Duties & Ethical Challenges of Government Lawyers

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Duties of Government Lawyers

1. Shared Duties* of all Members of the Bar
   * Law Society Acts & Codes of Professional Conduct +
   * Duty of Care under negligence law

2. Public Law Duties
   CLIENT: Crown through Elected Government(s)

3. Public Service Duties
   Government Lawyer
Sources of Public Law Duties:

1. History of Attorney General dating back to 13th century

2. “constitutional dimension”

3. *Department of Justice Act* + other acts
   (analogous legislation in provinces/territories)
Statutory Framework of Public Law Duties

- *Department of Justice Act*, RSC 1985, c J-2
  
  +

- *Canadian Bill of Rights*, SC 1960, c 44, s 3
- *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*, SC 1985, c 26, s 93
- *Statutory Instruments Act*, SC 1985, c S-22
- *Federal Accountability Act* SC 2006, c 9, s 121
- *Director of Public Prosecutions Act*, SC 2006, c 9, s 121
- *Government Contract Regulations*, SOR/87-402, s 4
  
  Plus ...
Public Law Duties:

• Support Minister’s role as official legal adviser of Governor General

• Support the Minister’s role as legal member of Cabinet

• “See that the administration of public affairs is in accordance with the law” encapsulated as “guardian of the rule of law”

• Advise Crown and heads of department on all matters of law

• Examine all government bills and proposed regulations for inconsistencies with Charter & Canadian Bill of Rights and support Minister’s duty to report inconsistency to the House of Commons
Public Law Duties

• Continue, through office of Minister of Justice, **public law duties associated with historic, constitutional office of Attorney General**

• **Regulate and conduct all Crown litigation**, encapsulated as “guardian of the public interest” before the Courts

• **Have superintendence of all matters**, largely policy in nature, **connected with administration of justice** not within provincial jurisdiction

• Carry out **additional assigned responsibility**, e.g. drafter of government legislation & **“Keeper of the Statute Book”**
Institutional Exercise of Public Law Duties: Implications

1. Government lawyers act on behalf of Minister.

2. Minister remains constitutionally responsible.

3. Government Lawyers are Public Servants = additional public service duties
Additional Public SERVICE Duties

- Common Law & Constitutional Duty of Loyalty & neutrality

  *Osborne v. Canada (Treasury Board)*, 1991 CanLII 60 (SCC)
  *Public Service Employment Act* SC 2003, c 22, Part 7

- Duties under statutes on all public servants
  e.g. Part IV of *Public Service Employment Act*, *Criminal Code*, ATIP

- Duties as conditions of employment
  e.g. *Values and Ethics Code for the Public Sector*
Ethical Challenge #1
Attorney General Independence

Exercising independence of Attorney General while Serving the Crown through Elected Government(s)
Ethical challenge #2
Meaning of
“Guardian of Rule of Law & Public Interest”

“to see that the administration of public affairs is in accordance with the laws”
Ethical Challenge #3
Understanding “Who is the Client?”

1. The Crown:
   Complexity of government
   +
   Consistency of Advice to Government(s)

2. Obligations to Courts

3. Obligations to Parliament/Legislatures
Ethical Challenge #4
Understanding Unique Aspects of Practice of Law

Illustrations:

1. Duty of Candour & Competence: Focus on Public Law & Public Interest + Broad Public Ramifications

2. Duties of Loyalty: three distinct sources

3. Taking “Instructions”

4. Legal Risk Management
John Edwards (1977)  
as true today as then ...

“There remains … the ongoing task of educating all sections of society, not the least of these being the members of legislative assemblies and members of the legal professions, as to the powers and restraints that must constantly engage the Attorney General in making the decisions that lie at the very heart of the administration of justice.”