

Ethics and Drafting

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Introduction

Given the topic we are discussing today, I will begin with a disclosure of a potential conflict of interest. I am an armchair legislative drafter! As you know, it is easier to be an armchair critic than the person who is committed to “doing the do”. In my case I have a diploma in legislative drafting but I have never practised full time as a drafter. I have drafted regulations and orders-in-council but I definitely do not have the same talents as the others in this room. I should also note that John Mark Keyes, who is here with us today, was a classmate in my legislative drafting class. He can testify to my limited and fleeting talents as a drafter over the years. The leader of our seminars used to put the individual assignments on the overhead projector screen and I still believe to this day that John Mark has kept copies of my assignments! I want to thank John Mark for his assistance in reviewing my articles over the years and, in particular, my master’s thesis, which is somewhat related to the topic we are speaking about today.²

These remarks are not intended to be a comprehensive commentary on lawyers and ethics. Instead, the purpose of these remarks is to provoke some thought and discussion about a subject which is often overlooked in the academic literature.

What has fascinated me over the years about public sector lawyering in general is the absence of commentary on how we do our

* June 8, 2004.

¹ Corporate Counsel, Department of Justice, Ottawa, Ontario (September, 2004). The views expressed in this paper are those of the author and do not reflect the views of the Department of Justice.

² Deborah MacNair, “Legislative Drafters: A Discussion of Ethical Standards from a Canadian Perspective”, 24(2) *Statute Law Review* 125; see also, generally, M. Deborah MacNair, *The Case for Introducing Specific Ethical Standards for Legislative Drafters*, Master’s Thesis LL.M. (University of Ottawa, 2000).

job.³ This can be either attributed to the fact that it has been assumed that the provincial and territorial codes of professional conduct are largely driven by the needs of the private practitioner, and that the codes are meant to apply to them, or as some may argue, through the benign neglect on the part of the public sector lawyer.

The practice of law in the public sector requires a different skill and competency; however, it has always stayed under the radar screen in comparison to the private practitioner. There has been an ongoing debate as to whether ethics, and doing the right thing, is intuitive or acquired as a skill.⁴ I have always been intrigued by the “how” in “how” we do our job. I was not a “born natural” when I joined the public service as a lawyer. But I soon became intrigued by the “public interest” component of our work and how we serve the Crown as a client. This led to my interest in ethics and, in particular, to professional responsibility. When I prepared my master’s thesis it therefore seemed natural to put the practice of a legislative drafter under the “ethics” lens.

Let’s start with the definitions

Time does not permit me to explore all of the possible definitions of a “legislative drafter” or “codes of ethics” or to describe all of the work environments where legislative drafters work and that would have an impact on the standards that apply to them (parliament, legislative assemblies, municipalities, provincial and territorial governments) and so I would ask you to bear with me in that regard.⁵ I developed the following summary for my thesis:

³ Deborah MacNair, “The Role of the Federal Public Sector Lawyer: From Polyester Lawyer: From Polyester to Silk”, (2000) 50 *U.N.B.L.J.* 125; Deborah MacNair, “Crown Prosecutors and Conflict of Interest: A Canadian Perspective”, (2002) 7 *Can. Crim. L. Rev.* 257.

⁴ D.S. Kleinberger, “Wanted: An Ethos of Personal Responsibility – Why Codes of Ethics and schools of Law Don’t Make for Ethical Lawyers” (1989) 21 *Conn. L. Rev.* 365; R.E.Loder, “Tighter Rules of Professional Conduct: Saltwater for Thirst” (1987-88) 1 *Georgetown Journal of Legal Ethics* 311.

⁵ See generally David A. Marcello, “The Ethics and Politics of Legislative Drafting”, (1996) 70 *Tulane Law Review* 2437; Roger Purdy, “Professional Responsibility for Legislative Drafters: Suggested Guidelines and Discussion of Ethics and Role Problems”, 11 *Seton Hall Legislative Journal* 67.

