WHERE ARE WE GOING? THE PAST AND FUTURE OF CANADIAN SCHOLARSHIP ON LEGAL ETHICS FOR GOVERNMENT LAWYERS

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In this essay I assess and reflect on the past and future of the Canadian literature on legal ethics and professionalism for government lawyers in order to identify strengths and weaknesses and areas for growth and to evaluate its long-term viability. I call for the existing and continuing first wave of doctrinal work to be joined by a second wave of analytical and critical work. Ultimately, I conclude that this literature is at a defining moment and that, without timely and sustained contributions by both academics and government lawyers, it risks failure as a meaningful area of study.

Dans cet essai, l'auteur évalue le passé et envisage l'avenir des études canadiennes en matière de déontologie et de professionnalisme juridiques en ce qu'elles traitent des juristes gouvernementaux afin de déterminer ses forces, ses faiblesses et les domaines dans lesquels elle peut se développer, et de déterminer sa viabilité à long terme. Il recommande qu'une deuxième vague de travaux analytiques et critiques s'ajoute à la première vague de travaux doctrinaux en cours. Enfin, il conclut que ces études importantes se trouvent à une croisée des chemins et que sans des apports opportuns et durables de la part d'universitaires et de juristes gouvernementaux, elles pourraient connaître l'échec.

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> I've failed much more than I've succeeded. And each time I fail, I get my people together, and I say, 'Where are we going?'. And it starts to get better.[1]

1. Introduction

Among the Canadian legal establishment, government lawyers remain a mystery. Their work, other than perhaps that of litigators, is largely hidden to those on the outside. As Dodek observed just a few years ago, "government lawyers exist in the shadows of the Canadian legal system … [they] are both everywhere and nowhere in Canada."[2] They not only comprise a significant proportion of the Canadian legal profession; they play an integral role, and arguably wield tremendous influence, in Canadian society. But until recently, they were largely ignored in the Canadian legal ethics literature, leaving that literature glaringly incomplete.

The state of Canadian legal ethics scholarship has attracted careful and optimistic scrutiny, going from negligible to noteworthy in less than ten years.[3] In this essay, I assess and reflect on the trajectory of the subset of this literature focused on legal ethics and professionalism for government lawyers. This literature has grown dramatically since its origins near the turn of the century. Given this dramatic growth, it is timely to assess what has been accomplished and what if anything remains to be done. Is it a flash in the pan, a dead end, an obscure niche that has been filled? In this essay I argue that it risks becoming those things but can still be saved as a legitimate and important area of academic study. My goal is to facilitate

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1 *Sports Night*, 16 May 2000, TV Series (Season 2, Episode 22, New York: American Broadcasting Corporation, 2000). This reflection on success and failure fittingly took place in the series finale. I use these words here, as Douglas Keesey characterizes their use by the series' characters, "to give … a sense of hope and direction"—as I hope this article will do: Douglas Keesey, "A Phantom Fly and Frightening Fish: The Unconscious Speaks in *Sports Night*" in Thomas Richard Fahy, ed, *Considering Aaron Sorkin: Essays on the Politics, Poetics, and Sleight of Hand in the Films and Television Series* (Jefferson, NC: McFarland & Co, 2005) 77 at 88.

2 Adam Dodek, "The 'Unique Role' of Government Lawyers in Canada" (2016) 49:1 Israel L Rev 23 at 24 [Dodek, "Unique"].

3 Adam M Dodek, "Canadian Legal Ethics: A Subject in Search of Scholarship" (2000) 50:1 UTLJ 115 [Dodek, "Search"]; Adam M Dodek, "Canadian Legal Ethics: Ready for the Twenty-First Century at Last" (2008) 46:1 Osgoode Hall LJ 1 [Dodek, "Ready"].

and inspire vibrant, continuing work in this area by both government lawyers and academics.

Research into legal ethics and professionalism for government lawyers is important and necessary not only because of the sheer number of such lawyers but because the contexts in which they practice raise special and even unique issues. The success and value of the resulting literature, both in itself and as a discrete and meaningful subset of legal ethics literature, relies on the successful identification, appreciation, and analysis of those special and unique issues. Without such consideration and guidance, government lawyers are at a significant disadvantage compared to their private sector colleagues when attempting to meet the highest standards of conduct and fulfill their professional obligations in both letter and spirit.[4] Indeed, government lawyers are more likely than their counterparts in private practice to find that the rules of professional conduct do not directly or adequately address their circumstances.[5]

This essay is organized in two parts. In Part 1, I analyze and critique the existing Canadian literature on legal ethics for government lawyers. Then in Part 2, I plot a path forward. Finally, I conclude by reflecting on the implications of my analysis.

At the outset, a note about terminology is necessary. Following the definitions in the literature, I use the phrase "government lawyers" to mean lawyers employed by the executive branch at the federal, provincial, and municipal levels.[6] I do not include in this group Crown prosecutors, who have a unique role and a well-established literature of their own.[7]

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4 See e.g. Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Rule 3.1.1, online (pdf): <flsc.ca/> ("'Competent lawyer' means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer's engagement, including: … complying in letter and spirit with all rules pertaining to the appropriate professional conduct of lawyers").

5 *Ibid* at 6 ("Some circumstances that raise ethical considerations may be sufficiently unique that the guidance in a rule or commentary may not answer the issue or provide the required direction"). See e.g. Adam M Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law" (2010) 33:1 Dal LJ 1 at 11, 41–42 [Dodek, "Intersection"].

6 Municipal lawyers are sometimes deliberately excluded. See Dodek, "Unique", *supra* note 2 at 25 (insofar as the special status of government lawyers flows from their duties as delegates of the Attorney General, for which there is no municipal equivalent, municipal lawyers are not properly considered government lawyers).

7 Alice Woolley, "Reconceiving the Standard Conception of the Prosecutor's Role" (2018) 95:3 Can Bar Rev 795; Palma Paciocco, "Seeking Justice by Plea: The Prosecutor's Ethical Obligations During Plea Bargaining" (2017) 63:1 McGill LJ 45; Jeremy Tatum, "Re-Evaluating Independence: The Emerging Problem of Crown-Police Alignment" (2012)

Neither do I include the Attorney General, the chief law officer of the Crown, who likewise has her own well-established literature.[8] Even with these exclusions, I acknowledge there remains some imprecision

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30:2 Windsor YB Access Just 225; Stuart J Whitley, "Prosecution Ethics: A Proposal for Formalizing Rules of Conduct" (2010) 55:4 Crim LQ 508–548 [Whitley]; Mary Lou Dickie, "Through the Looking Glass: Ethical Responsibilities of the Crown in Resolution Discussions in Ontario" (2005) 50:1/2 Crim LQ 128; David Layton, "The Prosecutorial Charging Decision" (2002) 46:3/4 Crim LQ 447; Deborah MacNair, "Crown Prosecutors and Conflict of Interest: A Canadian Perspective" (2002) 7 Can Crim L Rev 257; John D Brooks, "Ethical Obligations of the Crown Attorney: Some Guiding Principles and Thoughts" (2001) 50 UNBLJ 229; Michael Code, "Crown Counsel's Responsibilities When Advising the Police at the Pre-charge Stage" (1998) 40:3/4 Crim LQ 326; Bruce P Archibald, "The Politics of Prosecutorial Discretion: Institutional Structures and the Tensions Between Punitive and Restorative Paradigms of Justice" (1998) 3 Can Crim L Rev 69; John A Sutherland, *The Role of Crown Counsel: Advocate or Minister of Justice?* (LLM Thesis, University of Toronto, 1990) [unpublished]; David Vanek, "Prosecutorial Discretion" (1987) 30:2 Crim LQ 219; Donna C Morgan, "Controlling Prosecutorial Powers: Judicial Review, Abuse of Process and Section 7 of the Charter" (1986) 29:1 Crim LQ 15; Priscilla Elizabeth Susan Joan Kennedy, *The Prosecutorial Power in Canada* (LLM Thesis, University of Alberta, 1984) [unpublished].

[8] Richard Devlin & Sarah Frame, "Economic Corruption, Political Machinations and Legal Ethics: Correspondents' Report from Canada" (2019) 22:1/2 Legal Ethics 94 [Devlin & Frame]; Kate Bezanson, "Constitutional or Political Crisis?: Prosecutorial Independence, the Public Interest, and Gender in the SNC-Lavalin Affair" (2019) 52:3 UBC L Rev 76 [Bezanson]; Andrew Flavelle Martin, "The Legal Ethics Implications of the SNC-Lavalin Affair for the Attorney General of Canada" (2019) 67:3 Crim LQ 161 [Martin, "SNC-Lavalin"]; Andrew Flavelle Martin, "The Attorney General's Forgotten Role as Legal Advisor to the Legislature: A Comment on *Schmidt v Canada (Attorney General)*" (2019) 52:1 UBC L Rev 201; Steven Chaplin, "The Attorney General Is Not the Legislature's Legal Advisor" (2020) 14:2 JPPL 189; Andrew Flavelle Martin, "The Attorney General *Is* the Legislature's Legal Advisor (Though Not Its *Only* Legal Advisor), Although That Role Is Admittedly Problematic and Should Probably Be Abolished: A Response to Steven Chaplin" (2020) 14:3 JPPL 62; Andrew Flavelle Martin, "The Minister's Office Lawyer: A Challenge to the Role of the Attorney General?" (2019) 12:3 JPPL 641; François Hawkins, "Duties, Conflicts, and Politics in the Litigation Offices of the Attorney General" (2018) 12 JPPL 193; Andrew Flavelle Martin, "The Immunity of the Attorney General to Law Society Discipline" (2016) 94:2 Can Bar Rev 413; Andrew Flavelle Martin, "The Attorney General as Lawyer (?): Confidentiality upon Resignation from Cabinet" (2015) 38:1 Dal LJ 147; Brent Cotter, "The Prime Minister v the Chief Justice of Canada: The Attorney General's Failure of Responsibility" (2015) 18 Leg Ethics 73 [Cotter, "Failure"]; W Brent Cotter, "Ian Scott: Renaissance Man, Consummate Advocate, Attorney General Extraordinaire" in Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer* (Vancouver: UBC Press, 2015) 202; Wilfrid Lefebvre, "The Role of the Attorney General in Tax Litigation" (2013) 61 Can Tax J (Supp) 231; Kathryn Chan, "The Role of the Attorney General in Charity Proceedings in Canada and in England and Wales" (2011) 89:2 Can Bar Rev 373; 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 Toronto, 2011) [unpublished]; Mary Condon, "Commentary

at the definitional margins. For example, judicial law clerks are typically employed by the executive even though their client is the judiciary. As

