

Professional Responsibilities of Legislative Counsel
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Abstract: *This article considers the professional responsibilities of legislative counsel from three standpoints. The first is as members of the legal profession. The second is as public sector employees. The third relates to the functions they typically perform as legislative counsel. The starting point for understanding these responsibilities is a consideration of to whom they are owed, in other words: who is the client. The answer to this question is the basis for particular responsibilities relating to quality of service, conflict of interest and confidentiality. The scope of these responsibilities is vast and sometimes not altogether clear. This article aims to shed some light on them and provoke further consideration of their nature and content.*

Introduction

Over the course of my career as legislative counsel I have seen some remarkable changes in the way we provide drafting and related advisory services in the Canadian Department of Justice. The notion of a drafter who works alone producing drafts from written instructions¹ has given way to someone who works in a far more interactive environment that entails a range of expectations going well beyond formulating the wording of a draft bill or regulation.

One of the most striking indicators of these changes is the terminology used to describe the relationship that legislative counsel have with those who provide drafting instructions. When I began drafting in the mid-1980s for the Canadian Federal Government, these people were called “instructing officers”. The term suggested someone who held an office within the government and who had certain functions that complemented those of legislative counsel in the preparation of legislation. This notion was supported by a series of Cabinet Directives in the late 1940s requiring all Government bills to be drafted by counsel in the Department of Justice. And it was reinforced on an ongoing basis by Cabinet decisions authorizing particular bills to be drafted by the Legislation Section of the Department in conjunction with officials from the departments responsible for the bills.

Towards the late 1980s, a subtle shift occurred in the terminology used to describe our working relationships. We began to talk about “clients”. This came about as part of a more general change in the way the Department of Justice as a whole provided legal

¹ See for example E.A. Driedger, *The Composition of Legislation*, 2nd ed. (Department of Justice, Ottawa: 1976) at xvii:

Working by himself, [the draftsman] prepares a first draft of the proposed bill or, in the case of a lengthy or complicated bill, a first draft of a portion of it. He cannot work with other people looking over his shoulder and offering comments. And no satisfactory draft can be prepared by a group of draftsmen acting as a drafting committee; they will all have different ideas about how the work should be done, there will be endless discussions over trivialities, and the final product will be at best only a compromise. Drafts can be discussed, criticized and tested in a discussion group, but the responsibility for setting up the draft or making any changes must devolve upon one person.

While there is still some truth in this characterization of how a drafter must function, the practice in the Department of Justice has evolved beyond it, most notably in terms of the co-drafting of bilingual legislation by two legislative counsel and the use of drafting rooms fitted with computers for interactive discussion of drafts with instructing officials.

services. The change was encapsulated in the phrase “client-driven services”. It was inspired by the private sector model for providing legal services and has led to time-keeping and cost-recovery practices within the Department. The objective was to improve the quality of legal services to the Government and make Department of Justice counsel more responsive to its objectives and priorities.

Legal counsel in the Canadian Federal Government now straddle two worlds. The first is that of public office holders who exercise or support the exercise of public powers, duties and functions within a legal framework founded on the Canadian Constitution. The second is the world of legal service delivery in which law is recognized not only as a potential constraint on government action, but as a facilitator or tool as well.

Against this background, this paper looks at the responsibilities of those who draft legislation as legal professionals who are qualified to practise law under the regulatory regimes that govern their profession, whether as lawyers, barristers, solicitors or notaries. To be sure, there are others who draft legislation in the sense of formulating legislative text, but if they are not members of the legal profession, or are not providing their services as such, then they are not qualified to provide the legal advice necessary to ensure that the draft text will operate to bring about the legal result that is sought. Legislative text is much more than an assembly of words. It is a text that will function within a legal system, particularly in terms of its legislative components. Knowledge of the legal system and advice on how it works are essential parts of legislative drafting. Legislative drafting is also unquestionably an activity associated with the practice of law and one that can be provided only by a legal professional in jurisdictions where the practice of law is restricted to those who are professionally qualified to practise it.

Although there is a small body of writing on the professional responsibilities of legislative drafters,² the topic is somewhat neglected, perhaps because it is too often taken for granted that drafters know all there is to know about it and little remains to be said. I believe that nothing could be further from the truth and that in writing this paper I may be able to prompt discussion, if not add something useful, on this important topic.

In this paper I outline the sources and general nature of professional responsibilities of legal practitioners and consider to whom these responsibilities are owed. I also look at the overlapping responsibilities of those who are public servants employed by a government or legislative assembly. My purpose is to outline the salient features of, and the distinctions among, the various professional norms that apply to legislative counsel and to deepen our understanding of them. Some of these features entail matters of some complexity. I do not deal with them exhaustively, but instead point to them as areas for further consideration. My objective is to consider how these responsibilities fit together in the context of legislative counsel. I also consider the extent to which the fit is not altogether comfortable and suggest that these responsibilities may need to be adjusted in

² See, for example, D. MacNair, “Legislative Drafters: A Discussion of Ethical Standards from a Canadian Perspective (2003), 24 Statute Law Review 125; R. Purdy, “Professional Responsibility for Legislative Drafters: Suggested Guidelines and Discussion of Ethics and Role Problems” (1987-88), 11 Seton Hall Legislative Journal 67; D. Marcello, “The Ethics and Politics of Legislative Drafting” (1996), 70 Tulane Law Rev. 2437.

some respects, particularly as concerns giving advice, carrying out instructions, conflict of interest and confidentiality.

Sources and Nature of Professional Responsibilities

There are three main groups of professional responsibilities of legislative counsel. The first relate to the legal profession. The second relate to counsel who are employed by a public sector body. The third are specific to legislative counsel. Each group is considered in turn below.

Legal Profession

The responsibilities of legislative counsel as legal professionals flow out of their membership in an association that has authority to regulate the practice of law (lawyers, barristers, solicitors or notaries) in a particular jurisdiction. For public sector lawyers, these responsibilities are reinforced when the conditions of their employment require membership in one or other of these associations, as is the case with legislative counsel employed by the Federal Department of Justice. In addition, the Supreme Court of Canada has recognized that members of a provincial or territorial law society who are employed in government, including the Federal Department of Justice, are subject to professional discipline by the society to the extent that their conduct is not protected by the doctrine of prosecutorial discretion.³ Finally, the Ontario Divisional Court has said that, in applying rules of professional conduct, public service counsel are subject to the same standards as other counsel:

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

All lawyers in Ontario are subject to the same single high standard of professional conduct. It is not flattering to the lawyers of Ontario to say that most of them are held to a lower standard of professional conduct than government lawyers.⁴

Codes of conduct of legal professional bodies deal with a wide range of matters pertaining to the practice of law. Their general orientation is toward serving a client who is often not in a position to judge the adequacy of the services rendered. Thus, the solicitor-client relationship transcends a commercial or employment relationship. It involves an element of trust and dependence on the part of the client that requires legal professionals to take responsibility for the quality of the services they provide. *Caveat emptor* has no place in the provision of legal services.

³ *Krieger v. Law Society of Alberta* [2002] SCJ 45.

⁴ *Everingham v. Ontario* (1992), 8 OR 3d 121 (DivCt). See also the Canadian Bar Association Code of Conduct, chapter X:

The lawyer who holds public office should, in the discharge of official duties, adhere to standards of conduct as high as those that these rules require of a lawyer engaged in the practice of law.

Professionalism in this context also entails obligations that go beyond the particular interests of the client and involve broader, societal interests that may take precedence over those of an individual client. Courts and codes of professional conduct often describe these interests in terms of maintaining a legal system that functions for the benefit of society as a whole. Legal professionals must accordingly comply with the law itself in rendering their services and must not help their clients engage in illegal activities. They also have a duty not to abuse the legal system by bringing frivolous proceedings or unduly lengthening proceedings.

Both of the elements of professionalism just described are relevant to legislative counsel, whether employed in the public service or engaged in private practice. However, many of the detailed requirements of professional codes have little relevance to the practice of law by government employees much less by those who draft legislative texts. They are focused on private clients and involve activities or transactions that do not arise in relation to government lawyers. For example, detailed rules about advertising, charging fees or handling client money have little application to government lawyers who by the terms of their employment cannot practise law outside of their employment. It should also be noted that the need to protect a vulnerable client is also significantly diminished when legal services are being provided to a complex, well-resourced corporate or government client that has an employment relationship with their counsel.

Given the traditional focus of rules of professional conduct on the private practice of law, it is of interest to see that many professional codes now contain provisions relating specifically to members who are employed by public bodies.⁵ Although these provisions generally confirm that their practice is subject to professional codes,⁶ they also set out special provisions relating to conflict of interest, appearances before official bodies and confidentiality. In addition, Chapter X of the Canadian Bar Association Code of Conduct (CBA Code) says:

8. Generally speaking, a governing body will not be concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely upon the lawyer's integrity or professional competence may subject the lawyer to disciplinary action.⁷

By the same token, chapter 12 of the Law Society of Alberta's Code of Professional Conduct (Alberta Code) recognizes that the best interests of corporate and government clients are to be determined "as they are perceived by the corporation or government, subject to limitations imposed by law or professional ethics".⁸

These qualifications and the special rules for public sector practice recognize that there is something distinctive about it. This is not new, as Professor Alan Hutchinson has commented:

⁵ See Appendix 1 for a sampling of these provisions in Canadian codes of conduct.

⁶ See CBA Code, c. X; Nova Scotia Barristers Society Legal Ethics Handbook, c. 16; Law Society of Upper Canada Rules of Professional Conduct (LSUC Rules),, c. 6.05.

⁷ See <http://www.cba.org/CBA/activities/code/>.

⁸ See <http://www.lawsocietyalberta.com/resources/codeProfConduct.cfm>.

The significant difference between private lawyers and government lawyers is that the latter have a much greater obligation to consider the public interest in their decisions and dealings with others than the former.⁹

The obligation to consider the public interest does not, however, translate into a higher obligation to respect the rules of professional conduct. It instead recognizes that the public interest has greater prominence in the functions of governmental bodies than it does in relation to private individuals or corporations. Code, J has noted this in relation to the legality of municipal by-laws in *1784049 Ontario Limited (Alpha Care Studio 45) v. Toronto (City)* where he said:

... in *Shirose*, [(1999), 133 C.C.C. (3d) 257 (S.C.C.)] at p. 290, Binnie J. stated that “the Minister of Justice ... has a special legislated responsibility to ensure that ‘the administration of public affairs is in accordance with law’ and in that respect he or she is not subject to the same client direction as private clients ... In this country as well, the solicitor-client privilege may operate differently in some respects because of the public interest aspect of government administration ...” In a well known article titled “The Role of the Attorney General and the Charter of Rights” (1986) 29 C.L.Q. 187 at 189, the then Attorney General, Ian Scott, stated that his particular office in Ontario “has a positive duty to ensure that the administration of public affairs complies with the law.” He described this as a “fundamental obligation.”¹⁰

It is also worth noting that the Supreme Court of Canada has recognized that matters of professional regulation may have a double aspect in terms of the constitutional division of powers between the federal and provincial legislative spheres.¹¹ Thus, a federal regulatory regime for immigration consultants prevails over provincial regulatory regimes for the legal profession to the extent of any inconsistency. This suggests that the same would hold true of any conflicts between provincial regimes for the legal profession and the regulation of the professional conduct of members of the federal public service.

Public Servants

A further source of professional responsibilities, and one that helps explain the passage just quoted above, is rooted in employment in a professional public service. These responsibilities are typically expressed in codes of conduct and oaths of office for public servants¹² and flow not only out of the employment relationship between governments and their employees, but also out of the ideals of a professional, non-partisan public service.

⁹ A. Hutchinson, “In the Public Interest: The Responsibilities and Rights of Government Lawyers” (2008), 46 Osgoode Hall Law Journal 105 at 114.

¹⁰ 2010 ONSC 1204 (CanLII) at [38].

¹¹ *Law Society of British Columbia v. Mangat* [2001] 3 SCR 113.

