THE ROLE OF THE FEDERAL PUBLIC SECTOR LAWYER: FROM POLYESTER TO SILK

Deborah MacNair*

Government lawyers are bound to adhere to standards of conduct as high as those required by rules of professional conduct of lawyers engaged in private practice. Many of the ethical problems they encounter, however, are peculiar to public service. These include such fundamental issues as, who is the client of government lawyers? Are government lawyers limited in their choice of forensic strategies in ways in which lawyers in private practice are not?[1]

Introduction

The role of public sector lawyers has evolved in the last twenty years. There has been a noticeable coming together of professional practices, customs and beliefs for those who identify themselves professionally as public sector, or "government," lawyers. The image of the public servant lawyer has changed for various reasons, including how government conducts business and the increased awareness of this practise of law as a career.[2] While some knowledge and professional standards are shared among all members of the legal profession, whatever is the nature of their practice, there are some differences. The purpose of this paper is to explore these similarities and differences further in order for members of the legal profession to learn more about the role of the public sector lawyer.

Why the change? Some might say that the change is the result of the maturing

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* Ms. MacNair is a Corporate Counsel with the Department of Justice in Ottawa.

[1] G. MacKenzie, *Lawyers & Ethics, Professional Responsibility and Discipline* (Toronto: Carswell, 1993) at 21-1.

[2] "Public sector lawyer" is often synonymous with "government lawyer" or "Crown lawyer." The expression includes lawyers employed by municipal, provincial, territorial and federal governments. The expression "quasi-public sector" is often used to describe lawyers employed by universities and hospitals. The group of lawyers who work as in-house counsel to corporations and other privately funded organizations are still described as corporate counsel although within government "corporate counsel" may also be used to distinguish the general legal practitioner in a legal service from other specialists. In 1996 it was estimated that there were approximately 10,000 public sector lawyers: see "Calling all public sector lawyers," (Volume 5, No. 3, May 1996) *The National* (Ottawa: Canadian Bar Association, 1996) at 38. See generally the website of Industry Canada for some insight on how government does business with the private sector: <www.ic.gc.ca>, government initiatives.

of a distinct professional component of the legal profession and recognition from within the profession that lawyers are no longer a homogeneous group supported by one culture. For others it is a natural evolution of a professional body that is necessitated by, and mirrors, the development of the complex role of the Crown in society. Still others view recent developments as a change in attitude from within the public sector professional corps itself, a transformation from the belief that their practice is non-traditional, and unrelated to private practice, to acceptance by practitioners of having a legitimate, credible role in the practice of law. The debate is more important now as recognition is given to the role of the public sector lawyer not only from within the legal profession but also by professional associations. This coming of age is at a time when, some would argue, the legal profession - and lawyers generally - is under siege. Lawyers are positioning themselves for the new century. Multidisciplinary partnerships, increased specialization, and the gradual disappearance of sole practitioners in favour of large firms are symptoms of a larger dilemma. Central to this movement is the ongoing debate about whether lawyering is a profession or a business and if the adherence to the rule of law, and the neutrality that stance requires, is still realistic.

The public sector lawyer at the federal level is a specialized and unique practice. While there are many different types of public sector lawyers, this paper will focus on those who work for the federal Department of Justice. Part 1 contains a brief overview of the role of the public sector lawyer in general. Part 2 continues with some observations on the legal and policy framework of government and the Department of Justice. Some examples of how Justice lawyers practice law are included in Part 3 to illustrate the variety of their legal practice. There is also a brief discussion of some of the unique implications, including solicitor-client privilege, obligations under statute and conflict of interest. The conclusion in Part 4 will be a brief overview of some of the similarities and differences between the public sector and private practitioner.

Part 1: The Public Sector Lawyer

Who is a Public Sector Lawyer?

