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Duties & Ethical Challenges of Government Lawyers

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December 13, 2013

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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



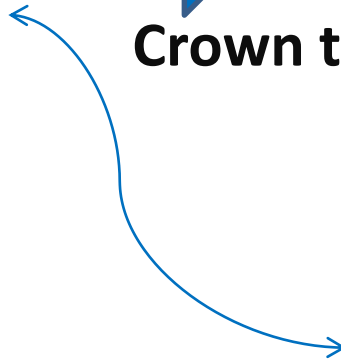
CLIENT:

2. Public Law Duties

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 of 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**

Fraser v. P.S.S.R.B., 1985 CanLII 14 (SCC)

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.”