¹² See, for example the Values and Ethics Code of the Canadian Public Service, excerpted in Appendix 2 and s. 54 of the *Public Service Employment Act*, SC 2003, c. 22, ss. 12-13..

In Canada, we have just celebrated the centenary of the creation of the Federal Civil Service Commission in 1908 that aimed to replace employment practices based on political patronage with a system of appointment on the basis of merit.¹³ Luc Juillet and Ken Rasmussen in a recent book on the Public Service Commission of Canada have said:

the history of the Commission can be understood as an evolving struggle to achieve a balance among three competing, and, at times, contradictory sets of values at the heart of public service staffing in a liberal democracy: political neutrality and independence; fairness and democratic equality; and competence and managerial efficiency.¹⁴

This assessment is reflected in the Values and Ethics Code of the Canadian Public Service, which says:

Public servants shall be guided in their work and their professional conduct by a balanced framework of public service values: democratic, professional, ethical and people values.¹⁵

These values also resonate with some of the elements of the codes for the legal profession, notably in terms of conflict of interest and confidentiality. But they are not the same. The differences are explored below in terms of specific elements of professional responsibilities such as confidentiality and avoiding conflicts of interest.

Finally, it should be noted that chapter 1 of the Canadian Values and Ethics Code incorporates professional standards in the following terms:

In addition to the stipulations outlined in this Code, public servants are also required to observe any specific conduct requirements contained in the statutes governing their particular department or organization *and their profession*, where applicable. [*emphasis added*]¹⁶

This assumes that there are no inconsistencies between the Code and other professional requirements. This remains to be seen.

Legislative Counsel

A further source of public sector responsibilities emerges in relation to legislative counsel. Many jurisdictions have legislation that frames their work and gives them particular duties relating to the legislative system as a whole. For example, section 3 of

¹³ SC 1908, c. 15.

¹⁴ L. Juillet and K. Rasmussen, Merit and the Public Service, excerpted in (2008), 38 Optimum Online 31 (<http://www.optimumonline.ca/article.phtml?id=312>)

¹⁵ See Appendix 2.

¹⁶ Note, however, that the reference to “their profession” does not appear in the French version:

En plus des dispositions du présent Code, il incombe aux fonctionnaires de respecter toutes les exigences particulières en matière de conduite qui sont contenues dans les lois régissant leur ministère ou leur organisation respective, de même que les dispositions pertinentes d’application plus générale, notamment

the *Statutory Instruments Act*¹⁷ requires the Clerk of the Privy Council in consultation with the Deputy Minister of Justice to examine all proposed regulations to ensure that they meet the enumerated criteria of legality and drafting quality. Similar functions, albeit focused on the *Canadian Charter of Rights and Freedoms*, are found in section 4.1 of the *Department of Justice Act*.¹⁸ A further example is the Queensland *Legislative Standards Act, 1992*, which established the Office of Parliamentary Counsel and recognizes a series of fundamental legislative principles that the office is responsible for ensuring are respected in the drafting of legislation.

The statutory provisions just noted and others like them express duties that are more generally recognized in relation to legislative counsel.¹⁹ This role may be encapsulated as follows:

... when the mandate of a drafting office is government-wide, its clients are institutions like government departments. Its responsibilities usually go beyond the interests of a particular client and embrace the functioning and maintenance of legislation as a system of law. One of its purposes is to ensure the system's coherence, intelligibility and efficiency in achieving policy objectives. These responsibilities may also include the protection of values associated with the entire legal system, such as fairness and equality. These responsibilities are sometimes described in terms of "guarding the statute book".²⁰

To Whom are These Responsibilities Owed (Who is the Client)?

Underlying the general account I have just given of ethical and professional duties is a fundamental question: to whom are these duties owed or, in terms of providing legal services, who is the client? The answer not only orients the duties, it also gives them content. If a duty is to be fulfilled for the benefit of someone, their needs and desires will critically influence what the duty entails.

For someone in the private practice of law, the answer to this question is quite straightforward when services are provided to an individual. The individual is the client and there is a duty to serve them and advance their interests subject to overriding public interests in adhering to the law and preserving the integrity of the legal system.

The answer becomes more complex when services are rendered to a corporate body. This is recognized in the commentary to Rule 2.02(1.1) of the Law Society of Upper Canada Rules of Professional Conduct:

¹⁷ RSC 1985, c. S-22.

¹⁸ RSC 1985, c. J-2.

¹⁹ See G.C. Thornton, *Legislative Drafting*, 3d ed. (Butterworths: 1997) at 124ff.

²⁰ J.M. Keyes & K. MacCormick, "Roles of Legislative Drafting Offices and Drafters" (unpublished paper presented at the 2002 Drafting Conference of the Canadian Institute for the Administration of Justice: <http://www.ciaj-icaj.ca/english/publications/LD94-Maccormick.eng.pdf>). See also the articles by D. Hull and S. Laws, "The Role of Legislative Counsel: Wordsmith or Counsel?" [2008] 1 *The Loophole* 35ff.

A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors, and employees. While the organization or corporation will act and give instructions through its officers, directors, employees, members, agents, or representatives, the lawyer should ensure that it is the interests of the organization that are to be served and protected. Further, given that an organization depends upon persons to give instructions, the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority.

This approach to corporate bodies arguably applies as well to public sector bodies. For example, the CBA Code defines “client” and “person” as follows:

“client” means the person who

(i) consults a lawyer and on whose behalf the lawyer renders or undertakes to render legal services; or

(ii) having consulted a lawyer, has reasonably concluded that the lawyer has agreed to render legal services.

In the case of an individual who consults the lawyer in a representative capacity, the client is the person, corporation, partnership, organization, or legal entity that the individual is representing

“person” includes a corporation or other legal entity, an association, partnership or other organization, the Crown in right of Canada or a province or territory and the government of a state or any political subdivision thereof.

In turn, the Statement of Principle in Chapter 12 of the Alberta Code elaborates further on government as a client:

A lawyer in corporate or government service has a duty to act in the best interests of the corporation or government, as they are perceived by the corporation or government, subject to limitations imposed by law or professional ethics.

...

Likewise, the client of a lawyer employed by the government is the government itself and not a board, agency, minister or Crown corporation.²¹

Although these rules appear to be quite straightforward, the realities and complexities of government bodies are yet another matter. The “Crown” generally refers to the Executive, but “Government” can also refer to the entire apparatus of the state (as in the legislative, judicial and executive branches of government). However, for the purposes of rules of professional conduct, it may fairly be assumed that the narrower meaning is appropriate given the independence that is ascribed to the other branches of government by the separation of powers that is generally recognized in parliamentary forms of government.

²¹ Above n. 8.

Within the Executive it is also possible to differentiate distinct elements that may possess some independence from one another. For the purposes of this article I intend to explore the notion of client in this context by focusing on two further issues relating to public sector bodies as clients. The first concerns how one identifies their interests while the other concerns who provides instructions and, more generally, makes decisions on their behalf.

Determining the Interests of the Client

When it comes to determining a client's interests, there are some important distinctions between private corporations and governments as clients. A private corporate body generally has a set of defined objects that provide guidance as to what is in its best interests. There is also a substantial body of corporate law to help define these interests, although it is worth noting that they are increasingly being defined more broadly than as simply the interests of shareholders.²²

The nature and interests of government bodies are not so easily or so well defined and what constitutes the "public interest" is a matter of continuing and at times highly speculative debate. Professor Hutchinson writes:

However, because there are so many competing notions of what comprises the public interest and how it should apply in particular situations, it is a notoriously difficult and contested task to designate what ends are in the public interest and what means—which must also be consistent with the public interest—are best pursued to realize those ends.²³

This no doubt explains why the Alberta Code says that the best interests of government clients are to be determined "as they are perceived by the ... government". As to what constitutes government, it goes on to say:

Similarly, "government" is to be understood in its broadest sense. A lawyer working in a division, department or agency of the government or in a corporation ultimately

²² See *Peoples Department Stores v. Wise* [2004] 3 S.C.R. 461, 2004 SCC 68 at para. 41-42 where the Court said:

it is clear that the phrase the "best interests of the corporation" should be read not simply as the "best interests of the shareholders". From an economic perspective, the "best interests of the corporation" means the maximization of the value of the corporation.... However, the courts have long recognized that various other factors may be relevant in determining what directors should consider in soundly managing with a view to the best interests of the corporation.

...

We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.

²³ Above n. 9 at 115-116. See also Deborah MacNair, "In the name of the public good: 'Public Interest' as a Legal Standard" (2006), 10 Can. Crim. Law Rev. 175.

controlled by the Crown is considered to be working for the government as a whole as opposed to that division, department, agency or corporation.²⁴

This suggests that there is an overarching client embracing a multitude of bodies that in fact operate with varying degrees of independence from each other. For example, many administrative agencies exercise quasi-judicial functions and operate at arm's length from the Government, but they are nevertheless subject to Government directives or review of their decisions.²⁵ These bodies also sometimes have separate standing in court proceedings and have their own counsel rather than counsel provided by the Attorney General.²⁶ Many of them also have their own legal services units, rather than obtaining legal services from a central government law office such as an attorney general's department.²⁷ Arguably, executive oversight mechanisms for independent government agencies and corporations do not alter their need for independent legal counsel. But how does this independence fit with the concept of a single government client?

The concept of an overarching client cannot override the organizational design that is implicit in constitutional or statutory provisions that create governmental bodies. But it may nevertheless reflect limits on the extent to which various governmental bodies and the officials within them may exercise their powers. The unity of a single client reflects the fundamental orientation towards the public interest that governmental bodies have in common. Although there may be great debate about what constitutes the public interest in any given situation, government bodies exist to define and advance it. To this extent, they are all focused on a common goal, which in the world of professional responsibilities finds its counterpart in a single client, albeit having many components and actors on its behalf. This makes it critical to determine which of them is entitled to act or provide instructions for this client and what is the scope of this entitlement.

Determining Who Acts for the Client

The Alberta Code deals with this matter in some detail, saying:

As an internal matter, a corporate or government client usually provides specific instructions regarding the lawyer's duties and responsibilities. These instructions may include a direction to accept instructions from and report to a particular person or group within the client.

...

²⁴ Above n. 8, c. 12, G.1.

²⁵ See, for example, s. 89 of the *Financial Administration Act*, RS 1985, c. F-11 (directives to Crown corporations), s. 43 of the *Canada Transportation Act* (directions to the Canada Transportation Agency) and ss. 26-28 of the *Broadcasting Act*, SC 1991, c. 11 (directives to the Canadian Radio-television and Telecommunications Commission and review of its decisions on petition by any person).

²⁶ For example, a search of Federal Court of Appeal decisions from 2000 to 2008 yields 8 decisions on which the Canada Transportation Agency appears as a respondent and 9 decisions on which the Canadian Radio-television and Telecommunications Commission appears as the respondent in appeals of its decisions. In all these cases, the agencies in question were not represented by Crown counsel.

²⁷ This is the case with the Canadian Transportation Agency and the Canadian Radio-television and Telecommunications Commission.

A corporate or government lawyer is entitled to act in accordance with such instructions until they are countermanded or rescinded by the client. Since a corporation or government must act through human agents, however, counsel must be satisfied that those purporting to speak for the client have the authority to do so and that the instructions they convey are in the best interests of the client, as perceived by the client based on considerations including legal advice. Independent inquiry or verification is seldom necessary when instructions have been received through normal channels and contain no unusual or questionable elements.²⁸

The responsibilities and authority of those who are employed by or otherwise act for an organization are defined with varying degrees of specificity. In a government context, ultimate authority rests with the Cabinet and the ministers who form it. However, given the scope of government operations, a great deal must be done by officials, as has been recognized in the *alter ego* doctrine enunciated in *Carltona Ltd. v. Commissioners of Works*.²⁹ This diffusion of functions occurs in the first instance in terms of the organization of government departments and agencies and their mandates. Then, within each of them, further organizational structures are put in place along with the creation of staff positions and accompanying job descriptions. Thus, legislative counsel should take instructions from officials whose responsibilities are commensurate with the instructions being given. For example, major policy decisions should be made at quite a senior level, if not by ministers themselves, while minor details may be provided by officials who work at an operational level.