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on "Prosecutions, Politics and the Public Interest: Some Recent Developments in the United Kingdom, Canada and Elsewhere"" (2010) 55:4 Crim LQ 479; Kent Roach, "Prosecutorial Independence and Accountability in Terrorism Prosecutions" (2010) 55:4 Crim LQ 486; Philip C Stenning, "Prosecutions, Politics and the Public Interest: Some Recent Developments in the United Kingdom, Canada and Elsewhere" (2010) 55:4 Crim LQ 449; Grant Huscroft, "Reconciling Duty and Discretion: The Attorney General in the *Charter* Era" (2009) 34:2 Queen's LJ 773; Lori Sterling & Heather Mackay, "The Independence of the Attorney General in the Civil Law Sphere" (2009) 34:2 Queen's LJ 891; Marc Rosenberg, "The Attorney General and the Administration of Criminal Justice" (2009) 34:2 Queen's LJ 813 [Rosenberg]; Craig E Jones, "The Attorney General's Standing to Seek Relief in the Public Interest: The Evolving Doctrine of *Parens Patriae*" (2007) 86:1 Can Bar Rev 121; M Deborah MacNair, "In the Name of the Public Good: 'Public Interest' as a Legal Standard" (2006) 10 Can Crim L Rev 175; 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; James (Sákéj) Youngblood Henderson, "Aboriginal Attorney General" (2003) 22 Windsor YB Access Just 265; Ian Binnie, "Mr. Attorney Ian Scott and the Ghost of Sir Oliver Mowat" (2004) 22:4 Advocates' Soc J 4; Lori Sterling & Heather MacKay, "Constitutional Recognition of the Role of the Attorney General in Criminal Prosecutions: *Krieger v. Law Society of Alberta*" (2003) 20 SCLR (2d) 169 [Sterling & Mackay]; Mark J Freiman, "Convergence of Law and Policy and the Role of the Attorney General" (2002) 16 SCLR (2d) 335; Debra McAllister, "The Attorney General's Role as Guardian of the Public Interest in Charter Litigation" (2002) 21 Windsor YB Access Just 47; Graeme Mitchell, "The Role of the Attorney General in Litigation under the *Canadian Charter of Rights and Freedoms*: Reflections on Where We Are After Twenty Years and Where We May Be Going" (The Isaac Pitblado Lectures, 2002); Kent Roach, "The Attorney General and the *Charter* Revisited" (2000) 50:1 UTLJ 1; Susan Chapman & John McInnes, "The Role of the Attorney-General in Constitutional Litigation: Re-Defining the Contours of the Public Interest in a Charter Era" in Jamie Cameron, ed, *The Charter's Impact on the Criminal Justice System* (Scarborough: Carswell, 1996) 201; John L J Edwards, "The Office of Attorney General: New Levels of Public Expectations and Accountability" in Philip C Stenning, ed, *Accountability for Criminal Justice* (Toronto: University of Toronto Press, 1995) 294; Lara Friedlander, "Must the Law Be Obeyed? The Attorney-General's Response to Flouting" (1995) 17 Adv Q 80; Grant Huscroft, "The Attorney General and *Charter* Challenges to Legislation: Advocate or Adjudicator?" (1995) 5 NJCL 125; Bryce C Tingle, "The Strange Case of the Crown Prerogative Over Private Prosecutions or Who Killed Public Interest Law Enforcement?" (1994) 28:2 UBC L Rev 309; The Honourable Ian Scott, "Law, Policy, and the Role of the Attorney General: Constancy and Change in the 1980s" (1989) 39:2 UTLJ 109; John Ll J Edwards, "The Charter, Government and the Machinery of Justice" (1987) 36:1 UNBLJ 41; John Ll J Edwards, "The Attorney General and the Charter of Rights" in Robert J Sharpe, ed, *Charter Litigation* (Toronto: Butterworths, 1987) 45; Gordon F Gregory, "The Attorney-General in Government" (1987) 36:1 UNBLJ 59; Ian G Scott, "The Role of the Attorney General and the Charter of Rights" (1987) 29:2 Crim LQ 187; John Ll J Edwards, *The Attorney General, Politics, and the Public Interest* (London: Sweet & Maxwell, 1984); John Ll J Edwards, *The Law Officers of the Crown: A Study of the Offices of Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (London, UK: Sweet & Maxwell, 1964).

a result, they are not properly characterized as government lawyers. Similarly, legal officers in the Canadian Forces are more properly characterized as Crown servants than as government employees, and thus are not squarely government lawyers. However, for my purposes those lawyers can be acknowledged as government-lawyer-adjacent. As for a definition of 'Canadian literature', I consider it to comprise articles and books about Canadian law, whether published in Canada or elsewhere.

2. Analysis of the Canadian scholarship on legal ethics for government lawyers

In this Part, I assess and analyze the existing Canadian literature on government lawyers, with the goal of answering several key questions: who is writing, i.e. practitioners or academics; how they are writing, i.e. their approaches to scholarship; what they are writing about, i.e. the substantive content; and why they are writing.

A) The birth and growth of the literature

Before I analyze the Canadian literature, I first synthesize and critique its content. I organize this synthesis and critique into three chronological stages.

i) 1997 to 2006: Government lawyers by government lawyers

The earliest identifiable Canadian literature on legal ethics for government lawyers is from a speech by John Tait, then a senior adviser to the federal Privy Council Office, published in the *Commonwealth Law Bulletin* under the title "The Public Service Lawyer, Service to the Client and the Rule of Law."[9] This speech warrants careful consideration because it introduced several themes that continue to resonate through the literature. Indeed, Elizabeth Sanderson considered it so foundational that she included it as an appendix to her recent book on government lawyers.[10]

Tait argued that government lawyers have a higher duty, beyond their duties as lawyers, to the rule of law—a duty as delegates of the Minister of Justice and Attorney General that is also reflected in the status of government lawyers as members of the public service. Indeed, he characterized this as "the main duty" of government lawyers.[11] He

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9 John C Tait, "The Public Service Lawyer, Service to the Client and the Rule of Law" (1997) 23:1/2 Commonwealth L Bull 542 [Tait].

10 Elizabeth Sanderson, *Government Lawyering: Duties and Ethical Challenges of Government Lawyers* (Toronto: LexisNexis Canada, 2018) at 257–65 (Appendix 2) [Sanderson].

11 Tait, *supra* note 9 at 544.

encouraged government lawyers to push back against pressure to be mere service providers, instead fulfilling their "duty … to remind governments of their responsibilities and help prevent harm."[12] He argued that government lawyers are "guardians of the rule of law," a role he anchored in the statutory duties of the Minister of Justice, and from which he derived a responsibility to interpret the law objectively and consistently regardless of the client's wishes.[13] He emphasized that the powers of government lawyers are delegated from the Attorney General and Minister of Justice, and along with those powers comes the delegated duty "to enhance respect for the Constitution and the law."[14] He situated this duty in the values of the public service more broadly.[15] Indeed, while Tait recognized that government lawyers have the same duties of all lawyers,[16] he argued that government lawyers also have a "higher duty … to the law and the Constitution."[17] Tait also anchored this analysis in democracy and "democratic values," among other things, which previews legal academic Allan Hutchinson's later analysis of government lawyers.[18]

Tait's three-fold understanding of government lawyers—as lawyers, delegates of the Attorney General, and public servants—presaged the two most influential models of government lawyers, both Adam Dodek's "rule of law triangle" model and Sanderson's "three layers" model.[19] His concept of "guardians of the rule of law" would also be taken up by Dodek.[20]

Tait also addressed two more specific issues that appear throughout the subsequent literature, the identity of the client—what Tait terms a "perennial issue" for government lawyers—and the role of the public interest.[21] Tait makes clear that, while the effective client may be a department, the ultimate client is the Crown.[22] This understanding anchored his imperative that legal advice must be consistent across government departments.[23] Unlike more recent commentators, who

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12 *Ibid* at 543. See also at 546 ("there is a positive duty on the government lawyer to provide good service, but it should not be at the expense of the very real corporate function in support of the rule of law"); see also at 548 ("while service to the client is a good thing, it is not the only thing").

13 *Ibid* at 543–44.

14 *Ibid* at 544.

15 *Ibid* at 546.

16 *Ibid* at 543.

17 *Ibid* at 548.

18 *Ibid* at 546–47.

19 Dodek, "Intersection", *supra* note 5 at 20–21; Sanderson, *supra* note 10 at 2.

20 Dodek, "Intersection", *supra* note 5 at 29, citing Tait, *supra* note 9 at 543–44.

21 Tait, *supra* note 9 at 545.

22 *Ibid* at 545.

23 *Ibid* at 543–44.

emphasize that it is for the client and ultimately elected officials, not the government lawyer, to determine the public interest,[24] Tait argued that the government lawyer has a legitimate role in that determination by ensuring the client is aware of the client's duties.[25]

In the years following Tait's speech, the Canadian literature was dominated by Deborah MacNair, corporate counsel for the federal Department of Justice. MacNair's work encompassed both government lawyers generally and the very particular—one might even say esoteric—role of legislative counsel.

MacNair's general work expanded on much of Tait's speech. MacNair characterized the identity of the client as "[t]he most basic issue for public sector lawyers"[26] and "[t]he starting point for government counsel"[27] and connected it directly to the contours of solicitor-client privilege, which was one of her main focuses.[28] She noted the important roles not only of the Attorney General and Minister of Justice, but also of the Deputy Minister, and of government lawyers as their delegates.[29] (This attention to the Deputy Minister would lay dormant until Sanderson's book.) She emphasized the duties and obligations of government lawyers as members of the public service, particularly conflicts of interest, post-service restrictions, and political activity, and how those interacted with their duties as lawyers.[30] In doing so, MacNair foreshadowed Dodek's "rule of law triangle" and Sanderson's "three layers" model.[31]

Whereas Tait emphasized a special duty of government lawyers to the rule of law, MacNair was the first to explore in detail whether government lawyers have higher ethical duties than other lawyers.[32] In doing so, she noted the complex interplay between whistleblowing and government

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24 See e.g. Malliha Wilson, Taia Wong & Kevin Hille, "Professionalism and the Public Interest" (2011) 38 Adv Q 1 [Wilson, Wong & Hille].