Perception and myth have followed the image of most public sector lawyers

throughout their career[3] as traditionally the practice of law has been viewed largely through the eyes of the private practitioner. This is not surprising, for several reasons. As the opening quotation to this paper demonstrates, there has even been an issue of whether public sector lawyers would follow a lower ethical and professional standard than their private sector counterparts in the legal profession. This is so because, in part, training for lawyers in law schools and bar admission courses has been designed for the lawyer working in the private law firm. In addition, the current understanding of lawyering has been fashioned to reflect the reality of employment opportunities in the last twenty years, with the emphasis being on the income and other benefits of a private sector practice. Public sector lawyering has been treated as an alternative career, about which little is known or understood, rather than as a mainstream practice. This is complicated, in part, by two things. Public sector lawyers are public servants whose main characteristic is anonymity. Also, public sector lawyers are largely hidden from view except to the extent the public reads about them during a highly publicized trial or commission of inquiry.

However, as a result of several changes to policy within government, active recruitment by government and the increased participation of public sector lawyers in many professional organizations,[4] their image has changed. Considerable effort has been made throughout the federal government, through exercises such as La Relève,[5] to encourage the public to look at the public service as a professional corps. A side benefit of this effort may be, in the case of lawyers, to dispel some myths with the current image of the public sector lawyer and replace it by that of the professional public servant and legal specialist who now holds a legitimate place in the legal profession.

And understandably so. In the past the legal profession has focussed on

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[3] "Lies, damn lies or just statistics," (February 19 - 25, 1996) *Law Times* (Toronto, 1996) 6; A. Nowack, "Editorial unfair to Crown lawyers" (March 11 - 17, 1996) *Law Times* (Toronto, 1996) 7; J. Coop, "Editorial showed astounding ignorance," (March 11 - 17, 1996) *Law Times* 6; "Soldiering on: Crown attorneys struggle to cope," (Volume 5, No.3, May, 1996) *The National* (Ottawa: Canadian Bar Association, 1996) 11; M. Goulet and B. Bonneville, "Canadians in Abundance" (November 1 - 7, 1999) *Law Times* (Toronto, 1996) 7.

[4] Public sector lawyers now have a formal conference which is aligned with the Canadian Bar Association. Military lawyers began their own section in August, 1999.

[5] La Relève is a government-wide exercise to encourage a renewal of the public service and to establish a workforce which reflects the core values of a professional corps. See: <http://publiservice.pco-bcp.gc.ca/compend1/cover_e.htm> (date accessed: March 30, 2001).

differences rather than similarities. This has been encouraged by treating the public sector practice of law as "non-traditional." However, with increasing pressure on the legal profession to change in so many other ways[6] it is timely to gain some perspective.

Definition

The terms "government lawyer," "Crown lawyer" and "public sector lawyer" are used interchangeably. However, the term "public sector lawyer" is broader than "Crown lawyer" and includes municipal lawyers. There is also some confusion about the terms "corporate counsel" and "government counsel." Corporate counsel work for private companies and Crown corporations. While it is true that corporate counsel share many of the characteristics of government counsel, they have a different role within the corporate setting. Some of the similarities are captured in a recent article by Timothy P. Terrell:

> ...Should we say that this corporate lawyer wears two hats? Too superficial. Serves two masters? A bit exaggerated. Is a jack of all trades but a master of none? Harsh and unnecessary. Perhaps, then, he or she simply has a split personality...I prefer anatomy and geography. The general counsel has one foot planted firmly in the shifting, treacherous terrain of the law, and the other planted just as firmly in the oozing swamp of business. The result is always challenging. Every general counsel teeters one way and then the other in an endless effort to remain standing. The natural response would be to bring one's feet together more securely in one world or the other.[7]

While public sector counsel who work in a legal advisory capacity share some of the characteristics of corporate counsel, they also have a unique focus because of the government environment in which they practice, which I will now describe briefly.

Role

There are at least four main characteristics that separate the public sector lawyer from the private practitioner. Unlike a lawyer in private practice, the public sector lawyer is always a salaried employee with fixed terms and conditions of

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[6] K. Roach and E. M. Iacobucci, "Multidisciplinary Practices and Partnerships: Prospects, Problems and Policy Options," (2000) 79 Can. Bar Rev. 1.