Legislative Services Context

Government Counsel

When it comes to the drafting of legislative texts, it is sometimes difficult to establish clearly for whom legislative counsel services are being provided. This is particularly true when all regulations are to be examined by a central agency of the Crown. For example, section 3 of the *Statutory Instruments Act* requires all federal regulations to be examined by the Clerk of the Privy Council in consultation with the Deputy Minister of Justice. In practice, this examination often includes drafting services in addition to advice on whether the proposed regulations meet the criteria set out in section 3. Functionally, the relationship between legislative counsel in the Department of Justice and officials in the department or agency that is sponsoring the regulation closely resembles that of solicitor and client. However, some agencies are independent regulatory bodies that also exercise adjudicative functions and have their own counsel who advise on the drafting of regulations.

In these circumstances, who is the client of the legislative counsel? Arguably, it is the central examining authority, the Clerk of the Privy Council, but this then raises the further question of the role of the sponsoring department or agency. Is it in some sense an emanation of the government for the purposes of making the regulation, but not more generally in terms of its adjudicative functions? Or does it retain its independence and

²⁸ Above n. 8, Chapter 12, commentary 1.

²⁹ [1943] 2 All ER 560 (CA).

receive drafting and advisory services in some capacity other than as a client of the legislative counsel? There is no clear answer except that the relationship defies the neat categories of solicitor and client that one finds in the context of non-government clients.

For legislative counsel, there are generally well established rules about who they take instructions from. For example, in the Canadian Government the drafting of government bills and the instructions for them must be approved by the Cabinet.³⁰ The Cabinet decision provides an authoritative framework for drafting and indicates which department is responsible for providing instructions. It also underscores who has the ultimate authority to make decisions on behalf of the Government as client: ministers of the Crown. This in turn provides a hierarchical orientation to determining who speaks for the government such that questions that cannot be resolved at one level may be moved up to the next.

This general structure for the provision of instructions does not altogether avoid or resolve questions about who is entitled to instruct. Legislation increasingly affects several different government departments and, although Cabinet processes are designed to resolve any conflicts they may have, they do not resolve all issues, particularly those relating to the details of how a legislative scheme is to be elaborated. The degree of Cabinet resolution also tends to diminish when legislative policy is being developed very quickly and drafting begins before it is well established. In these cases, central agencies of government, such as a Cabinet office, play a critical role in resolving conflicts and providing definitive instructions.

However, their capacity to resolve matters is limited, as indeed is the capacity of more senior managers to resolve conflicts at lower levels. This imposes a further discipline on those responsible for dealing with these questions. Not every question can or should be moved up to the next level since general managerial expectations require that as much as possible be resolved at lower levels. Thus, legislative counsel frequently have a role in sorting out these questions by brokering solutions among departmental officials. The private sector world of an individual client who provides clear instructions is very far removed from the reality of government where instructions are often a work in progress evolving from a complex dynamic of interacting officials.

Counsel to Legislative Assemblies

The complexity of a client takes on another dimension when one turns to legal professionals who work for legislative assemblies composed of elected members. Counsel employed by these assemblies provide drafting and advisory services to a diverse group divided along partisan political lines with a wide range of objectives and interests. Although it may be tempting to conclude that they function rather like a private law firm serving the needs of individual clients, this is not how their services are typically rendered. Rather, they primarily serve the corporate interests of the assembly.

³⁰ See the Cabinet Directive on Law-making, section 4: http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=legislation/cabdir-dircab_e.htm

In the United States, this has been taken to mean that no attorney-client relationship exists between legislative counsel and individual members.³¹ Such a relationship is untenable given the diversity of interests among the members of the assembly. Rather, the relationships between legislative counsel and members are determined by the interests of the assembly as a whole as well as resource considerations. The assembly has to speak with a single voice when it enacts laws: legislative counsel are needed to help ensure that this voice is coherent. By the same token, it is simply not feasible, financially or otherwise, to provide each member with separate counsel.

This is not to say that legislative counsel and individual members do not have a relationship. They clearly do, and in many respects it approaches that of a solicitor and client, for example in terms of confidentiality. It is just that the relationship is tempered by the need to make the assembly work. I will consider in more detail below how this happens in the context of my discussion of particular elements of professional responsibility.

One final point worth noting in relation to legislative assemblies is that legislative counsel for a government do not have a professional relationship with assembly members. This may seem self-evident, but members of these assemblies do not necessarily appreciate the differences between counsel who work for the assembly and those who work for the government. They occasionally lump them together as public sector counsel who all serve assembly members. Thus, it is critical that when government counsel appear before legislative committees they make it clear that they are not there to provide legal advice, but rather to answer questions on behalf of the government about legislation it is sponsoring. While they may be able to express a legal position on behalf of the government, they cannot provide legal advice to committee members. This distinction is discussed below.³²

Giving Advice and Carrying out Instructions

Rules and guidelines for professional conduct, whether in the legal profession or the public service, incorporate substantive limits on what can or should be done in providing legal services. Generally speaking, these limits are cast in terms of competency, maintaining the integrity of the profession and the legal system and not participating in illegal activities. These are of course also of critical importance for government counsel. In fact, they may be of even greater importance for government counsel than for those in private practice given that government action must be based on a secure legal foundation, as opposed to private action, which is generally permitted unless prohibited.

On matters of competency, it has already been noted that professional regulatory bodies are generally not concerned with the way lawyers holding public office carry out their official responsibilities, leaving it to their employers to attend to this.³³ In the context of

³¹ See D. Brown and D. Cartin, "Position statement on the attorney-client relationship in the legislative employment setting" (1996), 10 *The Legislative Lawyer* 3.

³² See below at pp. 22ff.

³³ Above nn. 7 and 8.

legislative drafting, this approach is reinforced by a case alleging negligence in the drafting of an agreement.³⁴ The defendant solicitor had drafted an agreement of purchase and sale of a business, but his client misunderstood the effect of a critical clause for calculating the purchase price and ended up paying more for the business than he thought he would. However, the court rejected the allegation of negligence on the basis that the client was a sophisticated businessman and that the clause was a “business clause with wording which I find was familiar to an experienced businessman in the insurance industry.” If the courts are prepared to let sophisticated business people look out for themselves in terms of understanding what is drafted for them, the same is likely to be all the more true of governments.

A further unique dimension of government practice is how it relates to the public interest.³⁵ In so far as democratic government is founded on serving the public interest, legal counsel in the public sector must take it into account to a greater extent than their counterparts advising private sector clients who do not have the same focus on the public interest. In this sense, government counsel may, as Professor Hutchinson³⁶ and Code, J³⁷ suggest, have a greater obligation to consider the public interest than do their counterparts in private practice. But what is in the public interest is often difficult to define, if not a matter of some controversy.³⁸ How then are legislative counsel to meet these obligations to consider interests that resist clear definition and avoid illegality when they are writing the law itself? The answers to these questions may be found in the principles of constitutional government and democratic processes.

Constitutions frame legislative action and legislative counsel have an obligation to support conformity with constitutional limits when drafting laws. This obligation is recognized in provisions such as section 4.1 of the *Department of Justice Act*,³⁹ which requires the Minister of Justice to examine draft bills and regulations to determine whether they are inconsistent with the *Canadian Charter of Rights and Freedoms*.

However, determining consistency with constitutional limits is hardly an exact science and indeed the courts generally presume that laws are valid. This is reflected in the further obligation under section 4.1 to report to the House of Commons any inconsistency that the Minister “ascertains” from examining a draft bill or regulation. This threshold

³⁴ *Hallmark Financel v. Fraser & Beatty* (1990), 1 OR 3d 641 (OCGD).

³⁵ See also Note, (2008), 121 *Harvard Law Review* 1409 at 1413-4.

³⁶ Above n. 9.

³⁷ See the *Alpha Care* decision, above n. 10

³⁸ See L. Pal and J. Maxwell, *Assessing the Public Interest in the 21st Century: A Framework* (Paper prepared for the External Advisory Committee on Smart Regulation, 2004) http://www.cprn.org/documents/25967_en.pdf and D. Zussman, “Governance: The New Balance between Politicians and Public Servants in Canada” 38 *Optimum Online*, issue 4, Dec. 2008 (<http://www.optimumonline.ca/article.phtml?id=319>).

³⁹ RSC 1985, c. J-2.

for reporting requires a high degree of certainty about the inconsistency, one that is generally considered to exist only when no credible argument can be made to oppose it.⁴⁰

Lest this give short shrift to constitutional limits, one should note the role that the democratic process plays in law-making and the functioning of democratically elected governments. Democracy entails the popular election of officials who are thereby entrusted with the right to exercise public powers. Counsel are employed to advise them and, as Professor Hutchinson says, “to defer to such officials on what the public interest demands in deciding on policy and implementing it.”⁴¹ Thus, it is the responsibility of legislative counsel, on the one hand, to advise of the potential for a finding of unconstitutionality but, on the other, to give effect to the judgment of ministers about whether to proceed with legislation despite that potential. Legislative counsel are not judges and do not exercise power over ministers or elected members.

However, there is undoubtedly a point at which it is not sufficient merely to give advice and stand back. In the *Alpha Care* decision, Code, J said:

[39] I am inclined to the view that it is equally fundamental that the City Solicitor ensure that City Council “complies with the law.” It is not enough to take an adversarial stance in litigation, because opposing counsel’s argument is not well framed, if it means that City Council will continue to proceed in a manner that knowingly violates the law. The statutory framework governing municipalities generally and the City of Toronto in particular, as set out above, does not permit this approach. More fundamentally, the importance of the rule of law as a constitutional precept in Canada does not permit this approach to public administration at any level of government.⁴²

If a government client is intent on pursuing a course of action that is manifestly illegal and no credible argument exists to support the constitutionality of what legislative counsel are being instructed to draft, they must consider whether to continue to act. Reed Dickerson captures this as follows:

How far may a draftsman give vent to his own social values when shaping deals for his client? The answer is “not very far.” If he cannot remain functionally loyal to his client’s views, he should withdraw from the relationship. On the other hand, a draftsman who is deferential, decently reticent, candid and diplomatic can usually make much policy in the service of his client.⁴³

Although constitutionality is of the utmost importance in drafting laws, it does not, as noted above,⁴⁴ exhaust the responsibilities of legislative counsel. Another facet of their

⁴⁰ The approach has been documented by other commentators, notably J. Hiebert, *Charter Conflicts: What is Parliament’s Role?*, McGill-Queen’s University Press: 2002 at 10.

⁴¹ Above n. 9 at 117.

⁴² See *Alpha Care*, above n. 10 at para. 39.

⁴³ R. Dickerson, *The Fundamentals of Legal Drafting*, 2nd ed. (Little, Brown and Company, Toronto: 1986) at 13. See also Zussman, above n. 38.

⁴⁴ See n. 20.

role that informs its ethical dimension is to ensure that the law is clearly stated in accordance with drafting conventions. This is not always easy, particularly when instructing officials may have an interest in preserving vagueness or ambiguity. Reed Dickerson recounts one of his experiences of this:

There are ethical problems peculiar to legal drafting. When I was drafting laws for the Pentagon, a high-level lawyer from the National Security Agency asked me to “fuzz up” a draft bill so that, when the particular provision came back to NSA to be administered, they could interpret it to mean what they wanted to have subtly hidden in it. Although such an action would certainly not be unprecedented, I indicated that I would not participate in any scheme that put blinders on Congress.⁴⁵

Dickerson’s refusal to draft under these circumstances no doubt reflects a unique characteristic of the services that legislative counsel provide. They do not merely give advice, which their clients may or may not choose to follow. They are using their powers of expression to create something for their clients to use. The connection that legislative counsel have with their draft text arguably results in a greater sense of responsibility than if they had simply given their clients advice. And although this responsibility may be diminished by attaching cautionary advice to the draft, it cannot be completely absolved.

Conflict of Interest

Conflict of interest is a matter of some importance both for members of the legal profession as well as for public servants. It entails both actual conflicts as well as the appearance of a conflict. Although there is much common ground between the two in terms of general types of conflict of interest, the way in which they arise are often quite distinct.

