Legal Ethics and the Legislative Drafter

Beverley G. SMITH*

Through more than fifty years at the Bar I have been gratified to observe a decided shift in emphasis by Canadian law societies and their members respecting the emphasis placed upon ethical principles of practice and their application. While you are undoubtedly aware of the fact, I mention that, following the adoption by the Canadian Bar Association ("CBA") of its Canons of Ethics in August of 1920, and with the exception of some of our western provinces, there was an hiatus of approximately a half century during which the topic of ethics and the practice of law was not in a codified form across our country. That is not to say that we lawyers practised without paying attention to matters of professional conduct in our practices. Rather, law societies as a whole and in any sort of unified way paid less attention to promoting the matter other than through disciplinary proceedings from time to time. I pause here to pay tribute to Mark Orkin, Q.C. whose 1957 text entitled *Legal Ethics*[1] filled at the time a need for guidance in ethical professional matters not otherwise spoken to through codes of conduct.

The 1970's changed our profession's approach to matters of professional conduct, by virtue of the promulgation by law societies of written codes of conduct that advocated standards of what would constitute acceptable ethical practice by lawyers. We see the advent of the *Professional Conduct Handbook* emanating from the Law Society of New Brunswick in 1971, and the ground-breaking 1974 *Code of Professional Conduct* of the CBA — the latter revised in 1987 and presently in process of updating. Now well launched into the 21st century, we see that all Canadian law societies have adopted written codes of professional conduct that have set out — usually in a fairly general form — ethical principles of

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* Professor Emeritus, Faculty of Law, University of New Brunswick, Prince William, New Brunswick.

1 (Toronto, Ontario: Cartwright & Sons Limited). Subtitled *A Study of Professional Conduct*.

practice deemed by the bodies from which they come to be acceptable ones. While not the only source of what we may refer to (as did Mark Orkin) as legal ethics — court decisions such as *MacDonald Estate v. Martin*[2] being an example — the codes may be regarded as being reasonably complete statements of what is expected of we lawyers as long as we remain such.

I propose to address the highly pertinent question of whether legislative drafters who are lawyers are required to observe the principles and guidelines for practice adopted by the respective law society of which they are a member; and to highlight the latest statement by our New Brunswick Law Society respecting lawyers who are employed by government. Before doing so I raise a threshold question on which my panel colleagues will wish to comment:

> Is legislative drafting a form of practising law for those drafters who are lawyers, or is it rather an esoteric profession that may require skills possessed by a lawyer but is not the practice of law?

It would be an easy answer to say that whatever a lawyer does using their legal training must indeed be "practising law", but that, I think, does not assist us other than generally. While opinions may differ, my own comes down firmly on the "practice of law" side of the question. I find support for my view in a number of facts:

- the subject dealt with by legislative drafters — law through legislation — is a matter affecting legally many constituencies and as such should be dealt best with by those trained in the discipline of the law;

- though not always[3], usually legislative drafting is carried on by persons who have not only received a university degree from a recognized law school but who, in the ordinary course, are required to

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[2] *MacDonald Estate v. Martin and Rossmere Holdings (1970) Ltd.* [1990] 3 S.C.R.1235.

[3] See Deborah MacNair, "Legislative Drafters: A Discussion of Ethical Standards from a Canadian Perspective", *Statute Law Review 24(2), 125-156* at p.131.

be members of a law society[4]. *Ergo*, what they do professionally (and, incidentally, for a living) will likely have a connection with legal matters;

- most, if not all, Canadian law society codes of professional conduct are so cast as to cover the lawyer's conduct in all aspects — professional and other. As long as the lawyer is acting professionally, s/he is obliged to adhere to those standards, thereby fulfilling the definition of the term "lawyer" as essayed by one writer[5] using a foundation formulated by Roscoe Pound: "'Lawyers are professional persons who are specially trained in knowledge of the law and the skills to appropriately apply it, and who as members of a group offer that knowledge and those skills in the spirit of public service to the community, usually for a reward.'"

- In New Brunswick a newly minted code of professional conduct has provided in its Chapter 12, entitled "OTHER LAW PRACTICES", the following Rule:

> "Save as in this chapter otherwise provided the lawyer who is employed full time by an organization to provide professional legal services to it shall observe the same professional and ethical requirements therein as are required of the lawyer in the private practice of law."[6]

The term "organization" is defined in our new code as including "an incorporated or unincorporated body, a government and a body politic". That term is to be given a broad interpretation[7] and in my opinion would cover all three levels of government as we understand them to exist in our country: federal, provincial and municipal.