[7] T. P. Terrell, "Professionalism as Trust: The Unique Internal Legal Role of the Corporate General Counsel," (1997) 46, 3 Emory Law Journal 1.

employment. Secondly, the ultimate client is a legal entity, the Crown or the municipal corporation, and therefore the determination of who is the client can be a vexing, difficult issue in a public sector practice. Thirdly, while private lawyers can control the number of clients they choose to serve, keeping the professional rules of conduct and the practical realities of earning a living in mind, the client base for public sector lawyers is unlimited. Lastly, the role of the public sector lawyer is more closely linked to public service than that of the private practitioner. It is a natural allegiance. While on a daily basis the lawyer advises the Crown or the municipality, there is a broader, ill-defined notion of acting in the public interest in the case of the public sector lawyer. This obligation is in addition to the public interest obligations of any lawyer and which form part of the professional rules of conduct.[8]

Ultimately, the focus of practice between private and public sector lawyers is different. The private practitioner is operating a business and needs visibility to attract clients. Public sector lawyers are all salaried employees with a limitless and undefined client base, the Crown. Therefore the public sector lawyer does not need to undertake the same marketing and other business practices. More importantly, the work of public sector lawyers is behind the scenes as it is Ministers, as members of Cabinet, or the Prime Minister, as head of government, who present the views of government and who are visible. The most visible public sector lawyers are Crown prosecutors and civil litigators who appear regularly before the courts and administrative tribunals. However, their role may sometimes overshadow some of the other legal counsel functions within the public service.[9]

Part 2: The Legal and Policy Framework of Government

Introduction

There is a distinct, professional group of lawyers who serve the federal Crown. Some of the larger groups are those who work for the Department of Justice. There are other lawyers who work for the public service, including lawyers in departments,

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[8] See, for example, Law Society of Upper Canada, *Rules of Professional Conduct*, r. 18.

[9] Major Michael Gibson, "Military Legal Counsel, There's no life like it," (October 18 - 24, 1999) *Law Times* (Toronto, 1996) 6.

Crown corporations and administrative tribunals.[10] Broadly defined, the federal public sector lawyer is a lawyer who provides advice to the federal Crown and who is paid out of the Consolidated Revenue Fund. This does not include those who are trained as lawyers but who work for government in some other capacity. The main employer of lawyers within government is the Treasury Board and lawyers are appointed, as are other public servants, under the *Public Service Employment Act*.[11] Other employers, some of whom are referred to as separate employers, also hire lawyers and they include the military, the RCMP,[12] the courts, administrative boards, commissions and tribunals, parliament, commissions of inquiry and Crown corporations.

The legal and policy framework requires an understanding of government, some constitutional and employment law, and a myriad of laws and policies that form the underpinnings of this very unique practice of law. I will begin first with a brief review of the nature of government before discussing in more detail the nature of a public sector lawyer's role.

Mandate and Organization

Government

It is crucial for the public sector lawyer to understand the nature of government. The most basic issue for public sector lawyers, as mentioned previously, is the determination of who is the client.[13]

Aside from the *Constitution*,[14] the core statutes that are helpful in defining

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[10] Some examples include Veterans Affairs (Bureau of Pension Advocates), the Canadian International Trade Tribunal, the Judge Advocate General (National Defence), the Canadian Human Rights Commission, the Office of the Information and Privacy Commissioners, the Senate and House of Commons.

[11] R.S.C. 1985, c. P-33.

[12] In the case of *Delisle* v. *Canada (Deputy Attorney General)*, (1999) 176 D.L.R. (4th) 513 (S.C.C.), the Supreme Court of Canada decided that paragraph (e) of the definition of "employee" of the *Public Service Staff Relations Act* and Part I of the *Canada Labour Code*, which exclude RCMP members from forming an employee association, does not infringe the *Charter*.

[13] *Supra* note 1.