25 Tait, *supra* note 9 at 544.

26 Deborah MacNair, "The Role of the Federal Public Sector Lawyer: From Polyester to Silk" (2001) 50 UNBLJ 125 at 130 [MacNair, "Silk"].

27 Deborah MacNair, "In the Service of the Crown: Are Ethical Obligations Different for Government Counsel?" (2006) 84:3 Can Bar Rev 501 at 523 [MacNair, "Service"].

28 MacNair, "Silk", *supra* note 26 at 154–58; Deborah MacNair, "Solicitor-Client Privilege and the Crown: When is a Privilege a Privilege?" (2003) 82:2 Can Bar Rev 213 [MacNair, "Privilege"].

29 MacNair, "Silk", *supra* note 26 at 133–37.

30 *Ibid* at 141–42, 158–64.

31 Sanderson, *supra* note 10 at 2; Dodek, "Intersection", *supra* note 5 at 20–21.

32 MacNair, "Service", *supra* note 27 at 517–23.

lawyers' obligations of confidentiality,[33] a topic that Dodek would later consider.[34] MacNair's nuanced conclusion was that while government lawyers had "other duties," these did not comprise "enforceable higher or special ethical duties."[35]

MacNair also wrote an exhaustive analysis of solicitor-client privilege in the government context.[36] Her analysis was rooted in the unique nature of the Crown as client, both at common law and in statute. In this way it would presage the later literature's fixation with the identity of the client and its special implications.

A special focus of MacNair's work was legislative counsel.[37] While she asserted that legislative drafters may not always be lawyers and drafting might not qualify as the practice of law,[38] and she argued that law societies may lack jurisdiction over legislative counsel,[39] she focused (as in her other work) on how the duties of legislative counsel as public servants interact with their duties as lawyers.[40] In her LLM thesis, she went further and argued, based on these issues of confidentiality and privilege and conflicts of interest, that specific rules for legislative counsel (particularly on the identity of the client, confidentiality, and privilege) should be added to the rules of professional conduct.[41]

In addition to her focus on legislative counsel, MacNair also highlighted another often-forgotten subset of government lawyers that she termed "policy lawyers," being those lawyers who advise on legislative and policy proposals within the authority of the Minister of Justice.[42]

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33 *Ibid* at 522.

34 See *below* note 67 and accompanying text.

35 MacNair, "Service", *supra* note 27 at 528.

36 MacNair, "Privilege", *supra* note 28.

37 Deborah MacNair, "Legislative Drafters: A Discussion of Ethical Standards from a Canadian Perspective" (2003) 24:2 Stat L Rev 125 [MacNair, "Legislative Drafters"]; M Deborah MacNair, *The Case for Introducing Specific Ethical Standards for Legislative Drafters* (LLM Thesis, University of Ottawa, 2000) [unpublished], online: <ruor.uottawa.ca > [MacNair, *The Case*]; see also MacNair, "Silk", *supra* note 26 at 148–50.

38 MacNair, "Legislative Drafters", *supra* note 37 at 131.

39 *Ibid* at 134–36.

40 *Ibid* at 141–48 (conflicts of interest), 149–54 (confidentiality and privilege).

41 MacNair, *The Case*, *supra* note 37.

42 MacNair, "Silk", *supra* note 26 at 151–52.

After this mention by MacNair,[43] policy lawyers would not reappear in the literature until a footnote in 2016.[44]

Conspicuous by their absence in this first stage are academics. With some assist from Tait, MacNair was essentially toiling alone, building the foundational literature one piece at a time.

ii) 2006 to 2010: Enter the academics

After MacNair's cluster of work came a stage in which practitioners were joined by academics Brent Cotter, Allan Hutchinson, and Adam Dodek. Whereas Cotter had served as Deputy Attorney General in Saskatchewan,[45] and Dodek as chief of staff to Ontario Attorney General Michael Bryant,[46] Hutchinson alone had no significant experience in government.[47] It is unclear what inspired Cotter, Hutchinson, or Dodek to write about government lawyers at this time. By 2008, Cotter had been Dean at the Saskatchewan College of Law for almost four years. Dodek had entered the academy immediately after his service to Bryant and indeed had been in the academy for only two years by the time he published his article, suggesting that it was one of his first major projects as an academic.[48] The closest thing to an explanation comes from Hutchinson, who merely asserted that scholarly attention was "more than timely … as the number and importance of government lawyers continue to grow."[49]

Cotter argued that the identity of the client imposed a special "public interest" duty on government lawyers, which he termed a "duty of fair dealing."[50] He explained that governments represent all their citizens and

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[43] Noted in passing, but not expanded on, in Joshua Wilner, "Service to the Nation: A Living Legal Value for Justice Lawyers in Canada" (2009) 32:1 Dal LJ 177 at 182 [Wilner, "Service"].

[44] Dodek, "Unique", *supra* note 2 at 25, fn 13 ("These lawyers are not providing 'legal' advice or services when they are providing policy advice"). Oddly, see Dodek, "Intersection", *supra* note 5 at 26 (identifying "policy development" as an "advisory function" and a "government lawyering activit[y]").

[45] See his academic bio at <https://law.usask.ca/people/faculty/w-brent-cotter.php>.

[46] See his academic bio at <https://commonlaw.uottawa.ca/en/people/dodek-adam>.

[47] See his academic bio at <https://www.osgoode.yorku.ca/faculty-and-staff/hutchinson-allan-c/>.

[48] Dodek, "Intersection", *supra* note 5 at 1, n *.

[49] Allan C Hutchinson, "'In the Public Interest': The Responsibilities and Rights of Government Lawyers" (2008) 46:1 Osgoode Hall LJ 105 at 106 [Hutchinson].

[50] Brent Cotter, "Lawyers Representing Public Government and a 'Duty of Fair Dealing'" (paper presented at the Alberta Law Conference of the Canadian Bar Association, March 2008), reprinted in Adam M Dodek, "Government Lawyers," in

thus owe a special duty of fairness to those citizens, particularly those in conflict or adversarial proceedings with the government, which becomes a duty of government lawyers.[51] Cotter's account would gain little traction (or even mention) in the subsequent literature but was a novel application of the concept of the public interest.

Hutchinson argued that government lawyers have a special "obligation to consider the public interest."[52] Unlike Tait, who did not weigh or rank the duties of government lawyers as lawyers against their duties as public servants, Hutchinson argued that "all government lawyers … are government bureaucrats first and lawyers only second."[53] He anchored his public interest claim in what he described as "a democratic appreciation of the public interest."[54] He argued that it is for the government as client to determine the public interest and thus government lawyers must advance the client's positions and decisions with the same resolute advocacy as lawyers in private practice.[55] In contrast, Hutchinson argued from the same premises that government lawyers should have a lesser obligation of confidentiality than lawyers generally, and should breach confidentiality when such a breach is in the public interest.[56] He situated confidentiality in the "protec[tion] of the relatively powerless citizen against the state"[57] and emphasized the importance of transparency in government.[58] While Hutchinson's perspective on the public interest was followed at least implicitly in subsequent literature, his creative account of confidentiality garnered significant criticism and no endorsement.[59] Ironically it was Hutchinson, the one author in this area without a significant background in government practice, who coined the phrase "the orphans of legal ethics" to describe government lawyers.[60]

Alice Woolley, Richard Devlin & Brent Cotter, eds, *Lawyers' Ethics and Professional Regulation*, 4th ed (Toronto: LexisNexis Canada, 2021) 473 at 491-95 [Cotter, "Fair Dealing"] (Now Senator Cotter). I do not separately consider an article by Cotter in which he makes similar arguments but focuses on duties of governments, not their lawyers: W Brent Cotter, QC, "The Legal Accountability of Governments and Politicians: A Reflection upon Their Roles and Responsibilities (2007) 2 JPPL 63.

51 Cotter, "Fair Dealing", *supra* note 50 at 494–495.

52 Hutchinson, *supra* note 49 at 114.

53 *Ibid* at 115 (Hutchinson includes Crown prosecutors in this claim, which is a more controversial claim that I leave for another day).

54 *Ibid* at 116.

55 *Ibid* at 118–19, 124.

56 *Ibid* at 124, 127–28.

57 *Ibid* at 125.

58 *Ibid* at 127–28.

59 See *below* note 121 and accompanying text.

60 Hutchinson, *supra* note 49 at 106.

Dodek's main contribution was his argument that government lawyers have a higher professional duty as "custodians of the rule of law."[61] Like Hutchinson's view of confidentiality, this idea would become controversial among government lawyers.[62] As had Tait, Dodek explained that while the effective client may be a department, the ultimate client is the Crown.[63] (He also characterized government lawyers as "rightly obsessed with the question of who is their client.")[64] Indeed, Dodek went further and argued that the identity of the Crown as client is "[t]he defining characteristic of government lawyers."[65] He focused on the complex interplay between government lawyers as lawyers and as public servants,[66] giving whistleblowing as one example,[67] and the implications of their role as delegates of the Attorney General.[68] Dodek's conceptual model was his "rule of law triangle," comprised of government lawyers' status as lawyers, as members of the public service, and as delegates of the Attorney General.[69] Like Tait before him, Dodek anchored the delegated duty of government lawyers to the rule of law in the statutory duty of the Attorney General to ensure that public affairs are conducted lawfully.[70]

Building on his articulation of the special role of government lawyers, Dodek also proposed a more active role for governments in the regulation of their lawyers. He argued that governments should adopt—and make public—specific codes of conduct for their lawyers.[71] Contrast here MacNair, who argued for specific rules for legislative counsel to be added to the rules of professional conduct enforced by law societies,[72] as opposed to Dodek's argument that governments should develop separate codes of their own, enforceable internally.[73] Dodek also argued that governments should create offices of professional responsibility for their lawyers following the US federal model.[74] While this proposal was largely ignored in the subsequent literature,[75] it was essentially adopted

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61 Dodek, "Intersection", *supra* note 5 at 8, 18–19.