Legislative drafting has been described as both an art and a profession. There are several factors that serve to distinguish the practice of the legislative drafter from other legal practitioners.

- The legislative drafter may or may not be a public servant. In Canada legislative drafters are normally practicing in a public sector environment, whether at the federal, provincial or municipal levels of government.
- The drafter may or may not be a lawyer. In Canada the rule of thumb is that a drafter will be a lawyer with a practicing status in one of the provinces or territories of Canada. While they are trained as lawyers, none of the rules of professional conduct of the provincial or territorial law societies or the Canadian Bar Association refer specifically to the legislative drafter.
- The drafter does not require specialized training in drafting although many have now acquired certification as legislative drafters through the training program offered at the University of Ottawa. No distinction is normally made, for training purposes, between drafting legislation, regulations, rules or other specialized documents. Some drafters simply receive their training through experience on the job.
- The drafter is the wordsmith who puts pen to hand and reduces ideas to a written text. While some may argue that this is a technical skill it falls in between traditional editing and taking dictation.
- Some have questioned whether legislative drafting constitutes the practice of law. The Law Society of Upper Canada is silent on the issue of what is the “practice of law”. However, for those jurisdictions which do define the “practice of law”, such as the Law Society of British Columbia, the definition does not refer to the legislative drafter.
- A legislative drafter needs an appreciation of language, including grammar, as well as knowledge of the technical requirements of legislative form.

- The legislative drafter is often perceived as having a distinct, independent role similar to Crown prosecutors and “judicial-like” in nature. In other words, there is an importance to their role given the special part they play within government, Parliament and the Legislative Assembly.
- The legislative drafter has a duty to be non-partisan. While the drafter may be putting forward legislation for the Parliament or government of the day they must still stay out of the political fray and remain impartial.
- The legislative drafter does not control the final product. Before a statute or regulation becomes law, there will be many, including members of the legislature, consultants and members of the public, who will provide their input.⁶

And the proposal is....

I am going to put forward my thesis today in the following terms. I believe that public sector lawyers, including legislative drafters, should be bound by, and included by reference in an enforceable, express code of professional conduct to govern their ethical behaviour and professional conduct. Following this thesis, it is envisaged that there would be general principles in such a code that would apply to all lawyers, including legislative drafters, and then these general principles would be tailored, where appropriate, to the legislative practitioner’s needs and circumstances. As an example, annotations could be added to the commentary section rather than adding an express rule to a code. In other words, a separate code of professional conduct that would apply only to legislative drafters, or silence, are not part of this proposal.

My “case” is built on several premises (some may argue “false” premises)!

It has always been recognized that codes of professional conduct should apply in some form or another to all lawyers, salaried or not. The extent to which the drafters of the various codes of professional conduct

⁶ *Ibid.*, note 2 at 22-23.

thought this through with respect to the application of codes in the various operational contexts has never been clear to me. As an example, the Canadian Bar Association *Code of Professional Conduct* contains the following proviso in the Interpretation section at the beginning of the Code:

It will be noted that the term “lawyer” as defined above extends not only to those engaged in private practice but also to those who are employed on a full-time basis by governments, agencies, corporations and other organizations. An employer-employee relationship of this kind may give rise to special problems in the area of conflict of interest, but in all matters involving integrity and generally in all professional matters, if the requirements or demands of the employer conflict with the standards declared by the Code, the latter must govern.⁷

Several of the other codes of professional conduct contain a similar provision.⁸ In fact, the Law Society of Alberta has included a specific chapter for government and in-house counsel in the *Code of Professional Conduct* entitled, The Lawyer in Corporate and Government Service.⁹

There is some credence to the view that lawyers practice in highly compartmentalized professional practice areas now. The age of the general practitioner, some would say, has passed. This is true within government as well. As a result, I think that the overarching ethical principles that apply to public practitioners need to be reaffirmed and codified. A written code is an ideal way, in my view, by which to do this.