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4 *Ibid.*

5 Beverley G. Smith, *Professional Conduct For Lawyers And Judges* (2nd ed.) (Fredericton, N.B.: Maritime Law Book Ltd., 2002), Chapter 1, para.[3].

6 *Code of Professional Conduct* of the Law Society of New Brunswick, in force January1, 2004.

7 *Ibid*., Chapter 12, fn.1.

Based on the foregoing reasoning I shall couch the remarks to follow as recognizing legislative drafters who are lawyers as lawyers who are practising law.

Returning to our main question — are legislative drafters who are lawyers required to observe the ethical principles and guidelines for practice adopted by the law society of which they are a member — we might consider the question to be already answered. Let us put the question another way: if legislative drafters are in fact practising law when pursuing their professional pursuits, is there a possibility that, because they have not been specifically or perhaps even inferentially mentioned in it, they are exempt from the requirements of a code of professional legal conduct that has been adopted by their governing law society? For an answer one is required to examine the circumstances in which they work professionally.

My panel colleague, Deborah MacNair, in her insightful paper entitled "Legislative Drafters: A Discussion of Ethical Standards from a Canadian Perspective"[8], has outlined the usual circumstances under which legislative drafters perform their professional functions. She posits that wearing different hats may be a part of those functions: the public servant hat as well as the hat of a lawyer[9]. While perhaps difficult in some sets of circumstances to determine, it is here suggested that the legislative drafter does have a client, in the ordinary legal sense of that word, on behalf of which the drafter's professional services are rendered. The client may be the entity known as "the Crown", as represented by this or that Minister of the Crown; or known as "the government" of this or that Province or Territory of Canada, again as represented by a delegated representative; or in the case of a municipality, known by the somewhat more easily recognized concept of a statutorily created "corporation". Notwithstanding the wearing of different hats from time to time the drafter should be able to trace a lawyer-client relationship back to its inception, and if necessary, forward to any changes that may have occurred in that relationship since its inception.

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[8] See fn. 3, *supra*.

[9] Fn.3, *op. cit.*, p.139.

Over thirty years ago the late Lord Justice Denning of English courtroom repute articulated his concept of what we today call variously the in-house lawyer, corporate counsel, staff lawyer and the like[10] :

> "Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority…. In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer.... They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients."

Lord Denning went on to state[11]that the in-house counsel must uphold the same standards of honour and etiquette as the private practitioner. They are subject to the same duties to their client and to the court. They are to respect the same confidences. They and their client have the same privileges. To me, that indicates that, notwithstanding their lack of particular mention in professional codes of conduct, legislative drafters as practising lawyers are deemed to be covered by these codes.

If one subscribes to Lord Denning's characterization of the relationship of in-house counsel to the body professionally served by that lawyer, the establishment of what we in the profession term "the lawyer-client relationship" triggers a host of professional responsibilities on the part of the lawyer. Over all hovers the imposition of the duty to act as a fiduciary toward the client. That means seeking always to serve within legal limits the best interests of the client rather than the interests of the lawyer.

Amongst the more general qualities now required of the lawyer one finds mentioned those of honesty, integrity, trustworthiness, respect for the

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[10] *Alfred Crompton Amusement Machines Ltd. v. Commissioners of Customs and Excise (No.2)* [1972] 2 All E.R.373 (C.A.), at p.376.

[11] *Ibid.*

client, loyalty to the client and its legitimate interests and a thing called by former Chief Justice of Canada Brian Dickson "compassion"[12]. The Chief Justice was using the term in the sense of "a feeling of empathy or sympathy for the hardships experienced by others — a feeling, which extends to a sense of responsibility and concern to alleviate hardships at least in some measure."[13].