62 See *below* note 122 and accompanying text.

63 Dodek, "Intersection", *supra* note 5 at 11–13.

64 *Ibid* at 12.

65 *Ibid* at 11.

66 *Ibid* at 6.

67 *Ibid* at 7–8.

68 *Ibid* at 18–19.

69 *Ibid* at 20–21.

70 *Ibid* at 21. See also *ibid* at 29, citing Tait, *supra* note 9.

71 Dodek, "Intersection", *supra* note 5 at 42.

72 See *above* note 41 and accompanying text.

73 Dodek, "Intersection", *supra* note 5 at 42.

74 *Ibid* at 48.

75 But see Eric Pierre Boucher, "Civil Crown Counsel: Lore Masters of the Rule of Law" (2018) 12 JPPL 463 at 486–87 [Boucher, "Lore"].

by the government of Canada—making Dodek's piece arguably the most concretely influential one among the entire literature.

In addition to their substantive importance, these pieces by Cotter, Hutchinson, and Dodek arguably played a signalling function in introducing legal ethics for government lawyers as a legitimate area of academic attention. However, these three academics wrote no further on legal ethics for government lawyers, with the exception of a 2016 piece by Dodek that largely echoed his initial work.[76] Thus, while their work provoked controversy and dialogue, it is a dialogue in which they largely did not continue to participate.

Alongside these foundational pieces by academics came two pieces by practitioners. One by John Mark Keyes, then Chief Legislative Counsel for the Government of Canada, built on MacNair's work on ethics for legislative counsel.[77] Like MacNair, Keyes focused on the interaction between duties as lawyers and duties as public servants, in the specific contexts of conflicts of interest and confidentiality.[78] Keyes added to these two aspects the unique attribute of legislative counsel as "guardians of the statute book,"[79] which he positioned as being in "tension" with the other two aspects—albeit characterizing that tension as "not such a bad thing."[80] While Keyes covered much of the same ground as MacNair had in her examination of legislative counsel, Keyes' contribution was an added level of depth and detail.

The other piece by a practitioner during this time was by Joshua Wilner.[81] Wilner's work is noteworthy because it was the first philosophical approach to legal ethics for government lawyers, with a particular focus on virtue ethics. Wilner grounded his account in a value he identified as "service to the nation," in which he wrestled with the impact of the identity of the client and the role of the public interest.[82] While writing before Dodek set out his "rule of law triangle," Wilner too recognized that government lawyers are simultaneously lawyers, public servants, and delegates of the Attorney General.[83]

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76 Dodek, "Unique", *supra* note 2.

77 John Mark Keyes, "The Professional Responsibilities of Legislative Counsel" (2009) 5 JPPL 11.

78 *Ibid* at 27–32 (conflicts of interest), 32–42 (confidentiality).

79 *Ibid* at 17–18, 42–43.

80 *Ibid* at 42–43.

81 Wilner, "Service", *supra* note 43.

82 *Ibid* at 191–96 (identity of the client), 196–200.

83 *Ibid* at 182–84, 189.

This second stage was characterized by the presence of academics. Building on the work of Tait and MacNair, though in some cases more implicitly than explicitly, they made a handful of radical proposals that would shake up government lawyers in the years to come.

iii) 2011 to 2020: A decade of rapid growth and of dialogue

The last decade is the stage in which true dialogue emerged in the literature. This work was authored by a mix of government lawyers—some with experience as academics—and academics with experience as government lawyers. Among this literature the work of Elizabeth Sanderson and of Patrick Monahan stands out the most, but several other pieces are worth noting.

Sanderson, formerly a federal Assistant Deputy Attorney General and the Deputy Minister of Justice for Nunavut, wrote the first comprehensive Canadian book on legal ethics for government lawyers. While *Government Lawyering: Duties and Ethical Challenges of Government Lawyers* has been reviewed elsewhere,[84] it merits careful attention here. Arguably the most important element of the book is Sanderson's model of government lawyers as having three "layers" of duties: as lawyers, as delegates of the Attorney General, and as public servants.[85] Like other foundational work before her, but in more detail, Sanderson focused on the identity of the client ("the old chestnut"),[86] the role of government lawyers as "guardians of the rule of law,"[87] the role of the public interest,[88] conflicts of interest,[89] and confidentiality and privilege.[90] To this she added an analysis of the role of the Deputy Attorney General and Minister of Justice,[91] which had been essentially ignored since Tait's speech, and a timely reflection

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84 Sanderson, *supra* note 10; Andrew Flavelle Martin, "Orphans No More: A Review of Elizabeth Sanderson, *Government Lawyering: Duties and Ethical Challenges of Government Lawyers*" (2018) 41:2 Dal LJ 575 [Martin, "Sanderson Review"]; Eric Boucher, "Review of: Elizabeth Sanderson, *Duties and Ethical Challenges of Government Lawyers*" (2019) 13 JPPL 199 [Boucher, "Sanderson Review"].

85 Sanderson, *supra* note 10 at 2 (With great respect to Sanderson, I prefer Dodek's model of a "triangle" because layers imply a ranking or hierarchy).

86 *Ibid* at 100–07.

87 *Ibid* at 80–91.

88 *Ibid* at 91–99.

89 *Ibid* at 124–35.

90 *Ibid* at 142–67.

91 *Ibid* at 211–26 (Chapter 5); Martin, "Sanderson Review", *supra* note 84 at 579–80; Boucher, "Sanderson Review", *supra* note 84 at 203.

on reconciliation.[92] The book is thus a comprehensive, if not exhaustive, account of legal ethics for government lawyers.

Aside from its substantive contributions, Sanderson's book by its mere existence arguably served a signalling function, recognizing government lawyers as a key element of the profession and legitimizing legal ethics for government lawyers as an area of study.[93]

The importance of Patrick Monahan's piece, "'In the Public Interest': Understanding the Special Role of the Government Lawyer," lies less in its content than in its authorship.[94] Monahan propounded a fairly traditional conception of the role of the government lawyer, anchored in the public interest—"the foundational principle that guides and structures the special role of government lawyers"—and the rule of law which, like Tait and Dodek, he rooted in the statutory duties of the Attorney General.[95] Like Tait, he emphasized the importance of "principled consistency" in the legal advice given by government lawyers.[96] Monahan had been the Dean at Osgoode Hall Law School, but at the time of publication he was the Deputy Attorney General for Ontario. While the article features the typical disclaimer ("[t]he views expressed are those of the author alone and should not be attributed to the Ministry of the Attorney General or the Government of Ontario"[97]), there is weight and significance to the piece nonetheless. Presumably these views influenced his oversight of the Ministry and percolated down through management to line lawyers.

During this time, Monahan and Sanderson were far from the only current or former government lawyers contributing to the literature. The next most important pieces were arguably those by John Mark Keyes and Kerry Wilkins, both former government lawyers at that point. Keyes used the case of government lawyer Edgar Schmidt to identify and articulate the limits of loyalty for government lawyers as both lawyers and public servants.[98] Schmidt had sought a declaration in Federal Court that the Department of Justice, in rejecting his advice, was misinterpreting legislation that required the Minister to inform the House of Commons

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92 Sanderson, *supra* note 10 at 175–208 (Chapter 4); Martin, "Sanderson Review", *supra* note 84 at 580; Boucher, "Sanderson Review", *supra* note 84 at 202.

93 See e.g. Martin, "Sanderson Review", *supra* note 84 at 576.

94 Patrick J Monahan, "'In the Public Interest': Understanding the Special Role of the Government Lawyer" (2013) 63 SCLR (2d) 43 [Monahan].

95 *Ibid* at 43–44.

96 *Ibid* at 45, 46.

97 *Ibid* at 43.

98 John Mark Keyes, "Loyalty, Legality and Public Sector Lawyers" (2019) 97:1 Can Bar Rev 756 [Keyes, "Loyalty"].

if government bills were inconsistent with the *Charter*.[99] While in my view Keyes' chosen limit—"clear illegality"—is too high from a normative perspective,[100] he provides compelling support for his position as a matter of law. Wilkins' contribution was the first consideration of the role of government lawyers in the Crown's interactions with Canada's Indigenous peoples.[101] Perhaps most valuable was his nuanced and thoughtful explanation and reflection on the interaction between government lawyers and elected officials and their political staff, and the implications for the role of government lawyers.[102]

Also notable in its substantive contribution was the article "Civil Crown Counsel: Lore Masters of the Rule of Law" by Eric Boucher, a lawyer with the government of New Brunswick.[103] Boucher was the first to propose specific additions to the rules of professional conduct that would address government lawyers.[104] Chief among these was a duty to "advise the person from whom the lawyer takes instructions as to the requirements of the Rule of Law."[105] His important insight was that government should not be able to contract out of these duties by retaining private counsel, and thus that his proposed rule should apply both to government lawyers and to lawyers in private practice.[106] Indeed, Boucher argued that the government *cannot* retain outside counsel "simply because it does not like the advice given" by government lawyers: "If government has been told by the Attorney General that its proposed conduct is contrary to the rule of law, it cannot absolve itself of its duty simply by relying on a contrary opinion from an outside source."[107] Boucher also proposed that a commentary to the rule could clarify the uncertainty around the person or entity to whom the government lawyer reports up in case of wrongdoing or breach of the rule of law.[108] Boucher anchored these proposals in a variant of the Tait-Dodek concept of the Attorney General and government lawyers as "guardians of the rule of law." In Boucher's account it is the Crown itself that is "guardian of the rule of law,"[109] whereas the Attorney General is

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99 See e.g. *ibid* at 757–58; *Schmidt v Canada (AG)*, 2016 FC 269 [*Schmidt*], aff'd 2018 FCA 55 [*Schmidt* FCA], leave to appeal to SCC refused, 38179 (4 April 2019).

100 *Ibid* at 776.