In the legal professional context, there are three general sources of conflicts of interest:

- conflicting interests of different clients;
- conflicting interests as between legal counsel and their clients;
- conflicts between practising law and concurrently engaging in some other business, occupation or activity.⁴⁶

Similar types of conflicts of interest are defined in the public service context in terms of private interests and public service duties.⁴⁷ They involve relationships that public servants may have with persons or organizations outside government, particularly relationships that result in personal gain. The latter are often addressed not only by codes of conduct, but also by penal sanctions for behaviour that amounts to corruption or abuse of office.⁴⁸

⁴⁵ Dickerson, above n. 43.

⁴⁶ See CBA Code, chapters 5 and 6.

⁴⁷ See Canada PS Code, chapter 2 and the *Conflict of Interest Act*, SC 2006, c. 9, s. 2 dealing with political office-holders and appointees.

⁴⁸ See *Criminal Code*, RSC 1985, c. C-46, ss. 119-125.

Conflicting Interests of Clients

Legislative counsel who work for a government or legislative assembly have, strictly speaking, only one client. They are generally employed to provide legal services exclusively to that client and are generally prohibited from practising law otherwise. Hence, there is little chance for this form of conflict to arise in terms of counsel's work during their employment for such a client. However, there is potential for conflict in terms of their work either before or after such employment. There are also, if not conflicts, tensions that can arise within the various components of a complex governmental client. I will deal here with pre- and post-employment conflicts and consider internal client tensions below under the heading of institutional conflicts.

The potential for pre- and post-employment conflicts is recognized in many professional codes when a member of one law firm transfers to another. For example, the CBA Code says:

23. Where the transferring member actually possesses relevant information respecting the former client that is confidential and disclosure of it to a member of the new law firm might prejudice the former client, the new law firm shall cease its representation of its client in that matter unless: ...⁴⁹

It then elaborates circumstances that will negate or mitigate the conflict.

In the context of someone transferring from private practice to employment with a public sector client, there may indeed be potential for conflict in this sense, for example when someone transfers to a law enforcement branch that deals with their former clients. It is also conceivable that there could be a conflict of interest when counsel who has advised private sector clients on a law transfers to a government agency that is revising the law as a result of litigation carried on by those clients against the government. However, it is difficult to see how a conflict could arise from the fact alone of having worked for private sector clients who are subject to a law of general application that is being revised. There is also no conflict when a change of government takes place since the client is the government and not the particular individuals who happen to hold office.

Professional codes also recognize the potential for conflict when counsel leave the government to work in the private sector. For example, chapter 5, rule 18 of the CBA Code says:

18. A lawyer who has information known to be confidential government information about a person, acquired when the lawyer was a public officer or employee, shall not represent a client (other than the agency of which the lawyer was a public officer or employee) whose interests are adverse to that person in a matter in which the information could be used to that person's material disadvantage.

Similarly, subrule 6.05(5) of the LSUC Code says:

⁴⁹ Above n. 7 at chapter 5.

(5) A lawyer who has left public office shall not act for a client in connection with any matter for which the lawyer had substantial responsibility before leaving public office.

Finally, public service codes and conflict of interest legislation also regulate post-employment activities of public servants. For example, chapter 3 of the Canadian Public Service Code says:

former public servants should undertake to minimize the possibility of real, apparent or potential conflicts of interest between their new employment and their most recent responsibilities within the federal public service.⁵⁰

It then goes on to identify particular activities that are not to be carried on within prescribed periods following departure from the public service, including:

give advice to their clients using information that is not available to the public concerning the programs or policies of the departments or organizations with which they were employed or with which they had a direct and substantial relationship.

The seriousness with which the courts are prepared to take these provisions is amply demonstrated in *Tiboni v. Merck Frosst Canada* where the court ruled that a former Minister of Health was disqualified from acting as counsel on a matter involving the actions of his department while he was the minister.⁵¹

Conflicting Interests between Counsel and their Clients

What constitutes a conflict of interest with a client, whether in the professional or public service context, is often self-evident. Monetary gain and outside activities that call into question a person's integrity are clear examples.⁵² But for legislative counsel, the potential for conflicting interests is quite substantial given the generally broad application and scope of the legislative texts they draft. Legislative counsel are subject to the law like other citizens and may be affected by it in a personal capacity. If a rigorous concept of conflict of interest were applied to them, there would be very little legislation on which they could work. Thus, the mere fact that legislation may apply to legislative counsel themselves should not be enough to disqualify them from working on it.

Arguably, a conflict for legislative counsel must entail a personal interest that is greater or more substantial than that of most other members of the public. For example, there is no impediment to drafting general provisions for the imposition of income tax on individuals. However, the drafting of a provision for a special tax exemption for owners of a certain type of property might create such a conflict if the person drafting it owns such property too. The dividing line between the two situations may not always be easy to draw and codes of conduct generally leave some discretion for dealing with them.⁵³

⁵⁰ See also Part 3 of the *Conflict of Interest Act*, SC 2006, c. 9, s. 2.

⁵¹ 2008 CanLII 6872 (ON S.C.).

⁵² Above n. 48.

⁵³ For example, chapter 2 of the Canada PS Code, above n. 47, says:

Responsibility for drafting legislation can also give rise to another type of conflict in terms of personal views about the merits of the policy that forms the substance of drafting instructions. When legislative counsel have strong and contradictory views about the policy, there is a conflict of interest that imperils their professional relationship and, in the public service context, their political neutrality. Although the role of a legal adviser or public servant is to give fearless, objective advice, there is a line beyond which advice becomes obstruction and confidence is undermined. It may be crossed when one loses sight of the role of elected officials to make policy decisions.

Conflicting Activities

Conflict of interest in the public service context goes beyond matters of material gain to include activities that are incompatible with public service employment. This reflects one of the fundamental underpinnings of a professional public service: political neutrality and the capacity to serve both a government of any political stripe and, more generally, the public. Political neutrality is supported both by legislative restrictions on the political activities of public servants⁵⁴ as well as by public service codes of conduct, for example the Canadian Code, which says:

Public servants must work within the laws of Canada and maintain the tradition of the political neutrality of the Public Service.

Public servants shall perform their duties and arrange their private affairs so that public confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced.⁵⁵

The requirement of political neutrality sets government counsel apart from their private sector colleagues. On the one hand, they must maintain a higher level of detachment from their clients while on the other hand being capable of advising their political rivals should there be a change in government.

Institutional Conflict

Deborah MacNair identifies a further type of conflict of interest that is not addressed in professional or public services codes:

The role of the Minister of Justice and Attorney General poses for many an ‘institutional’ conflict of interest. This has been interpreted to mean that the position, by its very nature, puts the individual who occupies it in an automatic conflict of interest. The conflict arises as a result of the dual role of the Minister. On the one hand, the Minister of Justice develops policy proposals for legislation and provides

Where outside employment or activities might subject public servants to demands incompatible with their official duties, or cast doubt on their ability to perform their duties in a completely objective manner, they shall submit a Confidential Report to their Deputy Head. The Deputy Head may require that the outside activities be curtailed, modified or terminated if it is determined that real, apparent or potential conflict of interest exists.

⁵⁴ See the *Public Service Employment Act*, Part 7 (Political Activities), SC 2003, c. 22.

⁵⁵ *Ibid.*

legal advisory services to the federal Crown; on the other hand, the Attorney General of Canada must exercise their responsibilities in an independent manner and in the public interest.⁵⁶

A further dimension of this situation arises from the organization of governments into various departments and agencies that support different ministers. Although the principle of Cabinet solidarity and the unity of the Crown amalgamate them into a single entity, the real world of politics and government is rife with internal differences among these components as to what should be done in any given situation. The policy-making and governance structures within government are intended resolve these differences, ultimately by ensuring that they are brought to the Cabinet for final resolution if they cannot be resolved otherwise. But within these processes, individual actors within government constantly seek policy and legal support for their positions and often look to government counsel as if they were their own counsel as opposed to counsel for the larger government enterprise. Arguably, the differences among these actors produce conflicts that are similar to those that arise among individual clients in the private sector.

This type of conflict is of a somewhat different nature from the others. It is sanctioned by legislation that creates government institutions and defines the roles of those who act for them. For example, following the Glassco Commission Report,⁵⁷ the Department of Justice was given the role of providing legal services to the whole of the Government of Canada. Thus, it may be more accurate to refer to this as an institutional *tension* rather than a conflict of interest. It is analogous to the concept of bias in administrative law. The courts have recognized that bias is not an immutable concept, but rather it varies from one public role to another. An absence of bias is generally a prerequisite for adjudicative functions where a decision-maker must maintain an even hand between the parties. However, it may have less significance in the context of legislative powers since policy-making functions presuppose a range of points of view with no “right” answer. This is exemplified in *Alaska Trainship Corporation et al. v. Pacific Pilotage Authority*⁵⁸ where the Supreme Court of Canada found that any bias in the exercise of certain regulation-making functions was authorized by the statutory framework that constituted the regulation-making authority. Laskin, CJ said:

As LeDain J. pointed out in his reasons, the Pacific Pilotage Authority has both an operating and a regulatory function. Once the appointments to it are conceded to be validly made (and I should note they also include persons associated with shipping interests) and there is no contention of bad faith, I find it difficult to deny it the power to exercise its regulatory authority, in fact a legislative power, in accordance with the statutory prescriptions, even though there is a resulting pecuniary benefit. Such a

⁵⁶ Above n. 2 at 145. See also James B. Kelly, “Bureaucratic Activism and the Charter of Rights and Freedoms: the Department of Justice and its entry into the centre of government” (1999), 42 Can. Pub. Admin. 476 at 502 discussing the tension inherent in the Minister of Justice’s role in examining government bills under section 4.1 of the *Department of Justice Act*.

⁵⁷ Canada, Royal Commission on Government Organization, *Report*, Ottawa, 1962,

⁵⁸ [1981] 1 S.C.R. 261.

benefit is immanent in the statute under s. 9(2), if not also in the regulation-making power.⁵⁹

If the tensions that arise in the context of providing legal, including legislative, services in the public sector fall short of conflicts of interest, they nevertheless pose challenges to those who must manage them. It may be tempting to give in to a powerful client who is also one's employer or to simply say no and hide behind security of tenure in the public service. However, the first of these is not ethical and the second is far from satisfying. The better way is to gain the confidence of client officials and engender in them respect for the advice and drafting services one renders. This is not accomplished overnight, but rather through mastery of one's craft and the ability to argue persuasively the wisdom of a recommended course of action. In government, the generally sophisticated nature of client officials means that explanations for advice are often sought, if indeed the advice is not itself challenged. In this world, legislative counsel must often be as much advocates as drafters.

Confidentiality

Confidentiality is an essential element of most professional relationships, including those of the legal profession and the public service. It is justified by the need for frank and open discussions with legal advisers and public servants. Without it, advice is less likely to be sought and those who do seek it are less likely to disclose fully their circumstances or intentions, which in turn undercuts the effectiveness of the legal advice and counsel's role in providing it.⁶⁰

Confidentiality is addressed in a variety of ways. In the context of legal professional relationships, the law of evidence protects confidentiality under the rubric of solicitor-client privilege,⁶¹ which applies not only to private sector clients but also in a government context.⁶² In turn, the various codes of conduct for the legal profession recognize obligations to maintain client confidentiality.

In the government context, confidentiality enjoys similar protections in terms of public service codes of conduct, information security legislation,⁶³ exemptions from disclosure under access to information legislation⁶⁴ and, in the evidentiary sphere, public interest

⁵⁹ Ibid., at 274.

⁶⁰ See, for example *R. v. Gruenke* [1991] 3 SCR 263, at p. 289 where Lamer, CJC said:

The *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication....

⁶¹ *Blank v. Canada* [2006] 2 SCR 319 and *Canada v. Blood Tribe Department of Health* [2008] SCC 44. Note that litigation privilege protects communications between counsel and their clients independently of whether they are confidential.

⁶² See *R. v. Campbell* [1999] 1 SCR 565 at para. 49.