[14] *Constitution Act, 1982* [hereinafter the *Constitution*].

government are the *Financial Administration Act*,[15] the *Public Service Employment Act*[16] and the *Public Service Staff Relations Act*.[17] It is the *Financial Administration Act*[18] that helps to define what is included in "government" and provides authority to act in matters of personnel and financial management. The *Public Service Employment Act*[19] is the main governance statute for rules relating to the hiring of public servants. The *Public Service Staff Relations Act*[20] establishes the staff relations framework for government, including the structure of employee organizations and the right to grieve.

The Canadian constitutional structure has three basic components, the Executive, the Legislature and the Judiciary. While there are those who argue that there is no clear separation of powers,[21] and that there is overlap between these three branches, the current practice of law in government still proceeds on this assumption that there is a distinction. I will provide only a brief review here in order to set the stage for the discussion of the role of Justice lawyers.

Any analysis of government must begin with the Executive branch. The Executive is charged with governing and tending to the day to day administration of the country. The main source of legal authority is the *Constitution*:

> 9. The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.
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> 10. There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada; and the persons who are to be members of that Council shall be from Time to Time chosen and summoned by the Governor General and sworn in as Privy Councillors, and members thereof may be from Time to Time removed by the Governor General.
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> 11. All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and

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[15] R.S.C. 1985, c..F-11.

[16] *Supra* note 11.

[17] R.S.C. 1985, c. P-35.

[18] *Supra* note 15.

[19] *Supra* note 11.

[20] *Supra* note 17.

[21] P. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1985).

> Ireland, or of the Legislature of Nova Scotia, or New Brunswick, are at the Union vested in or exercisable by the respective Governors or Lieutenant Governors of those Provinces, with the advice, or with the advice and Consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any Number of Members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same continue in existence and capable of being exercised after the union in relation to the Government of Canada, be vested in and exercisable by the Governor General, with the advice and consent of or in conjunction with the Queen's Privy Council of Canada, or any member thereof, or by the Governor General individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of Canada....
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> 17. There shall be One Parliament for Canada, consisting of the Queen, an Upper House and styled the Senate, and the House of Commons.[22]

The Crown, a legal fiction which embodies the legal administration of the state, is at the head of the constitutional system and is represented in Canada by the Queen's representative, the Governor General. The Crown is not an easy concept to define because its meaning varies according to the context. It is generally accepted that the "Crown" is treated as a natural person and a legal entity which is reflected in the various expressions used to describe the concept, including "the state," "the Sovereign," "the government," and "Her Majesty."[23] This distinction is important for federal lawyers to comprehend because there is a body of case and statute law which flows from this concept, including the capacity of the Crown to enter into contracts and to sue and be sued.[24] Similarly, the Governor General still performs legal functions that lawyers cannot overlook. The Governor General is present in Parliament for the formal passage of legislation into law and gives legal effect to all Orders in Council, which are recommendations from Cabinet to the Crown.[25]

There is no single statute in which one can find a definition of "government" or "public service." With respect to the administration of government, the *Financial*

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[22] Supra, note 14.

[23] P. Lordon, *Crown Law* (Toronto: Butterworths, 1991) at 2.

[24] *Crown Liability Act*, R.S.C. 1985 c. C-50.

[25] The responsibilities of the office of Governor General are set out in the *Letters Patent Constituting the Office of Governor General of Canada*, R.S.C. 1985, Document 31.

Administration Act[26] is the main starting point. The role of the Treasury Board, as a committee of Cabinet responsible for the treasury of government, and as employer of public servants, is described in this Act, and for that purpose the Schedules to the Act list the names of departments, departmental corporations and other bodies within government. The list is not exhaustive. The expression "public service" is found in both the *Public Service Employment Act*[27] and the *Public Service Staff Relations Act.*[28]

Concerning the Legislative branch, Parliament is the deliberative body responsible for making laws. The Minister of Justice is one of many departments that presents bills to Parliament. Both the House of Commons and the Senate employ lawyers. Some are legislative drafters and some are employed to provide legal advisory services. Legislative drafters who are employed by the Department of Justice cannot, as public servants, provide legal advice to, or draft private members' bills for, Parliament. However, they may appear before legislative committees, on behalf of Ministers, to provide background and factual information on a bill before Parliament.