101 Kerry Wilkins, "Reasoning with the Elephant: The Crown, Its Counsel and Aboriginal Law in Canada" (2016) 13 Indigenous LJ 27.

102 *Ibid* at 33–36, 38–40.

103 Boucher, "Lore", *supra* note 75.

104 Recall however that MacNair, *The Case*, *supra* note 37 had proposed rules of professional conduct specific to legislative counsel.

105 Boucher, "Lore", *supra* note 75 at 482.

106 *Ibid* at 480–81, 483.

107 *Ibid* at 479, 479–80.

108 *Ibid* at 480–81, 483.

109 *Ibid* at 479.

"the exclusive interpreter" or "Lore Master" of the rule of law,[110] although these roles are "symbiotic."[111]

In contrast, Michael Morris and Sandra Nishikawa, lawyers for Canada and Ontario respectively, provided a fairly representative account of government lawyers.[112] Similar to Monahan, their account was rooted in the role as "guardians of the rule of law" and a duty to the public interest.[113] Like Monahan, they were clear that the identity of the ultimate client, the Crown, means that legal advice must be consistent across departments.[114] They did emphasize more than Monahan the status of government lawyers as public servants and the implications of that status.[115]

Other than Monahan, the highest-ranking government lawyer to contribute to the literature during this time was Malliha Wilson, an Assistant Deputy Attorney General for Ontario, in collaboration with other government lawyers—including Ronalda Murphy, who at this time was on leave from an academic appointment. The first piece, "Professionalism and the Public Interest," situated government lawyers in the broader discussion around professionalism.[116] It emphasized the role of government lawyers as counsel for the Attorney General and explained how the structure of legal services delivery in the Ontario government reinforces that role.[117] The bulk of the article pushes back against Dodek's argument that government lawyers have higher professional duties than other lawyers.[118] In identifying government lawyers as counsel for the Attorney General, as opposed to delegates of the Attorney General, the article argues that government lawyers do not exercise the delegated authority of the Attorney General but merely "empower" and "enabl[e] the Attorney General to discharge his or her obligations."[119] This account is inherently problematic in my view insofar as it relieves government lawyers of the delegated duties that come alongside delegated functions. Whether for that reason or otherwise, this account was never endorsed in the subsequent literature. The second Wilson piece, "Legal

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110 *Ibid* at 465, 479.

111 *Ibid* at 479.

112 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 [Morris & Nihshikawa].

113 *Ibid* at 172, 174–77.

114 *Ibid* at 176–77.

115 *Ibid* at 177–78.

116 Wilson, Wong & Hille, *supra* note 24 at 1–5.

117 *Ibid* at 7–9.

118 *Ibid* at 10–17.

119 *Ibid* at 15.

Professionalism in the Twenty-First Century: Government Lawyers as Accidental Innovators" was an introspective reflection on the pressures facing the profession.[120] While it used government lawyers as an example, arguably it added more to the literature on professionalism than to the literature on government lawyers.

Notable during this decade is the vehemence with which government lawyers pushed back against Hutchinson's suggestion that privilege and confidentiality are less important for governments than for other clients,[121] and against Dodek's argument that government lawyers have higher professional duties than other lawyers.[122] These comprised the first real dialogue in the literature on legal ethics for government lawyers, a dialogue in which academics and government lawyers engaged one another.

This brings me to the somewhat awkward task of evaluating and situating my own work as an academic with experience in government. It spanned a range—political activity,[123] activism,[124] federalism,[125] and reconciliation[126]—but largely focused on the meaning of loyalty for government lawyers. I took a strict approach to partisan political activity at the same level of government, arguing that it was precluded for government lawyers by the duty of loyalty and only permissible to the extent that legislation on the public service waived that duty.[127] In contrast, I was more relaxed on non-partisan activism.[128] I argued that while a principled yet simplistic approach would be for government lawyers to avoid all non-partisan activism, *Charter* considerations should allow them—at a minimum— to advocate for a group to which they belong, defined broadly,

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120 Ronalda Murphy, Malliha Wilson & Taia Wong, "Legal Professionalism in the Twenty-First Century: Government Lawyers as Accidental Innovators" (2012) 63 UNBLJ 420 [Murphy, Wilson & Wong].

121 Morris & Nihshikawa, *supra* note 112 at 178–80; Monahan, *supra* note 94 at 52–54; Boucher, "Lore", *supra* note 75 at 469. See also Andrew Flavelle Martin & Candice Telfer, "The Impact of the Honour of the Crown on the Ethical Obligations of Government Lawyers: A Duty of Honourable Dealing" (2018) 41:2 Dal LJ 443 at 469–70 [Martin & Telfer].

122 See e.g. Monahan, *supra* note 94 at 49–52; Wilson, Wong & Hille, *supra* note 24 at 13–17. For a synthesis, see Martin & Telfer, *supra* note 121 at 453–57.

123 Andrew Flavelle Martin, "Legal Ethics and the Political Activity of Government Lawyers" (2018) 49:2 Ottawa L Rev 263 [Martin, "Political Activity"].

124 Andrew Flavelle Martin, "The Government Lawyer as Activist: A Legal Ethics Analysis" (2020) 41 Windsor Rev Leg & Soc Issues 28 [Martin, "Activist"].

125 Andrew Flavelle Martin, "The Implications of Federalism for the Regulation of Federal Government Lawyers" (2020) 43:1 Dal LJ 363 [Martin, "Federalism"].

126 Martin & Telfer, *supra* note 121.

127 Martin, "Political Activity", *supra* note 123 at 282–88, 297–302.

128 Martin, "Activist", *supra* note 124 at 78–79.

on matters unrelated to their practice.[129] My piece on federalism used a traditional doctrinal analysis to argue that absent a requirement in federal law or in the terms of their employment, lawyers for the federal government can practice without being members of the corresponding law society—but if they are members of a law society they are subject to its regulatory jurisdiction unless Parliament passes a law constraining or removing that jurisdiction.[130] I also advanced a proposal, inspired by Sanderson, for a separate bar for federal government lawyers.[131] Perhaps most useful was my synthesis with Candice Telfer of the debate in the literature and case law on whether government lawyers have additional or higher ethical obligations than those of lawyers generally, and the application of that debate to the place for government lawyers in reconciliation.[132] This piece was unusual in that it was a collaboration between myself as an academic and Telfer, a lawyer for the government of Ontario. In contrast to Cotter, Hutchinson, and Dodek, who each wrote foundational pieces and then essentially moved on to other areas of legal ethics research, my sustained attention to legal ethics for government lawyers arguably demonstrates that this is a viable area for ongoing academic research.

While I recognize that my work in this area has been consistently—others might say stubbornly—doctrinal and Canada-centric, as opposed to theoretical or comparative, in my view those characteristics are not flaws. There is room for all kinds of work to contribute to this area of study, and doctrinal work often lays the foundation for alternative approaches to legal scholarship. A fair criticism, in contrast, would be that my work focused heavily on the rules of professional conduct and applied a narrow understanding of legal ethics as the law of lawyering. As Dodek has argued in his work on the state of Canadian legal ethics generally, the importance of codes is "hotly contested" and "legal ethics consists of much more than" the law of lawyering.[133]

Other than my work, and a brief note by Micah Rankin,[134] there were only two articles by academics over this time. One was a 2016 piece by Dodek titled "The 'Unique Role' of Government Lawyers in Canada."[135] In addition to recasting his earlier work for a non-Canadian audience, and incorporating the intervening literature, Dodek here provided a nuanced discussion of the appropriate role of government lawyers in

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129 *Ibid* at 70–72.

130 Martin, "Federalism", *supra* note 125 at 374–89.

131 *Ibid* at 389–94.

132 Martin & Telfer, *supra* note 121.

133 Dodek, "Ready", *supra* note 3 at 6.

134 Micah B Rankin, "The Trials, Tribulations and Troubling Revelations of Government Lawyers in Canada" (2014) 17:2 Leg Ethics 303 [Rankin].

135 Dodek, "Unique", *supra* note 2.

public law litigation.[136] The other, "A Less Private Practice: Government Lawyers and Legal Ethics" by Jennifer Leitch, advocates a "justice ethic" approach to legal ethics for government lawyers.[137] Under this approach, the unique obligations of Crown prosecutors would be extended to government lawyers.[138] Indeed, Leitch proposed amendments to the rules of professional conduct requiring that "[w]hen acting on behalf of the Crown in adversarial proceedings, a lawyer must act fairly and dispassionately to ensure that justice is done."[139] With respect, Leitch's proposal, grounded in a single, but admittedly unsettling and compelling case study, is creative but overbroad and unpersuasive. A narrower claim about a subset of government litigation would be stronger—for example, one rooted in the honour of the Crown, parallel to the negotiation context as I discussed with Telfer. More fundamentally, Leitch collapses the disputed ethical obligations of governments into professional obligations of government lawyers, allowing those lawyers to supplant the legitimate decisions of their clients. If governments are to be constrained in their legal decision-making, such constraints should come in legislation or in political consequences at the ballot box, and not be imposed by their lawyers via the law societies amending the rules of professional conduct.

One of Leitch's arguments is notable because it is (or should be) controversial and is, in my view, problematic. Like other commentators,[140] Leitch recognizes that for government lawyers, withdrawal effectively means resignation.[141] Unlike other commentators, however, she argues that this reality is "untenable" and thus that legal ethics should allow government lawyers—and even the Attorney General—to "avoid" that consequence by "creat[ing] a space for the government lawyer to adopt an ethical position that is different from her employer."[142] Quite simply, my view is that if government lawyers find the implications of their professional obligations 'untenable', they should choose a different practice instead of torquing those obligations to their comfort. There is an important distinction between recognizing that government lawyers operate under multiple legal regimes that do not interlock neatly and relieving them

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136 *Ibid* at 32–42.

137 Jennifer Leitch, "A Less Private Practice: Government Lawyers and Legal Ethics" (2020) 43:1 Dal LJ 315 at 352–62 [Leitch].

138 *Ibid* at 349.

139 *Ibid* at 357.

140 See e.g. Alice Woolley, *Understanding Lawyers' Ethics in Canada*, 2d ed (Toronto: LexisNexis Canada, 2016) at para 3.136 (now Justice Woolley of the Court of Queen's Bench of Alberta).