⁶³ *Security of Information Act*, RSC 1985, c. O-5 (formerly the *Official Secrets Act*).

⁶⁴ *Access to Information Act*, RSC 1985, c. A-1, ss. 13-25 and 68-69.1.

immunity, which generally protects against the disclosure of information held by governments when its release would not be in the public interest.⁶⁵

What information is protected?

Legal Professional Relationships

Solicitor-client privilege applies if three elements are present:

1. the communication must be between a solicitor and client;
2. it must entail the seeking or giving of legal advice; and
3. it must be intended to be confidential by the parties.⁶⁶

These elements may be found in the context of government counsel's relationship with their client, but in *R. v. Campbell*, Binnie, J also recognized that:

It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected.⁶⁷

One area where this appears to have given rise to some debate is in relation to draft legislation. In *Cooper v. BC*,⁶⁸ Tysoe, J considered a draft of the *Mortgage Brokers Act* and concluded: "... although the document may have been prepared by legislative counsel, it does not disclose the seeking or giving of legal advice. It is not privileged and shall be disclosed." (at para. 20). However, he ordered that a similar draft containing comments by legislative counsel was not to be produced: "It reflects the giving of legal advice and it is privileged to that extent" (at para. 25).

This decision is difficult to reconcile with the scope generally accorded solicitor-client privilege and perhaps reflects a misunderstanding of the nature of draft legislation and the services rendered by legislative counsel in preparing it. It is not merely a policy document, but also encapsulates the opinion of legislative counsel that the draft will produce in law the desired legal effect. This is quintessential legal advice that has been

⁶⁵ This privilege has traditionally been known as Crown privilege, but this is something of a misnomer, as explained by D. Paciocco and L. Stuesser, *The Law of Evidence*, 2nd ed. (Irwin Law: Toronto, 1999) at 173.

⁶⁶ *Solosky v. The Queen* [1980] 1 SCR 821 at 837.

⁶⁷ Above n. 62 at para. 50.

⁶⁸ *Cooper v. British Columbia*, unreported, February 3, 1999. See also *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia* 2002 BCSC 1509.

recognized as such by the Federal Court of Australia in *New South Wales v. Betfair Pty. Ltd.*⁶⁹

The Court in this case considered an argument that drafting instructions for regulations formulated by a working group, as well as drafts prepared by legislative counsel, were not protected by solicitor and client privilege. The Court rejected this argument, stating:

... the purpose of the government agency providing instructions to Parliamentary Counsel is to obtain effective and valid draft legislation that is in accord with the instructions. The provision of draft legislation without more necessarily involves Parliamentary Counsel implicitly advising that the draft legislation provided is effective and valid.⁷⁰

This conclusion was based on the following characterization of the role of legislative counsel:

Parliamentary Counsel do not merely type or format the legislation. Parliamentary Counsel apply legal skill and knowledge to give written expression to the policy underlying the proposed legislation. Parliamentary Counsel would be expected, and perhaps under a duty, to advise upon the legality or effectiveness of the legislation being sought by the instructors. In the case of subordinate legislation, if regarded as beyond power, Parliamentary Counsel would presumably advise of this view. Similarly, if an Act of Parliament was considered unconstitutional, or inconsistent with another Act of Parliament, this is a matter Parliamentary Counsel would be expected to advise upon, even if the only express instruction was to draft the legislation.

Where no problem of this kind arises, Parliamentary Counsel, in drafting the legislation and presenting the draft to the government agency, is in effect advising that the draft legislation is in accordance with the instructions given and gives legal effect to those instructions. The draft itself is not the legal advice, but the communication in providing the draft legislation contains implicitly the advice of Parliamentary Counsel endorsing the draft legislation as being effective and valid.⁷¹

⁶⁹ [2009] FCAFC 160. Note also a decision of an adjudicator in the Office of the British Columbia Information and Privacy Commissioner: 2010 BCIPC 6 commenting as follows on the BC decision:

[43] What I glean from those two cases is that, where draft legislation contains comments by Legislative Counsel those records will be privileged as disclosing or seeking legal advice. Neither *Cooper* nor *Health Services* indicates whether the comments in question were handwritten or embedded in the document by virtue of word processing software. In my view, there is no relevance to such a distinction. The only question here is whether the redline track changes in the records of category H can be considered commentary that discloses the giving or receiving of legal advice. In my view, the delineated additions and deletions to the text of the draft statutes in this case are commentary disclosing the giving of legal advice by Legislative Counsel. In essence, the tracked changes encapsulate counsel's confidential advice, on the face of the record, as to recommended statutory amendments. For this reason, these drafts are subject to solicitor-client privilege

⁷⁰ *Ibid.* at para. [24].

⁷¹ *Ibid.* at paras. [21-22].

In a legal context, confidentiality is protected not only by evidentiary privileges, but also by the various professional codes. For example, the CBA Code says that confidentiality extends to “all information concerning the business and affairs of the client acquired in the course of the professional relationship”.⁷² This goes further than solicitor-client privilege, as the following commentary indicates:

This ethical rule must be distinguished from the evidentiary rule of solicitor-client privilege with respect to oral or written communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or to the fact that others may share the knowledge.⁷³

Government Information

In the government context, confidentiality is generally defined in terms of security requirements that mirror disclosure exemptions in access to information legislation. For example, the Treasury Board of Canada has elaborated information security requirements in the following terms:

Departments must identify information and other assets when their unauthorized disclosure, with reference to specific provisions of the *Access to Information Act* and the *Privacy Act*, could reasonably be expected to cause injury to:

1. the national interest. Such information is *classified*. It must be categorized and marked based on the degree of potential injury (injury: "Confidential"; serious injury: "Secret"; exceptionally grave injury: "Top Secret").
2. private and other non-national interests. Such information is *protected*. It must be categorized and marked based on the degree of potential injury (low: "Protected A"; medium: "Protected B"; high: "Protected C").⁷⁴

This is supplemented by guidance from the Privy Council Office that Cabinet confidences are to be designated as either *classified* or *protected*, depending on the nature of the information they contain.

Cabinet confidences are also protected as a matter of evidence under the rubric of public interest immunity.⁷⁵ In addition, these evidentiary protections are mirrored in access to information legislation, which protects them from disclosure. In Canada, legislation dealing with Cabinet confidences specifically limits the protection to those that are less than 20 years old. It also identifies “draft legislation / *avant projets de loi ou projets de règlement*” as a Cabinet confidence.⁷⁶

⁷² CBA Code, above n. 7, ch. IV, rule 1.

⁷³ Ibid.

⁷⁴ Government Security Policy, s. 10.6 (<http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12322§ion=text#cha3>).

⁷⁵ See the *Canada Evidence Act*, RSC 1985, c. C-5, s. 39, *Carey v. Ontario* [1986] 2 SCR 637 at para. 14 and *Babcock v. Canada* [2002] SCC 57.

⁷⁶ See the *Access to Information Act*, RSC 1985, c. A-1, s. 69(1)(f) and the *Canada Evidence Act*, RSC 1985, c. C-5, s. 39(2)(f).

Access to information legislation also typically provides protections for information that is protected by solicitor-client privilege.⁷⁷ This protection is relevant in relation to draft legislation that is not protected as a Cabinet confidence (for example, draft regulations of regulatory agencies). It may also have some application to the disclosure of drafting or other office manuals. To the extent that these manuals are not related to specific pieces of legislation and outline practices that are evident from reading legislation itself, they are unlikely to be subject to solicitor-client privilege. However, any portions that contain legal advice to assist officials in making drafting decisions would be protected.⁷⁸

Limits on Confidentiality

There are some well-recognized limits on confidentiality. In the legal profession, they limits are framed in terms of disclosure required by law, such as that relating to child abuse or the prevention of a crime or serious harm.⁷⁹ The CBA Code also recognizes that counsel for an organization may have an obligation to ensure that information about wrong-doing is drawn to the attention of appropriate authorities within the organization.⁸⁰

In the government context, confidentiality encounters similar limits founded on legislation requiring the disclosure of wrongdoing.⁸¹ It also runs up against demands for transparency in government. In democratic systems, the public needs to know what its elected representatives and their public servants are doing in order to hold them accountable. Transparency and accountability are the foundation of legislation that provides public access to government information. The tensions between confidentiality and transparency are played out in provisions that exclude access to legally protected forms of confidentiality, notably solicitor-client privilege and public interest immunity.⁸² This is also recognized in the Canadian Public Service Code:

⁷⁷ See the *Access to Information Act*, RSC 1985, c. A-1, s. 23.

⁷⁸ See *Ontario (Ministry of Community and Social Services) v. Ontario (Privacy Commissioner)* (2004), 70 OR 3d 680 (SCJ-DivCt) where a manual to assist officials in making enforcement decisions under family support legislation was considered to be protected by solicitor-client privilege. The decision particularly recognizes that general instructions, not related to specific cases, may be protected.

⁷⁹ See, for example, the CBA Code, Chapter 4, commentaries 2, 3 and 11 and AB Code, chapter 7, rule 8.

⁸⁰ Above n. 7. Rule 12 says:

Rather, the general rule, as set out above, is that the lawyer shall hold the client's information in strict confidence, and this general rule is subject to only a few exceptions. If the exceptions do not apply there are, however, several steps that a lawyer should take when confronted with this problem of proposed misconduct by an organization. The lawyer should recognize that the lawyer's duties are owed to the organization and not to its officers, employees, or agents. The lawyer should therefore ask that the matter be reconsidered, and should, if necessary, bring the proposed misconduct to the attention of a higher (and ultimately the highest) authority in the organization despite any direction from anyone in the organization to the contrary. If these measures fail, then it may be appropriate for the lawyer to resign in accordance with the rules for withdrawal from representation (Chapter XII).

⁸¹ See, for example, the *Public Servants Disclosure Protection Act*, SC 2005, c. 46.

⁸² See ss. 37-39 of the *Canada Evidence Act*, RSC 1985, c. C-5 and s. 69 of the *Access to Information Act*, RSC 1985, c. A-1.

Public servants should also strive to ensure that the value of transparency in government is upheld while respecting their duties of confidentiality under the law.⁸³

Although the Supreme Court of Canada has recently affirmed that solicitor-client privilege applies with equal force in relation to government as well as private sector clients,⁸⁴ Professor Hutchinson argues that it should be limited in the interests of government transparency:

Insofar as the rule of confidentiality is meant to protect the relatively powerless citizen against the state by ensuring effective legal representation through open communication, it does not seem either necessary or useful when the government is the putative client being protected. While government business is important, it has no need of such privileges and protections. The dignity and vulnerability of individuals is not at stake in the same way. Indeed, the basic democratic commitment to openness and transparency as a vital prerequisite for accountability suggests that there is very little role for confidentiality in the affairs of government: confidentiality and open government do not sit at all well together.⁸⁵

He goes on to suggest that the potential disclosure of legal or other advice would bring more accountability to the exercise of public powers and concedes a need for confidentiality only in relation to national security.⁸⁶

While the objective of greater accountability is laudable, this suggestion would in practical terms neutralize the advisory role of government counsel by eliminating the space that confidentiality provides for the discussion of contentious issues. It would inhibit the conduct of litigation on behalf of the government and would, in all likelihood, induce ministers to seek advice elsewhere, if not dispense entirely with advice from public servants. This would significantly reduce the role of government counsel and the public service more generally in providing professional support and continuity in government.

One further pressure on government confidentiality arises in the context of the privileges that parliamentary bodies assert in relation to their law-making and executive oversight functions. Parliamentary committees generally have the power to summon witnesses and require the production of documents relating to their business. Parliamentary conventions suggest that committees should show restraint in the face of other privileges, but it is argued that their right to obtain information takes precedence over these privileges.⁸⁷ Thus, the needs of parliamentary institutions are said to prevail over those of the governments that they keep in office.

⁸³ Ibid.

⁸⁴ *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, 2004 SCC 31 at para. 21.

⁸⁵ Above n. 9 at 125-6.

⁸⁶ Ibid. at 128.