Lastly, the Judiciary interprets the law and is responsible for supervising the actions of the Executive. Appointments are made by the Governor General on the advice of the Minister of Justice to the Prime Minister. The Federal Court of Canada, the Tax Court and the Supreme Court of Canada employ lawyers to assist with legal research and the editing of the case law reports. Department of Justice counsel appear before the courts as advocates and participate on joint rules committees but they do not have a direct legal advisory relationship to the courts.

The Minister of Justice and Attorney General of Canada

The Minister of Justice and Attorney General of Canada has a unique, dual role within government. This dual role is reflected in the work of the Department and in the role of Justice lawyers. Those lawyers who work for the Attorney General provide legal advisory services and institute civil and criminal proceedings on the Minister's behalf. Those lawyers who work in an advisory role prepare policy proposals and assist with the conduct of litigation.

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[26] *Supra* note 15.

[27] *Supra* note 11.

[28] *Supra* note 17.

There are two sections in the *Department of Justice Act* which describe this duality:

4. The Minister is the official legal adviser of the Governor General and the legal member of the Queen's Privy Council for Canada and shall

(a) see that the administration of public affairs is in accordance with law;

(b) have the superintendence of all matters connected with the administration of justice in Canada, not within the jurisdiction of the governments of the provinces;

(c) advise on the legislative Acts and proceedings of each of the legislatures of the provinces, and generally advise the Crown on all matters of law referred to the Minister by the Crown; and

(d) carry out such other duties as are assigned by the Governor in Council to the Minister....

4.1(1) Subject to subsection (2), the Minister shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and every Bill introduced in or presented to the House of Commons by a Minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity.

(2) A regulation need not be examined in accordance with subsection (1) if prior to being made it was examined as a proposed regulation in accordance with section 3 of the *Statutory Instruments Act* to ensure that it was not inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms.*

5. The Attorney General of Canada

(a) is entrusted with the powers and charged with the duties that belong to the office of the Attorney General of England by law or usage, in so far as those powers and duties are applicable to Canada, and also with the powers and duties that, by the laws of the several provinces, belonged to the office of attorney general of each province up to the time when the *Constitution Act, 1867*, came into effect, in so far as those laws under the provisions of the said Act are to be administered and carried into effect by the Government of Canada;

(b) shall advise the heads of the several departments of the Government on all

matters of law connected with such departments;

(c) is charged with the settlement and approval of all instruments issued under the Great Seal;

(d) shall have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada; and

(e) shall carry out such other duties as are assigned by the Governor in Council to the Attorney General of Canada.[29]

Some have argued that the roles of the Minister of Justice and the Attorney General pose an "institutional conflict of interest." On the one hand the Minister of Justice develops policy proposals for legislation and provides legal advisory services to the federal Crown; on the other hand, it is the Attorney General of Canada who must exercise his or her responsibilities in an independent matter and in the public interest. The Attorney General of England, Sir Hartley Shawcross, in 1951 had this to say:

> I think the true doctrine is that it is the duty of an Attorney-General, in deciding whether or not to authorise the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other considerations affecting public policy.
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> In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the Government; and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations, which might affect his own decision, and does not consist, and must not consist in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney-General, and he is not to be put, and is not put, under pressure by his colleagues in the matter.
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> Nor, of course, can the Attorney-General shift his responsibility for making the decision on to the shoulders of his colleagues. If political considerations which, in the broad sense that I have indicated, affect government in the abstract arise, it is the Attorney-General, applying his judicial mind, who has to be the sole judge of those

[29] R.S.C. 1985, c.J-2, as am. by *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*, R.S.C. 1985, c. 31 (1st supp) s. 93.

considerations.[30]

The impact of these provisions on the role of the Justice lawyer is significant and therefore a further breakdown of duties may help to provide some clarification.