141 Leitch, *supra* note 137 at 324.

142 *Ibid* at 324–25 (Leitch gives the examples of former government lawyer Edgar Schmidt and former Minister of Justice and Attorney General for Canada Jody Wilson-Raybould).

from core professional obligations because the consequences of those obligations are severe. The former is critical to empowering government lawyers to comply with the letter and spirit of both their professional obligations and their obligations as public servants. The latter would lower the standards of the legal profession, or at least exempt government lawyers from them. While this distinction may be clearer in the abstract than in reality, it remains an important distinction nonetheless. Whereas Hutchinson argues that government lawyers are public servants first and lawyers second,[143] and whereas Dodek and Sanderson do not rank or order the layers or sides in their models of the duties of government lawyers, my starting point is that government lawyers are lawyers first. I acknowledge, however, that as a matter of law, Hutchinson is probably correct insofar as for federal government lawyers, federal legislation on the civil service prevails over provincial legislation on the legal profession via paramountcy.[144] However, at least at the provincial level, my view may be correct not only as a matter of policy but also as a matter of law—and would, I assume, be shared by the law societies.

This decade also saw growth in the literature on roles at the definitional margins of government lawyers, and specifically judicial law clerks and military lawyers. Joshua Wilner re-entered the literature with "To Be or Not to Be? Some Legal Ethics for Judicial Law Clerks," drawing on his experience as a former law clerk.[145] In striking contrast to his earlier work applying virtue ethics to government lawyers,[146] this later piece was heavily practice-oriented. It addressed both some core issues relevant to all lawyers, such as confidentiality, and more clerk-specific ones such as impartiality.[147] Wilner anchored his analysis in the relationship between a judge and her judicial law clerk. However, while he considered many facets and features of that relationship, in the end he left it as an amorphously defined, sui generis one.[148] Wilner was indeed noncommittal as to whether judicial law clerks practice law, which raised the question of whether the concept of "legal ethics" properly applies to them.[149] In sharp contrast, I grounded my analysis of judicial law clerks in the premise that law clerks practice law within a lawyer-client relationship.[150] This disagreement

143 See *above* note 53 and accompanying text.

144 See Martin, "Federalism", *supra* note 125.

145 Joshua Wilner, "To Be or Not to Be? Some Legal Ethics for Judicial Law Clerks" (2010) 89:3 Can Bar Rev 611 [Wilner, "Law Clerks"].

146 Wilner, "Service", *supra* note 43.

147 Wilner, "Law Clerks", *supra* note 145 at 637–39 (confidentiality), 639–40 (impartiality).

148 *Ibid* at 620–24.

149 Andrew Flavelle Martin, "Legal Ethics and Judicial Law Clerks: A New Doctrinal Account" (2020) 71 UNBLJ 248 at 249–50.

150 *Ibid* at 257–59.

reinforces the reality that law clerks are at the definitional margins of government lawyers.

During this time, I also wrote the first Canadian piece on legal ethics for military lawyers.[151] In it, I created a framework that was somewhat analogous to the Dodek and Sanderson models of government lawyers, arguing that military lawyers have two "layers" of duties—as lawyers and as officers—and focusing on the interaction between these layers.[152] Like my other work, this piece was squarely doctrinal.

This decade was the first period in which there was truly explicit dialogue in the literature, as government lawyers responded to the earlier work of Dodek and Hutchinson. During this time the literature provoked some reaction. Nonetheless, even at this stage the literature remained largely doctrinal, somewhat unimaginative, and relatively undynamic.

B) Who, how, what, why—and so what?

From this assessment of the literature emerge the answers to the questions I posed above—and a less comfortable one that I have thus far left unmentioned.

Most of the existing literature has been authored by current or former government lawyers or by academics with experience in government. The initial work was largely written by current or former government lawyers, particularly Deborah MacNair.[153] This group grew and persisted over time.[154] It was joined by academics with experience in government, particularly Brent Cotter, and Adam Dodek, and later myself.[155] However, little of the Canadian scholarship has been written by academics *without* significant experience in government. This reality is not surprising, given that the work of government lawyers, other than perhaps litigators, is largely hidden to those on the outside. But it is a limitation to be overcome going forward.

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151 Andrew Flavelle Martin, "Legal Ethics and Canada's Military Lawyers" (2019) 97:1 Can Bar Rev 727.

152 *Ibid* at 748–52. (Less relevant for the purposes of this article, I also examined the relationship and tension between the Judge Advocate General and the Minister of Justice: 740–48).

153 See also Tait, *supra* note 9.

154 Here I refer to Wilner, Keyes, Wilson, Wong, Hille, Morris, Nishikawa, Wilkins, Boucher, Sanderson, and Telfer. Murphy and Monahan are unusual in that they wrote while government lawyers but were previously academics.

155 Here see also Rankin, *supra* note 134.

What about the how, i.e. approach and methodology? Other than Wilner's piece applying virtue ethics,[156] the literature is primarily doctrinal—indeed, its authors and critics might characterize it as unabashedly or stubbornly doctrinal. This is not surprising given that most of the literature is by current or former government lawyers, as opposed to academics who one would expect to be more grounded in approaches other than doctrinal approaches. Similarly, little of the existing literature is more than superficially comparative.

As for substantive content, the existing literature both considers core questions in legal ethics—conflicts of interest, confidentiality, and privilege—and larger themes of particular note for government lawyers. The larger themes throughout are the rule of law and the role of the public interest. More recent work has grappled with what loyalty means for government lawyers, largely but not solely in the context of Edgar Schmidt.

It is unclear what precisely is motivating the dramatic growth in this work among both government lawyers and academics. Other than the pieces dealing with Schmidt,[157] none of the literature was an explicit response to specific events. The apparent general motivation, most explicit in the work of Hutchinson and Dodek but underlying all the literature, is that the previously meagre attention to government lawyers was disproportionate to their numbers and strikingly ignorant of the special issues that face them. Presumably, government lawyers and former government lawyers would be the most keenly aware of this discordance. However, the small number of academics participating in this growth suggests that legal ethics for government lawyers has yet to be accepted as a meaningful and legitimate area of study.

Contrast here Dodek's account of the impetus for the Canadian legal ethics literature generally. Dodek attributes the initial growth both to a major revision of the *Code of Professional Conduct* of the Canadian Bar Association and to the Supreme Court of Canada's first major decision on lawyer conflicts of interest, *Martin v Gray*—a decision with a stirring dissent and with major implications for the practicing bar.[158] In contrast, there have been only two major Canadian decisions on legal ethics for government lawyers. The first, *Everingham v Ontario (AG)*, ended at the Divisional Court level and predated most Canadian legal

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156 Wilner, "Service", *supra* note 43.

157 Keyes, "Loyalty", *supra* note 98. See also Boucher, "Lore", *supra* note 75 at 474–78.

158 Dodek, "Search", *supra* note 3; *MacDonald Estate v Martin*, [1990] 3 SCR 1235, 77 DLR (4th) 249.

ethics scholarship.[159] The second, the decision of the Supreme Court of Canada in *Krieger v Law Society of Alberta*,[160] would be applied in some scholarship on government lawyers,[161] but was more often and more deeply applied to its specific context of Crown prosecutors and to the Attorney General.[162] While the Edgar Schmidt affair has inspired and affected recent scholarship, the decisions of the Federal Court and Federal Court of Appeal in *Schmidt v Canada (AG)* did not address the potential legal ethics issues and Schmidt faced no disciplinary proceedings (at least yet), meaning no court or tribunal has pronounced on those legal ethics issues.[163] Thus, the literature on legal ethics for government lawyers has had fewer prompts than the literature on legal ethics more generally. Likewise, as I return to below, there have been fewer prompts in Canada than in the US.

Arguably the most important and publicly visible controversy around government lawyers in the last decade, other than the Schmidt affair, received little attention in the media and has yet to be picked up in the literature.[164] In November 2016, an Ontario government lawyer wrote a letter to the Deputy Attorney General alleging not only longstanding, pervasive, and extreme harassment, discrimination, and abuse within the Ministry of the Attorney General—but also that "[the Deputy Attorney General] and other senior leadership in government ... are fully aware of this pattern of behaviour."[165] Ironically, this came roughly five years after Assistant Deputy Attorney General Malliha Wilson had published her piece on professionalism, a piece in which she painted a rosy picture of life as a lawyer in the Ontario government:

> [T]here is a great deal of accountability as to how staff in government are treated. The government has workplace discrimination and harassment policies, online learning modules on accessibility and discrimination, and, perhaps most importantly, the Ministry of the Attorney General has fostered a norm of

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159 *Everingham v Ontario (AG)* (1992), 8 OR (3d) 121, 88 DLR (4th) 755 (Ct J (Gen Div Div Ct)), aff'g on other grounds, 84 DLR (4th) 354, 1991 CarswellOnt 400 (WL Can) (Ct J (Gen Div)).

160 *Krieger v Law Society of Alberta*, 2002 SCC 65.

161 Martin & Telfer, *supra* note 121 at 458; Keyes, "Loyalty", *supra* note 98 at 761; Martin, "Political Activity", *supra* note 123 at 300; MacNair, "Legislative Drafters", *supra* note 37 at 135.

162 See e.g. Whitley, *supra* note 7; Rosenberg, *supra* note 8; Sterling & MacKay, *supra* note 8.

163 *Schmidt*, *supra* note 99; *Schmidt* FCA, *supra* note 99.

164 Kevin Donovan & Robert Benzie, "Email revealed abuse" (23 February 2018), online: *The Toronto Star* <www.pressreader.com>.

165 *Ibid*.

> professionalism and civility amongst its lawyers. The government is also dedicated to diversity and inclusion.[166]

The silence in the literature might appear particularly surprising because this was an era in which the legal profession, in the legal literature and elsewhere, was deeply embroiled in a debate over civility.[167] However, in my view these events being overlooked is unsurprising, and not only because of the opacity of government practice. The civility movement, in both its aspirations and its application, paid perhaps the least attention to the ways in which lawyers treat their subordinates.