⁸⁷ See Diane Davidson, "The Powers of Parliamentary Committees", (1995), 18 *Canadian Parliamentary Review* <http://www.parl.gc.ca/Infoparl/english/issue.htm?param=152&art=1030>.

Similar issues are played out in the United States where demands for the disclosure of government legal advice have been made in the interests of presidential accountability and respect for constitutional limits on presidential powers. A note published in the *Harvard Law Review* in 2008 recognizes, on the one hand, that the relationship between the President and Congress can be seriously affected by the legal advice that the President receives, but that, on the other, there may be drawbacks to its disclosure. It accordingly suggests a compromise of sorts:

To address these issues, the Attorney General should be required to report to Congress regularly on the substance of the legal opinions his or her office has provided to the President. The Attorney General currently issues detailed reports on the fiscal state of the Department of Justice and its accomplishment of law enforcement goals, but its disclosures to Congress about important matters of legal policy are done on an ad hoc basis. Reporting would include protections for confidential information and would not extend to discussions between the President and his or her private attorneys. At minimum, the Attorney General would point to the sources of authority under which the President has authorized action and the interpretations of congressional statutes the executive branch has made.⁸⁸

However, the Note goes on to signal caution about this proposal:

Such a reporting obligation is admittedly open to criticism. As with the broad view of the attorney's client, reporting may reduce the President's ability to rely on advice from attorneys. If Congress is controlled by the other party, the President may choose not to seek legal advice at all. Moreover, annual reporting and up-the-ladder reporting by individual attorneys could erode the trust relationship between decisionmakers and attorneys. The sheer volume of legal opinions may render the reporting function an empty exercise or a waste of resources. For every opinion that has the potential to redefine the balance of power between the executive and legislative branches, there are dozens that address far more mundane matters. Finally and most importantly, a reporting obligation may increase the risk aversion of lawyers, particularly those counseling intelligence agencies. The 9/11 Commission faulted the CIA for being "institutionally averse to risk," a culture that Professor Goldsmith traced to excessive caution by agency lawyers.⁸⁹

These reasons are compelling, but it should be noted that the Obama Administration has begun to make good on the President's 2008 campaign promises of more transparency. It has disclosed some of the legal opinions given to the previous administration that had formed the basis for counter-terrorism policies. Attorney-General Eric Holder is quoted as saying that "Americans deserve a government that operates with transparency and openness" and that he hopes to make future legal opinions by his department on such

⁸⁸ Above n. 35 at 1428.

⁸⁹ *Ibid.*

matters “available when possible while still protecting national security information and ensuring robust internal” debate.⁹⁰

Internal Information-sharing and External Disclosure

Confidential information can generally be shared with those who work within an office that is providing legal services to the extent that they are involved in providing the legal services. However, in a government context, this does not necessarily mean that information can be shared with anyone working within the government. Information-sharing must be aligned with responsibilities relating to the information. This dovetails with the previous discussion of who can act on behalf of the government as client. Thus, legislative counsel generally provide draft legislative texts only to the officials who are authorized to give them drafting instructions. Any further sharing within the government is for those officials to decide in accordance with operational requirements.

Disclosure of confidential information to persons outside an office that is providing legal services is also possible if it is authorized. In terms of information protected by solicitor-client privilege, this occurs when the privilege is waived by those who hold it.⁹¹ This presents few difficulties with an individual client as long as they understand the nature and effect of the waiver and indicate the waiver clearly. However, in a government context, the question of who can waive the privilege is substantially more complex. It resembles the question discussed above about who has authority to provide instructions and make decisions on behalf of the government.

When legislation is being prepared under instructions from the Cabinet, it has the authority to waive solicitor-client privileges that attach to the draft legislation. Thus, in Canada the Cabinet Directive on Law-making says “if a draft bill is intended to be used in consultation before it is tabled in Parliament, the [Memorandum to Cabinet] should state that intention and ask for the Cabinet's agreement.”⁹² Authority to consult on draft regulations is granted more generally in the Cabinet Directive on Streamlining Regulation.⁹³ Authority to disclose confidential information other than draft texts is seldom given.

A recent decision of the Nova Scotia Supreme Court has gone somewhat further in finding that the authority of a government official to waive the privilege in an opinion “is

⁹⁰ See R. Jeffery Smith and Dan Eggen, “Post 9/11 Memos Show More Bush-Era Legal Errors” Washington Post, March 3, 2009, at A05. Also note that some US states have removed solicitor-client privilege from government opinions and that there is some evidence to suggest that the existence or non-existence of solicitor-client privilege has little effect on the exchange of information among government officials: See Nancy Leong, “Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys” (2007), 20 Georgetown J. Legal Ethics 163; Melanie B. Leslie, “Government Officials as Attorneys and Clients: Why Privilege the Privileged?” (2002), 77 Ind. L.J. 469.

⁹¹ See Paciocco, above n. 65 at 150.

⁹² Section 4: <http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=legislation/cabdir-dircab-eng.htm>

⁹³ See section 4.1: <http://www.regulation.gc.ca/directive/directive01-eng.asp>.

co-extensive with his authority to acquire the opinion in the first place.”⁹⁴ This decision related to an opinion about the legal status of a road. Whether it should be extended to a legislative drafting context is questionable given the interest that ministers and other regulation-making bodies have in such matters. It is understandable that officials could waive the privilege in opinions related to operational decisions that are usually made by officials without the involvement of ministers. In contrast, decisions about making legislation are seldom delegated to officials and are made almost exclusively by the ministers who introduce legislation in parliament or by ministerial or other bodies with authority to make delegated legislation.

Waiver of public interest immunity is somewhat less clear. In *Babcock v. Canada*, the Supreme Court of Canada rejected the notion that it could be waived, but acknowledged that there was nothing to compel the government to claim it:

As discussed, the Clerk or minister is not compelled to certify Cabinet confidences and invoke the protection of s. 39(1). However, if the Clerk or minister chooses to do so, the protection of s. 39 automatically follows. That protection continues indefinitely, unless: (i) the certificate is successfully challenged on the ground that it related to information that does not fall under s. 39; (ii) the power of certification of the Clerk or minister has otherwise been improperly exercised; (iii) s. 39(4) is engaged; or (iv) the Clerk or minister chooses to decertify the information. The clear language of s. 39(1) permits no other conclusion.

This is consistent with the fact that waiver does not apply at common law. A claim for confidentiality at common law cannot be contested on the ground that the government has waived its right to claim confidentiality. As Bingham L.J. observed in *Makanjuola v. Commissioner of Police of the Metropolis*, [1992] 3 All E.R. 617 (C.A.), at p. 623, “[p]ublic interest immunity is not a trump card vouchsafed to certain privileged players to play when and as they wish”. Consequently, “public interest immunity cannot in any ordinary sense be waived”.⁹⁵

The disclosure of protected information to outsiders generally results in a loss of the privileges that attach to it.⁹⁶ This makes it critical to define who is and who is not a part of a government client.⁹⁷ It also means that, while a degree of confidentiality can perhaps be maintained by obtaining undertakings on non-disclosure from those to whom limited disclosure is given, the privilege may be lost for evidentiary purposes. However, this is subject to some limited exceptions.

The first is where the disclosure is to others who have a common interest with the holder of the privilege in some anticipated or pending litigation.⁹⁸ It is conceivable that this

⁹⁴ *Peach v. Nova Scotia (Transportation and Infrastructure Renewal)* 2010 NSSC 91 at para. 38.

⁹⁵ Above n. 75 at paras. 30-31.

⁹⁶ See *Babcock*, *ibid.* at para. 52.

⁹⁷ See the discussion of this question above at p. 9.

⁹⁸ See J. Sopinka, et al, *The Law of Evidence*, 2nd ed. (Butterworths, Toronto: 1999) at 760 citing *Wellman v. General Crane Industries Ltd* (1986), 20 OAC 384 (CA).

exception might be extended to apply when legislation is being drafted and privileged information is shared with outsiders who may have a common interest with the government in defending the legislation from an anticipated challenge.

A second exception applies to disclosure that is required by law. In *British Coal Corp. v. Dennis Rye (No. 2)*,⁹⁹ the court held that there was no waiver of solicitor-client privilege when the plaintiff in a civil case provided privileged documents to police to aid in a criminal investigation, and those documents were subsequently required to be released to the defendant in the course of a prosecution.

A third, potentially quite extensive exception is applied in a decision of the Australian Federal Court. *New South Wales v. Betfair Pty. Ltd.* dealt with government regulations prepared on the basis of instructions formulated with input from a consultative working group consisting of representatives of two independent regulatory bodies.¹⁰⁰ It applied an earlier decision of the same court¹⁰¹ holding that information provided in confidence to a client by a third party was protected if it was provided “with the dominant purpose of its being used by the client to make the necessary communication with the client’s legal adviser to obtain legal advice”.¹⁰² The Court in *Betfair* held that the Government did not waive its privilege over its communications with the working group. The Court equated the advice of this group to other expert advice that might be needed in the formulation of legal advice,¹⁰³ distinguishing it as follows from public consultation:

The consultative process adopted by the State on this occasion was very different from the situation in which the State publishes an exposure draft of proposed legislation, and invites public comment. In the process at issue in this case, OLGR [Office of Liquor, Gaming and Racing] and members of the Working Group were essentially working together consensually, under a regime of confidentiality, to formulate and finalise the drafting instructions that OLGR was to provide to Parliamentary Counsel in order for it to obtain appropriate regulations.¹⁰⁴

This decision substantially reinforces the privilege in relation to information-sharing, but it should be viewed as applying only in relation to government agencies. It should not be extended to consultation with members of the private sector who are being regulated, regardless of their expertise, since this would protect from public scrutiny special access to legislative processes accorded to some stakeholders but not to others.

A further issue that frequently arises about the confidentiality of legal advice is whether anything can be said to outsiders about a related legal issue that comes up for discussion

⁹⁹ [1988] 3 All ER 816 (CA). This exception has also been applied in *Interprovincial Pipe Line Inc. v. Canada (Minister of National Revenue)*, [1996] 1 FC 367 (TD) and *Philip Services Corp (Receiver of) v. Ontario Securities Commission* (2005), 77 O.R. (3d) 209 (OSDC).

¹⁰⁰ Above n. 69

¹⁰¹ *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357.

¹⁰² *Ibid.* at para. [26].

¹⁰³ *Ibid.* at para. [32].

¹⁰⁴ *Ibid.* at para. [37].

in a public context, typically before a parliamentary committee. For example, parliamentarians who are reviewing draft legislation may have concerns about its legality and want to know about its legal basis. While it is clear that advice given to a client about such matters is protected by solicitor-client privilege, this does not prevent a legal position from being advanced on behalf of the client, much as is done before a court or tribunal that is considering a matter involving the client.

Legal advice is offered to assist a client in making a decision. A legal position is what is expressed to others when representing a client. Although there may be a substantial overlap between the two in terms of their content, they are fundamentally different. A legal position is offered to convince someone that they should do what the client is urging them to do. It is typically expressed to a court or administrative tribunal that is charged with making a decision. But it may also be expressed to a parliamentary committee that is dealing with a bill or regulation. It differs from an opinion in that it is offered, not as advice, but rather as a viewpoint expressed on behalf of someone who is arguing a position.

This approach has been recognized in a decision of an adjudicator in the Office of the Information and Privacy Commissioner of Ontario.¹⁰⁵ The decision concerned an opinion given to a public library about the legality of its Internet filtering policy. The library publicly disclosed a summary of the opinion revealing its “bottom line”, but it refused to disclose the opinion itself. The adjudicator held that there had been no waiver of privilege:

In my view, the summary does not specify the reasoning that went into the legal advice the Library’s counsel provided. Instead, the summary states that the information contained in the opinion letter advises “that it is almost certain that the protection of minors is a sufficiently important objective to limit an individual’s freedom of expression”. The summary goes on to state that, in order to ensure that the Library’s policies comply with the Canadian Charter of Rights and Freedoms, the “measures employed must place the least restrictions on the right as possible to achieve the stipulated objective (i.e., the protection of minors).