Lawyers may sometimes be reluctant to be governed by express codes and I can understand this point of view. There is no doubt that legislative drafters, as an example, are highly individualistic, talented professionals. However, this by itself can give rise to isolationism and a fear of critical review. On the other side of the coin there are those who

⁷ (1987) Ottawa, Ontario at xi. It is proposed that Council adopt an updated *Code of Professional Conduct* at the annual meeting in Winnipeg in August, 2004. See generally <http://www.cba.ca>.

⁸ See, for example, the *Legal Ethics & Professional Conduct Handbook*, Nova Scotia Barristers’ Society, <http://www.nsbs.ns.ca>, Interpretation.

⁹ The *Code of Professional Conduct*, Chapter 12, The Law Society of Alberta.

argue that codes permit lawyers to insulate themselves from the consequences of their actions if they “follow the rules”.¹⁰

The authors Margaret Ann Wilkinson, Christa Walker and Peter Mercer, in a recent article, “Do Codes of Ethics Actually Shape Legal Practice?”¹¹ concluded that ethical codes for lawyers inhibit rather than promote cohesiveness in a legal practice. In their research they found that lawyers did not rely on ethical codes to solve ethical problems. It is my view that this begs the question of whether the code is workable and responsive to the needs of the lawyer population affected by it.

I would agree that I think it is misleading to say that codes of professional conduct make lawyers more ethical. On the contrary, a code sets standards that serve as a reference point for me to become a better lawyer and to share values, provoke discussion, identify issues and to generally improve upon the professionalism in lawyering.

I prefer to think that codes do help to draw the boundaries around ethics in order to provoke thought and discussion, rather than to be limiting and prescriptive in nature:

The uncertainty of the application of the rules relating to professional integrity is largely by reason of the fact that the rules are hortative and not prescriptive. They are drafted in language that urges what is good and laudable and the espousal of uncorrupted virtue, uprightness, honesty and sincerity in one’s professional conduct. They are drafted in this manner for at least two reasons.

Firstly, the general ethical language permits the rules to apply to all conduct of every nature of a lawyer which depending on intent or motive can be ethical or unethical; and

Secondly, it would seem that the rules are drafted with the intent that they would be regarded as educational on the assumption that ethics can be taught and learned and lawyers will want to obey them. A lawyer is constantly exhorted through professional

¹⁰ H. Feldman, “Codes and Virtues: Can Good Lawyers be Good Ethical Deliberators” (1996) 69 *Cal. L.Rev.* 885; N.L. Firak, “Ethical Fictions as Ethical Foundations: Justifying Professional Ethics” (1986) 24 *Osgoode Hall L.J.* 35.

¹¹ (2000) 45 *McGill L. J.* 645.

conduct rules, call to the bar ceremonies, bar dinners and the like of the need and the duty to practice with integrity.

There is a creed of conduct in the profession. It is based upon integrity and the rules relating thereto. They are not easy to apply. The ability to apply them correctly is acquired through constant awareness of ethical situations and practice in making the right ethical choices. All professional ethics are directed towards the things to be sought and the things to be avoided in the interest of the chief good, aim and purpose of the profession.¹²

However, the role of the legislative drafter calls out for more transparency. Legislative drafters are uniquely positioned to serve one organizational client. Their duties are framed in terms of both their public service and lawyer duties and responsibilities. They serve at the top end of the law-making process which to a large degree is still largely unknown. The importance of their work cannot be underestimated—they are more than scribes and wordsmiths. They usually interact with those in significant decision-making roles, including members of Cabinet. Some will have formal training in addition to their training as lawyers; some will not. For the most part the exercise of their skill, and their competency level, is left to their own judgment and the employment standards set by their employer in their own work environment. The exercise of this skill and judgment is largely secretive and the decision-making about the “right thing to do” is left to individual discretion. Accountability occurs at different levels: it is at an individual, professional level, as a lawyer; as an employee in a public service with all of the trappings that involves (e.g. security clearance); as a lawyer with specialized training and knowledge as a drafter. This is captured by Professor Roger Purdy, an American academic, in the following comments:

Legislative drafters should be given the responsibility and authority to engage more actively in the legislative process. Reconsidering current drafting practices, and implementing guidelines of professional conduct for the drafter are two suggested ways of improving both legislation and the plight of legislative drafters.