Contrast this relative uneventfulness with the lively events and literature surrounding the Attorney General during recent years. Not long after an appalling attack on the Chief Justice of Canada by federal Attorney General and Minister of Justice Peter MacKay,[168] the SNC-Lavalin affair riveted public attention to the role of the Attorney General in federal prosecutorial decisions.[169]

Indeed, the Canadian literature on legal ethics for government lawyers appears to be both implicitly and explicitly more a response to US events than Canadian ones. Much of the work mentions John Yoo and the torture memos,[170] which likely dominated the attention and conscience of the Canadian legal profession, and to a lesser extent the Canadian public, over this time.

Dodek attributed later growth in Canadian legal ethics literature to the increase in legal ethics teaching and "the emergence of a new cadre of scholars prioritizing legal ethics scholarship."[171] These factors may also be promoting more literature specifically on legal ethics for government lawyers—but that remains to be seen. There are two possible explanations

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166 Murphy, Wilson &Wong *supra* note 120 at 434.

167 See Alice Woolley, "Does Civility Matter?" (2008) 46:1 Osgoode Hall LJ 175 [Wooley, "Civility I"] (now Justice Woolley of the Court of Queen's Bench of Alberta); Alice Woolley, "'Uncivil by Too Much Civility?' Critiquing Five More Years of Civility Regulation in Canada" (2013) 36:1 Dal LJ 239 [Wooley, "Civility II"]. But see Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007) 11 Can Crim L Rev 97 [Code, "Civility"] (now Justice Code of the Ontario Superior Court of Justice).

168 See Cotter, "Failure", *supra* note 8. See also Sanderson, *supra* note 10 at xxv.

169 See e.g. Devlin & Frame, *supra* note 8; Bezanson, *supra* note 8; Martin, "SNC-Lavalin", *supra* note 8.

170 MacNair, "Service", *supra* note 27 at 524–25; Dodek, "Intersection", *supra* note 5 at 24, 46–47; Monahan, *supra* note 94 at 49–50; Boucher, "Lore", *supra* note 75 at 471–73, 487; Sanderson, *supra* note 10 at xxvi–xxvii, 7–9.

171 Dodek, "Ready", *supra* note 3 at 3.

for the slow growth in this area.[172] One explanation is that Canadian legal ethics scholars are focusing their work on other substantive areas, such as civility,[173] good character,[174] family law,[175] solicitor-client privilege,[176] or the related topics of solicitor-client judicial ethics.[177] Another explanation is that there are relatively few legal ethics scholars in Canada, compared to those in other areas of legal scholarship. In my view, both explanations carry weight. Put another way, increased output in this area would come from either (and hopefully both) increased scholarly attention to legal ethics for government lawyers and an increase in the overall number of legal ethics scholars. As I will return to below, there will continue to be a key role for government lawyers writing in this area.

One last question remains: so what? Setting aside the idyllic and convenient notion that scholarship is a valuable good in itself, and without getting bogged down in disputes over the definition and measurement of "impact," what has this literature achieved? Its practical effect—if any—on the practicing bar is largely unknowable. Nonetheless, Sanderson's book

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172 Thanks to a reviewer for raising this point.

173 See e.g. Woolley, "Civility I", *supra* note 167; Woolley, "Civility II", *supra* note 167; Code, "Civility", *supra* note 167.

174 See e.g. Alice Woolley, "Tending the Bar: The 'Good Character' Requirement for Law Society Admission" (2007) 30 Dal LJ 27; Alice Woolley & Jocelyn Stacey, "The Psychology of Good Character: The Past, Present and Future of Good Character Regulation in Canada" in Kieran Tranter et al, eds, *Reaffirming Legal Ethics: Taking Stock and New Ideas* (London: Routledge, 2012) 165; Alice Woolley, "Can Good Character Be Made Better? Assessing the Federation of Law Societies' Proposed Reform of the Good Character Requirement for Law Society Admission" (2013) 26 CJALP 115.

175 See e.g. Deanne M Sowter, "Full Disclosure: Family Violence and Legal Ethics" (2020) 53:1 UBC L Rev 141; Deanne M Sowter, "Professionalism and Ethics in Family Law: The Other 90%" (2016) 6 J Arbitration & Mediation 167.

176 See e.g. Adam M Dodek, "The Public Safety Exception to Solicitor-Client Privilege" (2000) 34:1 UBC L Rev 293; Adam M Dodek, "Reconceiving Solicitor-Client Privilege" (2010) 35:2 Queen's LJ 493; Adam M Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis Canada, 2014).

177 See e.g. Stephen GA Pitel, "Ethical Issues for Judges Attending and Presenting at Conferences" (2019) 50 Adv Q 1; Stephen GA Pitel & Liam Ledgerwood, "Judicial Confidentiality in Canada" (2017) 43:1 Queen's LJ 123; Stephen GA Pitel & Michal Malecki, "Judicial Fundraising in Canada" (2015) 52:3 Alta L Rev 519; Stephen GA Pitel & Will Bortolin, "Revising Canada's Ethical Rules for Judges Returning to Practice" (2011) 34:2 Dal LJ 483. See also e.g. Philip Bryden & Jula Hughes, "The Tip of the Iceberg: A Survey of the Philosophy and Practice of Canadian Provincial and Territorial Judges Concerning Judicial Disqualification" (2011) 48:3 Alta L Rev 569; Jula Hughes & Dean Philip Bryden, "Refining the Reasonable Apprehension of Bias Test: Providing Judges Better Tools for Addressing Judicial Disqualification" (2013) 36:1 Dal LJ 171; Jula Hughes & Philip Bryden, "From Principles to Rules: The Case for Statutory Rules Governing Aspects of Judicial Disqualification" (2016) 53:3 Osgoode Hall LJ 853.

will doubtlessly be an invaluable reference for government lawyers going forward. Moreover, the adoption of Dodek's proposal for a professional responsibility service by the federal Department of Justice is tangible and impressive. To more symbolic effect, the adoption and rejection of some of the ideas of Dodek and Hutchinson by Deputy Attorney General Monahan, and to a lesser extent in the work of Assistant Deputy Attorney General Wilson, suggests that legal leadership in the government of Ontario is paying at least some attention to the literature. Insofar as legal literature can be evaluated by its uptake in the case law, the lack of uptake can be attributed to the paucity of cases on government lawyering and is not necessarily reflective of flaws in the literature itself. Insofar as the impact of literature is to beget more literature, the Dodek and Sanderson models of government lawyering, which might be fused into a single Dodek-Sanderson model, have been influential, as to a lesser extent so has been Tait's foundational work. All in all, the impact has been moderate at best.

3. A path forward

In this Part, I consider the potential future of Canadian scholarship on legal ethics for government lawyers.

In terms of substantive content, there are few if any glaring gaps in the existing Canadian literature but yet there remains room for growth. There are several issues, and several roles, that are largely unexplored. As I identified above, there is little work on the application of whistleblowing legislation to government lawyers. An idiosyncratic issue is that most of the lawyers in Canada who bargain collectively happen to be government lawyers other than management. Government lawyering thus intersects ethics and professionalism with both labour law and employment law. While the rules of professional conduct do not prohibit or discourage collective bargaining, other issues arise. Most importantly, do the rules of professional conduct on client service and on withdrawal prohibit strikes by lawyers? Whether the rules do and should do so is a discussion that incorporates and applies fundamental ethical considerations, including duties to the client and to the administration of justice. As for roles, policy lawyers for example have been ignored other than a few pages by MacNair. There are also numerous possibilities at the definitional margins of government lawyering, such as military lawyers and judicial law clerks. These are just some of the substantive areas for future growth. But those working in this area can and should do more, and strive for more.

With a considerable substantive and doctrinal foundation laid, there are now rich possibilities for the application of non-doctrinal or alternative

approaches to legal scholarship. These include legal theory, legal history, law and economics, and perhaps even law and philosophy. In particular, I would argue that there is a pressing need for empirical work to better understand the lived reality of government lawyers and the specific ethical issues that face them in practice, beyond the few who have published in this area. Here I echo Dodek's call for empirical work on lawyers generally.[178]

A parallel can be drawn here to Dodek's account of the history of Canadian legal ethics scholarship, in which he identified two intertwined "waves."[179] He characterized the first wave as "descriptive,"[180] "heavily focused on the codes of ethics and on law societies' regulations,"[181] and comprised of "treatises and doctrinal analyses."[182] In contrast, the second was analytical and critical, or what he called "a scholarship of self-reflection."[183] In a similar way, the Canadian literature on legal ethics for government lawyers is at a moment in which the first-wave doctrinal work, of which Sanderson's book represents a culmination, should be joined by second-wave analytical and critical work. That is not to say that none of the existing literature is critical, or that there is no need for further descriptive work. Sanderson's book, in particular, not only provides a foundation for critical work but starts towards that work itself.

What about comparative work? While Dodek was emphatic that Canadian legal ethics account for the "distinctly Canadian context" and "seek to identify and articulate uniquely Canadian aspects,"[184] he also identified a particular need for comparative legal ethics research,[185] specifying the UK and the US as sources of "fruitful inquiry."[186] His nuanced position was that it is better to use foreign content "as an opportunity for critical self-reflection on the values that underpin Canadian legal ethics" than as a source of values and rules themselves.[187] Dodek's imperative that Canadian legal ethics be Canadian is important, but may have been inadvertently caricatured by some commentators in this area to dismiss the value of comparative work.[188]

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178 Dodek, "Search", *supra* note 3 at 124, 126–27; Dodek, "Ready", *supra* note 3 at 47.

179 Dodek, "Ready", *supra* note 3 at 21.

180 Dodek, "Search", *supra* note 3 at 122.

181 Dodek, "Ready", *supra* note 3 at 21.

182 *Ibid* at 9.

183 Dodek, "Search", *supra* note 3 at 122.

184 Dodek, "Ready", *supra* note 3 at 7.

185 *Ibid* at 47.

186 *Ibid*.