Having regard to the above, I find that the disclosure of the summary does not represent or lead to a conclusion that the Library, implicitly or explicitly, waived its privilege to the legal opinion at issue. As well, given the limited nature of the disclosure in the summary, I am not satisfied that fairness or consistency require a finding that waiver has taken place.¹⁰⁶

Conclusion

The professional responsibilities of legislative counsel are among the most complex of any legal professionals. This complexity results from the fact that for most legislative counsel their professional responsibilities flow out of three distinct sources that are not entirely compatible.

¹⁰⁵ London Public Library Board, Appeal MA08-460, Order MO-2500, February 26, 2010.

¹⁰⁶ Ibid. at p. 7.

The first is their membership in a legal professional association. These responsibilities are largely oriented toward the private practice of law given the preponderance of such practitioners in these associations. Although many associations have made efforts to adjust their rules of professional conduct to take into account government or corporate practice, the fit is not always perfect. In particular, loyalty to an individual client cannot be replicated in the context of a complex government client that acts through a variety of individuals who may shift over time as members and governments are elected and defeated.

The second source is employment in a public administration. The rules of conduct for public servants provide a better fit to the work of legislative counsel, but there are some aspects related to confidentiality that create unresolved tensions, particularly relating to the waiver of privilege. Tension is also sometimes created between public policy goals or political considerations, on the one hand, and legal constraints or legislative system considerations, on the other.

The third source is the role of legislative counsel. Although it has elements of service to a client, it also entails responsibilities as guardians of the statute book in maintaining the legislative system and respect for legal values. The latter largely represents how considerations of broader public or social interest are expressed in the context of legislative services. Even when this role is recognized in statute, it results in tension with some of the main drivers of the other two sources of professional responsibilities insofar as they are aligned principally with serving a client or achieving public policy objectives, as opposed to maintaining a functioning legislative system.

But tension is not such a bad thing. Just as the classical tripartite division of state power among the legislative, executive and judicial branches produces effective, democratically responsible government, so too a tension within the role of legislative counsel orients the business of drafting legislation toward the same result. This works because legislative counsel do not have the power to decide what the law is. They instead work with a host of others to shape it. Success in doing this effectively and in being faithful to all three sources of their professional responsibilities depends not only on knowing their craft, but also on commanding the respect and confidence of those they serve. And on this point, Reed Dickerson's advice quoted above bears repeating: "a draftsman who is deferential, decently reticent, candid and diplomatic can usually make much policy in the service of his client."

Appendix 1 – Selected Professional Rules for Public Sector Counsel

*Canadian Bar Association Code of Professional Conduct*¹⁰⁷

<http://www.cba.org/CBA/activities/code/>

Interpretation

“client” means the person who

(i) consults a lawyer and on whose behalf the lawyer renders or undertakes to render legal services; or

(ii) having consulted a lawyer, has reasonably concluded that the lawyer has agreed to render legal services.

In the case of an individual who consults the lawyer in a representative capacity, the client is the person, corporation, partnership, organization, or legal entity that the individual is representing.

The term client does not extend to persons involved in, associated with, or related to a client such as:

(i) parent companies, subsidiaries or other entities associated or affiliated with a client, or directors, shareholders [or] employees of a client,

(ii) members of unincorporated clients such as trade associations, partnerships, joint ventures and clubs,

(iii) family members of a client, unless there is objective evidence to demonstrate that the related person reasonably concluded that a lawyer-client relationship would be established between the lawyer and that person;

“person” includes a corporation or other legal entity, an association, partnership or other organization, the Crown in right of Canada or a province or territory and the government of a state or any political subdivision thereof.

Chapter IV – Confidential Information

Confidential Information from Government Sources

16. A lawyer who has information known to be confidential information about a person from government sources, acquired when the lawyer was a public officer or employee, shall not represent a client (other than the agency of which the lawyer was a public officer or employee) whose interests are adverse to that person in a matter in which the information could be used to that person’s material disadvantage.

Chapter V – Impartiality and Conflict of Interest between Clients

Transfers

25. Paragraphs 26 to 29 do not apply to a member employed by the federal, a provincial or a territorial Attorney General or Department of Justice who, after

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transferring from one department, ministry or agency to another, continues to be employed by that Attorney General or Department of Justice.¹⁹

¹⁹ B.C. 6(7.3); N.S. 6a-3; Ont. 2.05(3).

Chapter X – The Lawyer in Public Office

RULE

The lawyer who holds public office should, in the discharge of official duties, adhere to standards of conduct as high as those that these rules require of a lawyer engaged in the practice of law.¹

Commentary

Guiding Principles

1. The Rule applies to the lawyer who is elected or appointed to legislative or administrative office at any level of government, regardless of whether the lawyer attained such office because of professional qualifications.² Because such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by failure on the lawyer's part to observe its professional standards of conduct.³

Conflicts of Interest

2. The lawyer who holds public office must not allow personal or other interests to conflict with the proper discharge of official duties. The lawyer holding part-time public office must not accept any private legal business where duty to the client will or may conflict with official duties. If some unforeseen conflict arises, the lawyer should terminate the professional relationship, explaining to the client that official duties must prevail. The lawyer who holds a full-time public office will not be faced with this sort of conflict, but must nevertheless guard against allowing the lawyer's independent judgment in the discharge of official duties to be influenced by the lawyer's own interest, or by the interests of persons closely related to or associated with the lawyer, or of former or prospective clients, or of former or prospective partners or associates.⁴

In the context of the preceding paragraph, persons closely related to or associated with the lawyer include a spouse, child, or any relative of the lawyer (or of the lawyer's spouse) living under the same roof, a trust or estate in which the lawyer has a substantial beneficial interest or for which the lawyer acts as a trustee or in a similar capacity, and a corporation of which the lawyer is a director or in which the lawyer or some closely related or associated person holds or controls, directly or indirectly, a significant number of shares.⁵

Subject to any special rules applicable to a particular public office, the lawyer holding such office who sees the possibility of a conflict of interest should declare such interest at the earliest opportunity and take no part in any consideration, discussion or vote with respect to the matter in question.⁶

Appearances before Official Bodies

3. When the lawyer or any of the lawyer's partners or associates is a member of an official body such as, for example, a school board, municipal council or governing body, the lawyer should not appear professionally before that body. However, subject to the rules of the official body, it would not be improper for the lawyer to appear professionally before a committee of such body if such partner or associate is not a member of that committee.⁷
4. The lawyer should not represent in the same or any related matter any persons or interests that the lawyer has been concerned with in an official capacity. Similarly, the lawyer should avoid advising upon a ruling of an official body of which the lawyer either is a member or was a member at the time the ruling was made.

Disclosure of Confidential Information⁸

5. By way of corollary to the Rule relating to confidential information (*Chapter IV*), the lawyer who has acquired confidential information by virtue of holding public office should keep such information confidential and not divulge or use it even though the lawyer has ceased to hold such office. As to the taking of employment in connection with any matter in respect of which the lawyer had substantial responsibility or confidential information, see commentary 3 of the Rule relating to avoiding questionable conduct (*Chapter XIX*).⁹

Disciplinary Action

6. Generally speaking, a governing body will not be concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely upon the lawyer's integrity or professional competence may subject the lawyer to disciplinary action.¹⁰

¹ Alta. 12-S.O.P.; ABA-MC 8.8; DR 8-101(A); ABA-MR 1.11; N.B. 17-R; N.S. R-16; Ont. 6.05(1); Que. 3.05.09.

² Common examples include Senators, Members of the House of Commons, members of provincial legislatures, cabinet ministers, municipal councillors, school trustees, members and officials of boards, commissions, tribunals and departments, Code of Professional Conduct 73 commissioners of inquiry, arbitrators and mediators, Crown prosecutors and many others. For a general discussion, see Woodman, "The Lawyer in Public Life", Pitblado Lectures (Manitoba, 1971), p. 129.

³ Ont. 6.05(1) Commentary; N.S. R-16 Guiding Principles, C-16.1.

⁴ ABA-MR 1.11(d); N.B. 17-C.2(a), (b), (c); N.S. C-16.2; Ont. 6.05(2) Commentary.

⁵ N.S. C-16.4.

⁶ N.B. 17-C.3; N.S. C-16.5; Ont. 6.05(2) Commentary.

⁷ N.B. 17-C.4; N.S. C-16.6; Ont. 6.05(4).

⁸ ABA-MC 9-101(A), (B); N.B. 17-C.5(a), (b); N.S. C-16.8; Ont. 3.05.10 Commentary.

⁹ ABA-MR 1.11(c); N.B. 17-C.6; N.S. C-16.8; Ont. 6.05(5) Commentary.

¹⁰ N.B. 17-C.9; N.S. C-16.9. In *Barreau de Montreal v. Claude Wagner* (1968), Q.B. 235 (Que. Q.B.) it was held that the respondent, then provincial Minister of Justice, was not subject to the disciplinary jurisdiction of the Bar in respect of a public speech in which he had criticized the conduct of a judge because he was then exercising his official or “Crown” functions. In *Gagnon v. Bar of Montreal* (1959), B.R. 92 (Que.) it was held that on the application for readmission to practice by a former judge, his conduct while in office might properly be considered by admissions authorities.

Law Society of Alberta Code of Professional Conduct

<http://www.lawsocietyalberta.com/resources/codeProfConduct.cfm>

CHAPTER 12

THE LAWYER IN CORPORATE AND GOVERNMENT SERVICE

STATEMENT OF PRINCIPLE

A lawyer in corporate or government service has a duty to act in the best interests of the corporation or government, as they are perceived by the corporation or government, subject to limitations imposed by law or professional ethics.

RULES

1. A lawyer in corporate or government service must consider the corporation or government to be the lawyer's client.
2. A lawyer may act in a matter for another employee of a corporation or government only if the requirements of Rule #2 of Chapter 6, *Conflicts of Interest*, are satisfied.
3. If a lawyer while acting for a corporation or government receives information material to the interests of the corporation or government, the lawyer must disclose the information to an appropriate authority in the corporation or government.
4. A lawyer must not implement instructions of a corporation or government that would involve a breach of professional ethics or the commission of a crime or fraud.

COMMENTARY

General

G.1 *Definitions and application:* For the purposes of this chapter, "corporation" is to be interpreted broadly and includes a sole proprietor, partnership, joint venture, society and unincorporated association. Similarly, "government" is to be understood in its broadest sense. A lawyer working in a division, department or agency of the government or in a corporation ultimately controlled by the Crown is considered to be working for the government as a whole as opposed to that division, department, agency or corporation. See Commentary 1 for a more detailed discussion of client identification.

G.2 While the ethical standards that apply to lawyers in corporations and government are the same as those applying to other lawyers, the existence of an employment relationship may generate issues that do not normally arise in private practice. The rules and commentary of this chapter are intended to assist such counsel in identifying and resolving some of these concerns. Lawyers in corporations and government may perform functions other than acting as lawyers. In this regard, see Chapter 15, *The Lawyer in Activities Other Than the Practice of Law*.

G.3 *Termination of employment:* A lawyer who leaves the employ of a corporation or government is governed by Rule #3 of Chapter 6, *Conflicts of Interest*, with respect to ability to subsequently act against the former employer. In addition, Rule #4 of that chapter applies if a lawyer moves during the currency of a matter to a firm representing another party to the matter. See also Chapter 7, *Confidentiality*, respecting a lawyer's obligations of confidentiality.

R.1 A lawyer in corporate or government service must consider the corporation or government to be the lawyer's client.

C.1 The client of a lawyer employed by a corporation is the corporation itself and not the board of directors, a shareholder, an officer or employee, or another component of the corporation. Likewise, the client of a lawyer employed by the government is the government itself and not a board, agency, minister or Crown corporation.

