing limits, above, part 2(C) on Wrongdoing Limits and part 3(B) on Illegality Limits. Andrew Flavelle Martin has argued that Attorneys General may be immune to law society rules, but that this should be regarded as a "narrow exception": Andrew Flavelle Martin, "The Attorney General as Lawyer: Confidentiality upon Resignation from Cabinet" (2015) 38:1 Dalhousie LJ 147 at 170.

<sup>139</sup> See notes 109 and 110, *above*.

publicly and it was open to any number of others, notably the intervenor civil liberties associations, to bring a challenge if they had been minded to do so.<sup>140</sup>

## 5. Conclusion

Public sector lawyers in Canada have had unparalleled opportunities, particularly since the enactment of the *Charter*, to advance respect for the Constitution and its values, including the rule of law. These opportunities have resulted not only from the constitutionalization of fundamental rights and freedoms, but also from the respect and confidence that public sector lawyers have had from the governments they serve. Just as the law can only operate effectively with the general good will and support of the public it governs, so too it can only realize its objects with the good will and support of governments. Public sector lawyers have an essential role to play in garnering this support, but they can do so only if they command the respect and confidence of those they advise.

The duty of loyalty recognized by courts, law society rules of professional conduct and public service legislation and codes is the foundation on which this respect and confidence is built. As with other foundations, there are limits to what it can support. One of the most important of these is legality, the very notion that lies at the heart of the services the legal profession renders. Legality is often debatable, which is precisely when lawyers are needed to assist in sorting it out. The uncertainty that characterizes many aspects of the law, particularly as it relates to public policy, and the role of the courts in resolving these uncertainties, argue that public sector lawyers must respect and support choices made by the government officials they advise in all but the clearest circumstances of illegality.

This explains why law society rules of professional conduct set a high standard of illegality for withdrawing from a retainer (“knowing” that a client is or will be acting “dishonestly, fraudulently, criminally or illegally”) and countenance what might be described as a “noisy” withdrawal only in circumstances involving imminent risk of death or bodily harm or the concealment or destruction of physical evidence.<sup>141</sup> It also explains why whistle-blower legislation like the *Public Servants Disclosure Protection Act* similarly authorizes public disclosure only when it is reasonable to believe there are matters involving “a serious offence” or “imminent risk of a substantial and specific danger to the life, health and safety of persons,

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<sup>140</sup> The plaintiff-interest criterion for standing recognized by the Supreme Court of Canada would likely encompass these associations: see *Downtown Eastside*, *supra* note 136 at para 43.

<sup>141</sup> See *Model Code*, *supra* note 12, ch 3.2-8, 3.3-3.

or to the environment.”<sup>142</sup> The element of illegality in both standards is comparable to what the Federal Courts in *Schmidt* have decided is required by section 4.1 of the *Department of Justice Act*: no credible argument to support legality. Anything less risks eroding the influence public sector lawyers have with the ministers and officials they serve, and ultimately eroding government compliance with the law and the rule of law itself.

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<sup>142</sup> *Disclosure Protection Act*, *supra* note 86, s 16.