As a Minister of the Crown, the Minister has administrative responsibilities. While the Deputy Minister carries out the daily work of the Department, it is the Minister who has overall legal management. Secondly, the Minister has political responsibilities for a riding, which are handled by the Minister's staff. The Minister must answer to constituents who elected him or her to office. Thirdly, the Minister examines all Bills introduced or presented to the House of Commons and reviews all regulations forwarded to the Clerk of the Privy Council Office under the *Statutory Instruments Act*[31] to ensure they conform to the *Bill of Rights*[32] and the *Charter*.[33] This power can be delegated to others. Fourthly, the Minister is the official legal advisor of the Governor General and the legal member of the Cabinet. Lastly, the Minister ensures that the administration of public affairs is in accordance with the law.

As Attorney General, the Minister is given all the powers and duties of Attorneys-General of England before Confederation in so far as they apply to Canada. This description is vague but notably among the powers handed down and which still apply today is the carriage of criminal prosecutions, some of which have been delegated to the provinces. It is the Attorney General who is the guardian of the integrity of the system of justice.

The Deputy Minister

The role of the Deputy Minister cannot be overlooked. The Deputy Minister is appointed by the Governor in Council as "deputy head of the Department." It is the Deputy Minister who presides over the Department on a daily basis, who provides continuity when the government changes, who is the main advisor to the Minister and who is the person in whose name litigation is conducted when documents, such

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[30] Quoted in the *Crown Counsel Policy Manual, The Independence of the Attorney General*, p. I-4-2. Available on-line at <http://canada.justice.gc.ca/en/dept/pub/index.htm> (date accessed: March 30, 2001). See also Debates of the Senate *The Role of the Minister of Justice and the Attorney General in Developing and Enforcing the Criminal Law*, Senator Flynn, October 18, 1979.

[31] R.S.C. 1985, c.S-22.

[32] *Canadian Bill of Rights*, S.C. 1960, c.44, reprinted in R.S.C. 1985, App. III.

[33] *Canadian Charter of Rights and Freedoms* [hereinafter the *Charter*].

as facta, are filed with the court. Generally, the Deputy Minister can exercise the same powers as the Minister except where a statute provides otherwise. As is the case for the Minister, the duality of the role is reflected in the title, "Deputy Minister and Deputy Attorney General of Canada." Some other functions include the supervision of the daily financial and personnel administration needs of the Department, with signing authority under the *Financial Administration Act*[34] and specific staffing functions for the hiring of employees under the *Public Service Employment Act*.[35] The provision of legal advice to the Minister and Attorney General of Canada, support and advice to the Minister on policy and program development and delivery of programs (e.g. crime prevention, firearms) are also important. The Deputy Minister appears before parliamentary and Cabinet committees with the Minister to provide advice and support. Participation in consultation on policy proposals and appearing on behalf of the Minister as a speaker at conferences and other public events are also part of the Deputy Minister's role.

The Department of Justice

The role of the Department of Justice within government has evolved since its inception in 1868 and will continue to do so in order to meet the ongoing needs of the Crown as the legal embodiment of the state. The Department has a long, rich history which is worthy of note. With the creation of Canada on July 1, 1867, Sir John A. MacDonald became the Attorney General of Canada and Minister of Justice. The role of Minister of Justice and Attorney General was formalized in legislation in May, 1868. The staff consisted of two barristers-at-law, a Deputy Minister, a clerk, a shorthand writer, an articling clerk and two messengers. The Department of Justice was housed in the East Block on the parliamentary common, a tradition which was maintained until December, 1998.[36] The Department provided legal opinions to other departments, reviewed provincial legislation and drafted and amended government bills. Generally private counsel conducted litigation. There were also other lawyers, who were employed by the Department, in each of the various departments to provide daily legal advice. Legal services were centralized in the Department in the 1960s. There were 42 lawyers in the Department by 1962, 250 lawyers in 1971 and almost 1800 in 2000.

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[34] *Supra* note 15.

[35] *Supra* note 11.

[36] The Department moved to 239 Wellington, which was part of the parliamentary common, until the move to the new quarters across the street at 284 Wellington in December, 1999.