As an internal matter, a corporate or government client usually provides specific instructions regarding the lawyer's duties and responsibilities. These instructions may include a direction to accept instructions from and report to a particular person or group within the client; to keep

certain information confidential from other persons or groups within the client; or to act for more than one of its components, in circumstances that would constitute a multiple representation if the corporation or government as a whole were not the client. A corporate or government lawyer is entitled to act in accordance with such instructions until they are countermanded or rescinded by the client. Since a corporation or government must act through human agents, however, counsel must be satisfied that those purporting to speak for the client have the authority to do so and that the instructions they convey are in the best interests of the client, as perceived by the client based on considerations including legal advice. Independent inquiry or verification is seldom necessary when instructions have been received through normal channels and contain no unusual or questionable elements. The risk of inaccurate or unauthorized instructions may also lessen as organizational size and complexity decrease since the interests of the person instructing the lawyer may be more closely identified with those of the client itself.

R.2 A lawyer may act in a matter for another employee of a corporation or government only if the requirements of Rule #2 of Chapter 6, *Conflicts of Interest*, are satisfied.

C.2 A corporate or government lawyer may be requested to perform legal services in circumstances in which another employee of the corporation or government expects that the lawyer will be protecting that person's interests. In some situations, it may appear that the corporation or government has no substantial interest in the matter, such as the purchase of a house by an employee. In other situations, such as the preparation of an employment contract, the corporation or government clearly has an interest that differs from that of the employee. In still others, such as the defence of both parties on a criminal or quasi-criminal charge, the corporation or government and the employee may seem to have a common interest. In any of these cases, however, the lawyer may acquire information from one party that could be significant to the other. Before the lawyer undertakes the representation, therefore, the parties must agree that there will be a mutual sharing of material information. The other requirements of Rule #2 of Chapter 6, *Conflicts of Interest*, must also be satisfied. For example, the lawyer must:

- determine that the representation is in the best interests of both parties after consideration of all relevant factors;
- stipulate that the lawyer will be compelled to cease to act in the matter if a dispute develops, unless at that time both parties consent to the lawyer's continuing to represent the corporation or government in the matter;
- obtain the consent of the parties based on full and fair disclosure of the advantages and disadvantages of the lawyer's acting versus the engagement of outside counsel. If the employee involved is (for example) the president of a corporate client, the consent of the corporation required by Rule #2 of Chapter 6, *Conflicts of Interest*, must issue from someone other than the president, such as the board of directors. If the lawyer considers the risk of divergence of interests to be high, or if one of the parties is unwilling to agree to the mutual sharing of material information, the employee must retain independent counsel. Rule #2 and this commentary also apply in principle when a corporate or government lawyer is requested to represent a third party, such as an affiliated corporation or joint venturer, having an association with the corporation or government but not forming part of it.

R.3 If a lawyer while acting for a corporation or government receives information material to the interests of the corporation or government, the lawyer must disclose the information to an appropriate authority in the corporation or government.

C.3 It is usual to convey material information respecting the interests of a corporate or government client to the person to whom the lawyer normally reports. However, there may be circumstances in which reporting information to that individual would be ineffective or inappropriate. For example, the information may relate to misconduct by that person, or the person may have a history of refusing or failing to deal with similar information in a proper manner. In such a situation, the lawyer should report the information to other, usually more

senior, authorities within the client until satisfied that the information has been conveyed to someone who will give it appropriate consideration. If a lawyer, after taking all reasonable steps to protect the client's interests, receives instructions that would involve a breach of professional ethics or the commission of a crime or fraud, the lawyer may be compelled to withdraw from the representation. (see Commentary 4) With respect to reporting a matter to authorities outside the client, see Rule #8(c) of Chapter 7, *Confidentiality*.

R.4 A lawyer must not implement instructions of a corporation or government that would involve a breach of professional ethics or the commission of a crime or fraud.

C.4 Like other lawyers, corporate and government counsel must refuse to engage in conduct that violates professional ethics. The fact that such a stand may create conflict with the client or jeopardize one's position or opportunity for advancement is not relevant from an ethical perspective. Rule #10 of Chapter 9, *The Lawyer as Advisor*, and Rule #2(a) of Chapter 14, *Withdrawal and Dismissal*, provides that withdrawal is mandatory when a client persists in instructions constituting a breach of ethics. In private practice, withdrawal is understood to mean ceasing to act in a particular matter and does not necessarily preclude a lawyer's continuing to act in other matters for the same client. Similarly, a corporate or government lawyer may "withdraw" from a given matter by refusing to implement the client's instructions in that matter, while continuing to advise the corporation or government in other respects. In the case of a profound and fundamental disagreement between lawyer and client or a pervasive institutional policy of illegality, withdrawal may also entail resignation. In most cases, however, a preferable approach is to refer the contentious matter to outside counsel, seek alternative instructions from other levels of authority in the corporation or government, or take similar action that falls short of resignation. It is a breach of ethics for a lawyer to act when the services rendered will not be competent. (see Chapter 2, *Competence*) Competence is an issue that arises in corporate and government practice as well as in private practice, particularly when a lawyer is requested by the client to provide services that are unusual or outside the scope of the lawyer's normal duties. Corporate and government counsel should therefore be aware of the issue of competence and take such steps as are necessary to ensure that the lawyer is able to satisfy in each matter undertaken the various aspects of competence described in Chapter 2, *Competence*. With respect to instructions of a corporation or government that would involve the commission of a crime or fraud, see Commentary 11 of Chapter 9, *The Lawyer as Advisor*.

Law Society of Upper Canada Rules of Professional Conduct

<http://www.lsuc.on.ca/regulation/a/profconduct/>

Rule 2 – Relationship to Clients, Quality of Service, Honesty and Candour

Honesty and Candour

2.02 (1) When advising clients, a lawyer shall be honest and candid.

Commentary

The lawyer's duty to the client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law, and the lawyer's own experience and expertise.

The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.

When Client an Organization

2.02(1.1) Notwithstanding that the instructions may be received from an officer, employee, agent, or representative, when a lawyer is employed or retained by an organization, including a corporation, in exercising his or her duties and in providing professional services, the lawyer shall act for the organization.

Commentary

A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors, and employees. While the organization or corporation will act and give instructions through its officers, directors, employees, members, agents, or representatives, the lawyer should ensure that it is the interests of the organization that are to be served and protected. Further, given that an organization depends upon persons to give instructions, the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority.

In addition to acting for the organization, the lawyer may also accept a joint retainer and act for a person associated with the organization. An example might be a lawyer advising about liability insurance for an officer of an organization. In such cases the lawyer acting for an organization should be alert to the prospects of conflicts of interest and should comply with the rules about the avoidance of conflicts of interest (rule 2.04).

6.05 THE LAWYER IN PUBLIC OFFICE

Standard of Conduct

6.05 (1) A lawyer who holds public office shall, in the discharge of official duties, adhere to standards of conduct as high as those that these rules require of a lawyer engaged in the practice of law.

Commentary

The rule applies to a lawyer who is elected or appointed to a legislative or administrative office at any level of government, regardless of whether the lawyer attained the office because of professional qualifications. Because such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by a failure to observe its ethical standards.

Generally, the Society will not be concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely upon the lawyer's integrity or professional competence may be the subject of disciplinary action.

Conflict of Interest

6.05 (2) A lawyer who holds public office shall not allow professional or personal interests to conflict with the proper discharge of official duties.

Commentary

The lawyer holding part-time public office must not accept any private legal business where duty to the client will, or may, conflict with official duties. If some unforeseen conflict arises, the lawyer should terminate the professional relationship, explaining to the client that official duties must prevail. The lawyer who holds a full-time public office will not be faced with this sort of conflict but must nevertheless guard against allowing independent judgment in the discharge of official duties to be influenced either by the lawyer's own interest, that of some person closely related to or associated with the lawyer, that of former or prospective clients, or former or prospective partners or associates.

Subject to any special rules applicable to the particular public office, the lawyer holding the office who sees that there is a possibility of a conflict of interest should declare the possible conflict at the earliest

opportunity, and not take part in any consideration, discussion or vote concerning the matter in question.

6.05 (3) If there may be a conflict of interest, a lawyer who holds or who held public office shall not represent clients or advise them in contentious cases that the lawyer has been concerned with in an official capacity.

Appearances before Official Bodies

6.05 (4) Subject to the rules of the official body, when a lawyer or any of his or her partners or associates is a member of an official body, the lawyer shall not appear professionally before that body.

Commentary

Subject to the rules of the official body, a partner or associate may appear professionally before a committee of the official body if the partner or associate is not a member of that committee, provided that in respect of matters in which the partner or associate appears, the lawyer does not sit on the committee, take part in the discussions of the committee's recommendations, or vote upon them.

Conduct after Leaving Public Office

6.05 (5) A lawyer who has left public office shall not act for a client in connection with any matter for which the lawyer had substantial responsibility before leaving public office.

Commentary

It would not be improper for the lawyer to act professionally in the matter on behalf of the public body in question.

A lawyer who has acquired confidential information by virtue of holding public office should keep the information confidential and not divulge or use it, notwithstanding that the lawyer has ceased to hold such office.

Barreau de Québec – Code de déontologie

<http://www.barreau.qc.ca/quebec/3/5/default.asp>

SECTION III –

DEVOIRS ET OBLIGATIONS ENVERS LE CLIENT

§ 5. Indépendance et désintéressement

3.05.09. L'avocat qui occupe une fonction publique ne doit pas:

- a) tirer profit de sa fonction pour obtenir ou tenter d'obtenir un avantage pour lui-même ou pour un client lorsqu'il sait ou s'il est évident que tel avantage va à l'encontre de l'intérêt public;
- b) se servir de sa fonction pour influencer ou tenter d'influencer un juge ou un tribunal afin qu'il agisse en sa faveur ou en faveur de la société au sein de laquelle il exerce ses activités professionnelles, d'une personne au sein de cette société ou du client;
- c) accepter un avantage de qui que ce soit alors qu'il sait ou qu'il est évident que cet avantage lui est consenti dans le but d'influencer sa décision à titre d'employé public.

R.R.Q., 1981, c. B-1, r. 1, a. 3.05.09; D. 351-2004, a. 42.

Appendix 2 – Values and Ethics Code for the Public Service (Canada)

http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TB_851/vec-cve1_e.asp#_Toc46202800

Chapter 1

Public Service Values

Public servants shall be guided in their work and their professional conduct by a balanced framework of public service values: democratic, professional, ethical and people values.

These families of values are not distinct but overlap. They are perspectives from which to observe the universe of Public Service values.

Democratic Values: *Helping Ministers, under law, to serve the public interest.*

- Public servants shall give honest and impartial advice and make all information relevant to a decision available to Ministers.
- Public servants shall loyally implement ministerial decisions, lawfully taken.
- Public servants shall support both individual and collective ministerial accountability and provide Parliament and Canadians with information on the results of their work.

Professional Values: *Serving with competence, excellence, efficiency, objectivity and impartiality.*

- Public servants must work within the laws of Canada and maintain the tradition of the political neutrality of the Public Service.
- Public servants shall endeavour to ensure the proper, effective and efficient use of public money.
- In the Public Service, how ends are achieved should be as important as the achievements themselves.
- Public servants should constantly renew their commitment to serve Canadians by continually improving the quality of service, by adapting to changing needs through innovation, and by improving the efficiency and effectiveness of government programs and services offered in both official languages.
- Public servants should also strive to ensure that the value of transparency in government is upheld while respecting their duties of confidentiality under the law.

Ethical Values: *Acting at all times in such a way as to uphold the public trust.*

- Public servants shall perform their duties and arrange their private affairs so that public confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced.
- Public servants shall act at all times in a manner that will bear the closest public scrutiny; an obligation that is not fully discharged by simply acting within the law.

- Public servants, in fulfilling their official duties and responsibilities, shall make decisions in the public interest.
- If a conflict should arise between the private interests and the official duties of a public servant, the conflict shall be resolved in favour of the public interest.

People Values: *Demonstrating respect, fairness and courtesy in their dealings with both citizens and fellow public servants.*

- Respect for human dignity and the value of every person should always inspire the exercise of authority and responsibility.
- People values should reinforce the wider range of Public Service values. Those who are treated with fairness and civility will be motivated to display these values in their own conduct.
- Public Service organizations should be led through participation, openness and communication and with respect for diversity and for the official languages of Canada.
- Appointment decisions in the Public Service shall be based on merit.
- Public Service values should play a key role in recruitment, evaluation and promotion.