Perhaps not unreasonably for our context His Lordship's use of the word "hardships" may be equated with a more neutral term such as the "requirements" of the client. By no means the least important of the several duties of the in-house counsel, the next duty to be mentioned here is the duty to be competent in what one does professionally. As a profession we have placed an ever increasing emphasis on this duty, to the point that — absent fraud and other like nasty carryings on — a lawyer's lack of competence in serving the legal needs of one's client is regarded by law societies as a cardinal sin, professionally speaking. Decisions of Discipline Committees across Canada have come down with increasing weight on those lawyers not measuring up to acceptable standards of performance. So concerned have some of our societies become with a perceived lack of competence of some of their members that they have indicated, sometimes with great particularity, what in their view constitutes the competent lawyer[14].

Another primary duty to be mentioned here is that of abstaining from any conflict of interest with the interests of the client. Again, our Canadian law societies have spent time and resources in defining this sometimes troublesome aspect of the practice of law. "Conflict of interest" is defined in the new New Brunswick code[15] as including "any interest that would interfere with the duties of loyalty and freedom of judgement

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12 Fn.5, *op. cit.*, Chapter 1, para.[14].

13 *Ibid.*

14 See, *e.g.*, Ontario's *Rules of Professional Conduct*, Rule 2.01(1) where "competent lawyer" "means a lawyer who has and applies relevant skills, attributes and values in a manner appropriate to each matter undertaken on behalf of a client including...." some eleven items.

15 *Code of Professional Conduct*, Application And Interpretation, pp. v, vi.

and action owed by the lawyer to the client...or that would be likely to affect adversely the judgement or advice of the lawyer on behalf of the client..." Too, we are aware of the use as a trial tactic — not used here necessarily in a pejorative sense — of a charge of conflict of interest. This duty hearkens back to the overriding duty of the in-house lawyer to act in a fiduciary manner and capacity toward the client in all that is done professionally for the client. The client's legitimate interests are to take precedence over any interests of the lawyer, and in the event of a conflict of those interests, those of the client are to prevail. It is of interest to note that in the New Brunswick *Code*, Commentary 4 of the chapter dealing with other types of law practices than private practice emphasizes the importance placed upon the duty to avoid conflicts of interest:

> "4. In providing professional legal services to the client the organization lawyer shall exercise particular care to avoid contravening the provisions of this Code relating to conflict of interest."

Last of the primary duties lawyer-to-client that will be emphasized at this time is the duty of confidentiality owed by the lawyer to the client concerning all of the client's affairs. As in the instances of dealing with the topics of competence and conflict of interest, law societies have allocated entire chapters of their codes to this high duty. The existing CBA *Code of Professional Conduct* (1987, as amended) devotes its Chapter IV to the topic and is reflective of the contents of codes promulgated by other law societies when it provides in its Rule:

> "The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and should not divulge such information unless disclosure is expressly or impliedly authorized by the client, required by law or otherwise permitted or required by this Code."

Again, the New Brunswick *Code* addresses this item specifically when it states[16]:

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[16] Chapter 12, Commentary 5.

> "5. In providing professional legal services to the organization the organization lawyer shall exercise particular care to avoid contravention of the provisions of this Code relating to confidentiality."

While not an absolute duty[17] it is most certainly a strict one, and the exceptions to its application are few. We lawyers are well advised to have as our starting point the belief that whatever we have learned about our client from whatever source is a piece of confidential information.

I pause at this point to make a point sometimes overlooked by members of our profession. The duties outlined in our various codes of professional legal conduct are expressly or impliedly put before us as *minimums*[18] .While productive of caution, that fact I feel should not overly concern us for two reasons. The first is that law societies often — perhaps usually — base their decisions in applying standards of conduct to particular situations on what is contained in writing in the code concerned. As long as these standards have been maintained the lawyer who has been called upon to explain this or that particular course of action will likely emerge unscathed from the inquisition. The second reason is that many lawyers have already as high or higher standards of conduct as those contained in a code their own personal criteria as to what is a good course of conduct to follow during the course of the practice day. The philosophical concept of the greater including the lesser comes into play in this instance.

If, in view of the apparently large number of professional duties attaching to you as legislative drafters, you at this point are tempted to throw up your hands and declare, "I'm moving to Tahiti!", I for one wouldn't blame you. There <u>are</u> a lot of duties, your adherence to which is in my view required of you by your governing body. But are they so onerous as to be humanly impossible of fulfilment? Let's examine them to see.

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[17] See fn.5, *op. cit.*, Chapter 2, para.[31].