187 Dodek, "Search", *supra* note 3 at 127.

188 Dodek, "Ready", *supra* note 3 at 7. (I consider primarily myself here. Though not on government lawyers, see especially Andrew Flavelle Martin, "Legal Ethics versus

While the US and UK would be the two obvious comparators, it is important to consider which is preferable. Dodek suggested that Canadian legal ethics "suffers from Anglo-American confusion" as to whether the US or the UK is the appropriate source of "inspiration and guidance."[189] However, even if the UK is the better comparator, there is little existing UK literature on which to draw.[190] In contrast, the US literature in this area clearly outnumbers the corresponding Canadian literature—just as the US legal ethics literature more generally vastly outweighs the Canadian. Indeed, Dodek argued in 2016 that "the paucity of attention to government lawyers in Canada compares poorly with the attention given to the subject in the US."[191] For example, there is extensive US literature on government lawyers and whistleblowing[192] and on conflicts of interest and other restrictions for former government lawyers.[193] These

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Political Practices: The Application of the Rules of Professional Conduct to Lawyer-Politicians" (2013) 91:1 Can Bar Rev 1 at 3).

189 Dodek, "Search", *supra* note 3 at 126.

190 But see e.g. Matthew Windsor, "The Special Responsibility of Government Lawyers and the Iraq Inquiry" (2016) 87:1 Brit YB Intl L 159. There is also some from other similar commonwealth countries. See e.g. Duncan Webb, "Keeping the Crown's Conscience: A Theory of Lawyering for Public Sector Counsel" (2007) 5:2 NZJPIL 243.

191 Dodek, "Unique", *supra* note 2 at 26, fn 19.

192 See e.g. Kathryn Marshall, "Advancing the Public Interest: Why the Model Rules Should Be Amended to Facilitate Federal Government Attorney Whistleblowing" (2018) 31:4 Geo J Leg Ethics 747; Jessica Wang, "Protecting Government Attorney Whistleblowers: Why We Need an Exception to Government Attorney-Client Privilege" (2013) 26:4 Geo J Leg Ethics 1063; Mika C Morse, "Honor or Betrayal? The Ethics of Government Lawyer-Whistleblowers" (2010) 23:2 Geo J Leg Ethics 421; Michael P Scharf & Colin T McLaughlin, "On Terrorism and Whistleblowing" (2006-2007) 38:3/4 Case W Res J Intl L 567; Kristina Hammond, "Plugging the Leaks: Applying the Model Rules to Leaks Made by Government Lawyers" (2005) 18:3 Geo J Leg Ethics 783; James E Moliterno, "The Federal Government Lawyer's Duty to Breach Confidentiality" (2005) 14:2 Temple Pol & Civ Rts L Rev 633; Jesselyn Radack, "The Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible at Last" (2003) 17:1 Geo J Leg Ethics 125; Charles S Doscow, "The Government Attorney and the Right to Blow the Whistle: The Cindy Ossias Case and its Aftermath (a Two-Year Journey to Nowhere)" (2003) 25:1 Whittier L Rev 21; Roger C Cramton, "The Lawyer as Whistleblower: Confidentiality and the Government Lawyer" (1991) 5:2 Geo J Leg Ethics 291.

193 See e.g. Irene Jefferson, "The Securities and Exchange Commission Revolving Door: Strengthening Ethical and Enforcement Standards" (2013) 26:4 Geo J Leg Ethics 773; Shira Mizrahi, "Up against the Wall: A Guide to the Effective Screening of Former Government Attorneys in New York" (2011) 10:1 Cardozo Public L Policy & Ethics J 131; Grant Dawson, "Working Guidelines for Successive Conflicts of Interest Involving Government and Private Employment" (1998) 11:2 Geo J Leg Ethics 329; John J Woykovsky, "Conflicts of Interest: The Former Government Attorney and the Case of Michael Abbell" (1997) 11:1 Geo J Leg Ethics 165; Rachel E Boehm, "Caught in the Revolving Door: A State Lawyer's Guide to Post-Employment Restrictions" (1996) 15:3 Rev Litigation 525; Rodney D Dickinson, "Rules Regulating Successive Government and Private Employment: A

areas are relative weaknesses in the Canadian literature. Not surprisingly, the torture memos have been a key topic of US research since the turn of the century,[194] and one that inspires helpful hypotheticals in the Canadian context. There is thus great potential to draw on US scholarship and to collaborate with American academics and lawyers in the future. Collaboration with the UK likewise has untapped potential.

Admittedly there is no single path forward. I nonetheless suggest that a timely move would be to supplement continuing doctrinal work with a new wave of non-doctrinal work.

While it may sound pessimistic, I would argue that the literature on legal ethics for government lawyers is at a defining but precarious moment—a moment of possibilities but also of danger. It runs the risk of stalling out or, even worse, becoming the worst kind of scholarship that is merely a running conversation among a handful of commentators who

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Comparison" (1994-1995) 19 J Leg Profession 359; Barbara G Mance, "Toward a New Ethical Standard Regulating the Private Practice of Former Government Lawyers" (1983) 13:2 Golden Gate U L Rev 433; Benjamin R Civiletti, "Disqualifying Former Government Lawyers" (1981) 7:2 Litigation 8; John P Graceffa, "Ethical Considerations of the Federal Lawyer upon Entering Private Practice" (1981) 4:2 W New Eng L Rev 199; Philip A Lacovara, "Restricting the Private Law Practice of Former Government Lawyers" (1978) 20:2 Ariz L Rev 369.

194 See e.g. Carrie L Flores, "Unfounded Allegations That John Yoo Violated His Ethical Obligations as a Lawyer: A Critical Analysis of the Torture Memo" (2011) 25:1 BYU J Pub L 1; Michelle Querijero, "Without Lawyers: An Ethical View of the Torture Memos" (2010) 23:1 Geo J Leg Ethics 241; Robert M Chesney "Executive Power: Bad Advice or Bad Laws? Allocating Responsibility Between Lawyers and Laws in the Content of National Security Policymaking" Book Review of *Bad Advice: Bush's Lawyers in the War on Terror* by Harold H Bruff (2010) 45 Tulsa L Rev 591; Michael P Scharf, "The Torture Lawyers" (2010) 20:3 Duke J Comparative & Intl L 389; Michael P Charf, "Keynote Address: The T-Team" (2010) 19:1 Michigan State J Intl L 129; W Bradley Wendel, "The Torture Memos and the Demands of Legality" (2009) 12:1 Leg Ethics 107; Peter Margulies, "True Believers at Law: National, Security Agendas, the Regulation of Lawyers, and the Separation of Power" (2008) 68:1 Maryland L Rev 1; David Luban, "The Torture Lawyers of Washington" in David Luban, ed, *Legal Ethics and Human Dignity* (Cambridge: Cambridge University Press, 2007) 163; Jesseyln Radack, "Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism" (2006) 77:1 U Colorado L Rev 1; Robert Vischer, "Legal Advice as Moral Perspective" (2006) 19 Geo J Legal Ethics 22; Marisa Lopez, "Professional Responsibility: Tortured Independence in the Office of Legal Counsel" (2005) 57:3 Florida L Rev 685; Richard B Bilder & Detley F Vagts, "Speaking Law to Power: Lawyers and Torture" (2004) 98:4 AJIL 689; Julie Angell, "Ethics, Torture, and Marginal Memoranda at the DOJ Office of Legal Counsel" (2005) 18:3 Geo J Leg Ethics 557; W Bradley Wendel, "Legal Ethics and the Separation of Law and Morals" (2005) 91:1 Cornell L Rev 67. I include here, though published in Canada, written by an American scholar with a US focus: W Bradley Wendel, "Executive Branch Lawyers in a Time of Terror: The 2008 F.W. Wickwire Memorial Lecture" (2008) 31:2 Dal LJ 247.

have little if any interest in, much less impact, on the outside world. To set out the existing law as the doctrinal work has done is an incomplete project that will become meaningful and whole if and when that existing law is pushed further, as primarily Dodek and Hutchinson have pushed so far. The literature should strive to be more and to be better—while challenging government lawyers to be more and to be better.

None of this is to denigrate the work so far, and most of all Sanderson's singular achievement. The question is whether this is the end, or instead merely the end of the beginning. Perhaps the best is yet to come.

4. Conclusion: A precarious moment and a promising future

There has been substantial progress in the Canadian literature on legal ethics for government lawyers since Tait's speech less than twenty-five years ago. Indeed, this is a moment of substantial excitement and growth but also of precariousness.

There remains lots of space, and indeed a real need, for intensified and sustained focus on government lawyering by both government lawyers and the academy. While current and former government lawyers contribute a richness and a grounding to the literature, they face many constraints from which academics enjoy freedom. The most obvious constraints may be confidentiality, privilege, and loyalty, but time and resources may be even more constraining in reality. There is a real opportunity for governments to encourage and facilitate increased participation by their lawyers in informing and shaping the literature about them—but this will require a change in attitude that embraces transparency over the current state of relative opacity. While it may still be unrealistic to expect governments to follow Dodek's advice to proactively disclose the legal advice they receive,[195] allowing and encouraging government lawyers to write more about themselves should be more tenable. In addition to freedom and time, academics are also more likely to have and cultivate expertise in non-doctrinal approaches. Those academics with experience in government should encourage their colleagues to enter this area—and to consider collaborating with government lawyers in doing so. Indeed, the active participation of current and former government lawyers is a key strength of the existing literature that should certainly not be abandoned.

The limited attention given to government lawyers in legal ethics research by academics parallels the limited attention given to government

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195 Dodek, "Intersection", *supra* note 5 at 45–47.

lawyers in legal ethics teaching in law schools.[196] While teaching is beyond the scope of this article, I would note that increased attention in legal ethics teaching should, and hopefully will, go hand in hand with increased attention in legal ethics research.

The limited number of academics working in this area is both problematic and symptomatic. This relative academic absence may incorrectly signal that legal ethics for government lawyers is not a meaningful subject of scholarship, becoming a self-fulfilling prophecy. My hope is that this may change, in the same way as legal ethics itself grew to be an accepted area of Canadian legal scholarship. The only apparent way to drive such change is one publication at a time—but time is running out. Without sustained contributions by both academics and government lawyers looms the real prospect of failure as a meaningful area of study. Such failure, however, is by no means inevitable and indeed is entirely preventable.

196 Thanks to a reviewer for raising this point.