¹² J. D. Ground, *Professional Responsibility*, c.1, Bar Admission course for the Law Society of Upper Canada (Toronto: 1997).

...

Legislative drafting is one particular area, which has been insufficiently examined. Legislation has significant impact on societal growth, and control over legislative expression, exercised to a considerable extent by lawyers, needs to be exercised in a responsible way. Although the number of lawyers acting as legislative drafters is small compared to those engaged in private practice, the impact of their ultimate product may be disproportionate. Yet, little attention or guidance is afforded these aspects of the legal system and lawyers' activities.¹³

I have always found it interesting that the existing codes of professional conduct usually make express reference to Crown prosecutors. In fact these are usually the only "public" practitioners where there is an express reference to them. Undoubtedly their role in the courts, which is often referred to as "quasi-ministers of justice" is important.¹⁴ On the other hand, it is equally important, in my view, for legislative drafters, who perform their function in a less public way, be subject to the same accountability.

Codes of professional conduct serve different functions.¹⁵ There is an ongoing debate about whether or not ethical codes are appropriate: if ethics is about moral choices then, the argument goes, the code, as an external standard, will not enhance the ethics of that individual. The existence of codes for lawyers is justified for two main reasons: confidence of the public in the system of justice and standards for self-governance. They are hortatory and inspirational. As an example, most codes exhort lawyers to have integrity and to respect the administration of justice. Current codes require public sector lawyers to extrapolate what applies to them—a specific code with interpretative commentary could help to clarify how the code applies to legislative drafters. The complexity of the job is such that codes can provide spiritual and professional guidance where there is disagreement and clarity where there is doubt. Thirdly, codes can put in express terms what one may be thinking. It is one thing

¹³ *Ibid*, note 5 at 69.

¹⁴ *R. v. Campbell*, [1999] 1 S.C.R. 565.

¹⁵ J. Honsberger, "Legal Rules, Ethical Choices and Professional Conduct" (1987) 21 *Law Society Gazette* 113.

to think something and another to be held accountable for what you do. Private practitioners have faced this dilemma for a long time. In the end, in my view, it is the immediacy of this accountability that keeps us honest, fair and reasonable.

The courts have commented very little about codes. One of the more lengthy, recent statements appeared in the Supreme Court of Canada case, *Martin v. Gray*.¹⁶ This case was about the conflict of interest rules that govern in a situation where a lawyer transfers from one firm to another firm where the new firm is on the side of the case. The Supreme Court confirmed the importance of codes of professional conduct but cautioned that they are not exclusive moral codes. However, the court noted the absence of references to institutional conflict of interest measures in law society codes and urged the Canadian Bar Association to act:

...It can be expected that the Canadian Bar Association, which took the lead in adopting a Code of Professional Conduct in 1974, will again take the lead to determine whether institutional devices are effective and develop standards for the use of institutional devices which will be uniform throughout Canada. Although I am not prepared to say that a court should never accept these devices as sufficient evidence of effective screening until the governing bodies have approved of them and adopted rules with respect to their operation, I would not foresee a court doing so except in exceptional circumstances. Thus, in the vast majority of cases, the courts are unlikely to accept the effectiveness of these devices until the profession, through its governing body, has studied the matter and determined whether there are institutional guarantees that will satisfy the need to maintain confidence in the integrity of the profession. In this regard, it must be borne in mind that the legal profession is a self-governing profession. The legislature has entrusted to it and not to the court the responsibility of developing standards. The court's role is merely supervisory, and its jurisdiction extends to this aspect of ethics only in connection with legal proceedings. The governing bodies, however, are concerned with the application of conflict of interest standards not only in respect of litigation but in other fields which constitute the greater