[18] See, *e.g.*, the CBA *Code of Professional Conduct*, 1987, that states in its Preface (p.viii): "The extent to which each lawyer's conduct should rise above the minimum standards set by the Code is a matter of personal decision." The New Brunswick *Code* expresses its provisions as being minimums: Preface, p.ii.

What may be termed our general duties are comprised in the set articulated by jurists, law societies and others and referred to earlier:

- honesty,

- integrity,

- trustworthiness,

- respect,

- loyalty,

- competence, and

- compassion.

We may agree that all of these are attributes that one would/should bring to any professional endeavour, of whatever nature. As such they are certainly not beyond our human grasp.

Using the somewhat tortured term “fiduciariness”, or the fiduciary duty that we are to evidence toward our client, we find that this is a major trait separating our activities as lawyers from those, say, of a seller of goods to customers. While never out of place even in the latter instance I suggest that its presence is more insistently demanded of us in all of our associations with our clients. Especially our law societies have been assiduous in this insistence.

While the duty of competence is listed with our more general duties, because of its high degree of importance it was singled out previously for comment. Put at its simplest, without competence we fail our client. A senior lawyer advised me recently that one of the most difficult things he has endeavoured professionally during a long professional life was the occasion, years ago, when he was called upon to draft a piece of legislation. My own experience mirrors his. Again, however, the products of what you ladies and gentlemen have brought forward as legislative drafters over the course of your professional experience has shown conclusively that your competence as such can be put up against any similar product in the western world. Accordingly, the abundance of this evidence shows that the fulfilment of this duty is certainly attainable.

The duty to have no conflict of interest with the interests of your client relates back — as was pointed out earlier — to the fiduciary duty we owe the client. Regrettably, some practising members of our profession wouldn't recognize a conflict of interest if it were to advertise its presence in flashing lights. It is granted that some conflicts of interest are subtle in their nature — Deborah MacNair refers to examples in her paper[19] — but they are to be searched out and dealt with appropriately. On every checklist, hard copy and mental, the question must be asked during all the stages of the lawyer-client relationship: is there a conflict of interest here? In this connection especially the adage holds true, that an appearance of a conflict of interest is as serious as an actual one. Having said these things, this particular duty is again a not insurmountable one. Recognition is the key to fulfilling the duty successfully.

Confidentiality, the last of what I have termed the primary duties of the practising lawyer, is not only a desirable requirement of the lawyer but is a *sine qua non* in our relationship with the client. A homely example may serve to illustrate the point. During World War II, at a time when the Allied merchant navy was being vigorously and successfully attacked in the Atlantic Ocean by German U-boats, a catchy warning was addressed to armed forces and civilian personnel alike. It stated: "Loose Lips Sink Ships". All persons in especially North America were thereby warned to give away no information that might assist the enemy to attack and sink Allied ships. The same message may be updated for address to members of our profession. It could read: "Loose Lips Sink Lawyer-Client Relationships". As in the case of conflict of interest, the New Brunswick *Code* has emphasized its concern with members of the profession meeting its requirements respecting confidentiality. Commentary 5 of Chapter 12, "Other Law Practices", provides:

> "5. In providing professional legal services to the organization the organization lawyer shall exercise particular care to avoid contravention of the provisions of this Code relating to confidentiality."

While an important duty it is noted that it is one relatively easily followed.

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[19] Fn.3, *op. cit.*, p.142.

In his recent book entitled, "The New Revelations"[20], author Neale Donald Walsch in an engaging manner portrays himself as a single human being having a conversation with God. The ambitious undertaking that has brought him to this event is nothing short of asking God what we humans must do to prevent ourselves from destroying ourselves. In the course of addressing the author's questions to Him, God takes pains to point out what to Him are some of the failings of the human race. One such failing is evidenced in the following God-ly soliloquy:

> "This stubborn tendency of human beings to cling to their past, to refuse innovation or new thinking until they are forced to do so by an ultimately embarrassing weight of evidence, has been slowing your evolutionary process for centuries."

While I cannot be certain that I have presented you with an "embarrassing weight of evidence" sufficient to uphold my thesis that you who are lawyers are bound to act professionally as lawyers in practice, I respectfully invite you to consider the evidence and to reach your conclusions on the point. I consider the matter to have been addressed, to at least a substantial degree, in our new *Code of Professional Conduct* in New Brunswick.

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[20] (New York, N.Y.: Atria Books, 2002).