¹⁶ *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, 77 D.L.R. (4th) 249.

part of the practice of law. It would be wrong, therefore, to shut out the governing body of a self-regulating profession from the whole of the practice by the imposition of an inflexible and immutable standard in the exercise of a supervisory jurisdiction over part of it.¹⁷

More recently, the Supreme Court of Canada had occasion to re-examine the issue of ethics for public sector lawyers again in *Krieger v. Law Society of Alberta*.¹⁸ The issue in that case was the authority of a law society, in this case the Law Society of Alberta, to review the ethical conduct of a provincial Crown prosecutor even when an internal investigation had been undertaken. The Code in that case contained provisions with respect to the duty of disclosure to the accused. The Supreme Court of Canada, while emphasizing the need to respect the discretion of Crown prosecutors to prosecute confirmed that the law society is not barred completely from having a supervisory role over their ethical conduct.

As a result, the trend in the few cases that come before the courts is to look at whether or not professional standards exist.

There are arguments against what I propose but I think this needs to be debated in light of the recent discussions in the Canadian Bar Association concerning the modernization of the *Code of Professional Conduct*.¹⁹ As a general rule, we dust off our code when we need to defend a principle; it becomes a sword rather than a shield which we wield to take the higher ethical ground in an argument. It then becomes a double standard. In other words we use it as a convenient tool rather than a tool for governance. Ideally, I would see it as neither. To use my “Maritime” analogies, which will reveal my Nova Scotia roots, it is a beam from a lighthouse rather than the sword of Damocles!

I do not want these comments to be taken out of context. I do not believe that codes of professional conduct are the means to an end. Nor

¹⁷ *MacDonald Estate v. Martin* (1990), 77 D.L.R. (4th) 249 at 270-71, per Sopinka, J.

¹⁸ (1997), 205 A.R. 243, 149 D.L.R. (4th) 92, [1997] 8 W.W.R. 221, rev'd (2000) 277 A.R. 31, 191 D.L.R. (4th) 600, [2001] 2 W.W.R. 102.

¹⁹ *Supra*, note 5.

should they be regarded as an exclusive, stand-alone ethics régime. I believe that other ethical tools must be put in place to supplement a written code. To that end I believe that a code cannot replace professional values, peer support, written policies and directives and so on. The Department of Justice, for example, has a written guide book for the legislative process that clearly sets out the role of the legislative drafter and describes the legislative process.²⁰ There is one for Crown prosecutors as well.²¹ The Department also has an ethics roster of professionals across the Department who can be convened to discuss ethical issues as hypothetical. This is a useful tool for public practitioners who need to discuss these issues in a non-threatening, professional atmosphere.

In this regard I take heed of the comments in an article by Lorne Sossin and Charles W. Smith in their fascinating article, “Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government”:

...the distinction between ethical codes which relate to conduct, and guidelines which relate to discretionary decision-making is, in our view, misleading and undesirable. It suggests that some discretionary judgments involve ethics, whereas others involve the application of mere technical expertise or straightforward legal requirements...In reality, the discretionary judgments of public officials reflect a complex set of legal, administrative, political, cultural and personal influences. Given the artificiality of this distinction between ethics on the one hand, and discretion on the other, it is puzzling that political scientists have devoted such a substantial literature to the value of codes of ethics while devoting little or no attention to other forms of soft law, and the political preferences encoded in guidelines generally.²²

Thank you.

²⁰ Guide to Making Federal Acts and Regulations, <http://canada.justice.gc.ca>.

²¹ Federal Prosecution Service DeskBook, <http://canada.justice.gc.ca>.

²² (2003) 40 *Alta. L.Rev.* (No. 4) 867 at 871.