What is the Role of the Department Today?

First of all, the Department is, like any other Department, an employer[37] within government. Like any corporation, employees are managed, furniture is bought, buildings are cleaned and libraries maintained. As mentioned previously,[38] the official who is both manager of the Department on a day to day basis, and advisor to the Minister, is the Deputy Minister.

Secondly, the Department also has its own internal organization. In tending to the legal needs of the Crown, the Department meets these needs from sea to sea, with a presence in three territories and ten provinces.[39] In order to provide legal services on site there are thirty-two legal service units, most of which are located in Departments in the national capital region. Where the Department cannot provide legal services with its own staff, legal agents, lawyers from private sector firms, are appointed as agents of the Attorney General.

Thirdly, the Department is a corporate citizen within government. In this respect the Department functions like any other government department, but with different priorities. In addition to the legal advisory, policy and litigation function described earlier,[40] the Department has its own programs and services. The Department also provides operational and policy support in a variety of ways. The Department administers programs and discretionary funds, including funding arrangements with the provinces and territories and various not-for-profit organizations, in the form of cost-sharing agreements, grants and contributions. The interception of federal monies to facilitate the collection of family support, the denial of licenses, such as passports, and the tracing of individuals who have been charged with abduction fall under a program administered by the department under the *Family Orders and*

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[37] Technically the Crown is the employer and Treasury Board is responsible for the overall management of the public service. I am referring to the Department as an employer in the sense that the Deputy Minister has the day to day management of the employee population. See the discussion *supra* pp. 126-129.

[38] *Supra* pages 130-133.

[39] See generally the Justice internet website at <http://canada.justice.gc.ca> (date accessed: March 30, 2001). The regional offices developed over time, beginning with Toronto in 1966, Vancouver and Montreal in 1967, Winnipeg in 1969, Halifax in 1970 and Edmonton, Saskatoon and the Northwest Territories throughout the 1970's. The Regional Office of Nunavut was opened in 1999.

[40] *Supra* note 38.

Agreements Enforcement Assistance Act.[41] Fourthly, the Department has a full range of administrative and advisory support services including communications, federal-provincial-territorial liaison, evaluation, audit and review. Lastly, the policy function includes the formulation of legislative proposals, particularly in the criminal and family law area. Some examples include proceedings of crime (money laundering), the child support guidelines and youth criminal justice.

The Department has undergone major organizational change in the past five years, similar to what has occurred in the private sector, to meet changing client needs. There are four sectors (the major organizational units), including Constitutional Affairs, Policy, Civil Law and Corporate Management, and Legal Operations, each reporting to the Deputy Minister. The two branches, Legislative Services and Communications and Executive Services, also report directly to the Deputy Minister.

The majority of lawyers are located in the Legal Operations Sector, which is the main operational arm of the Department and contains the legal services units, which are located in Departments and agencies across government, and the regional offices across the country.[42] The Civil Law and Corporate Management Sector has two mandates: the conduct of civil law matters (real property and litigation in the Province of Quebec) and the internal operations of the Department (e.g. management of the building, library, contracting, finance). The Policy Sector is the main policy development and program arm, the former including responsibility for changes to family and criminal law, and the latter including responsibility for such programs as crime prevention and the negotiation of legal aid agreements.

Part 3: The Federal Department of Justice

Employee profile

Public sector lawyers have a distinct profile. Justice lawyers form the main core of legal advisors to the Crown. They come from across the country and around the world.

Central to an understanding of the role of the public sector lawyer is that they

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[41] R.S.C. 1985, c.4 (2nd Supp.).

[42] The Quebec Regional Office is the only regional office which is not located in the Legal Operations Sector. It is found in the Civil Law and Corporate Management Sector.

wear different hats. Lawyers are employees of the Crown and they are paid out of the Consolidated Revenue Fund, or treasury, of government. The Crown has a right to dismiss its officers and servants at pleasure, subject to statute or contract. However, some other lawyers in government are governed by collective agreements.[43]

Justice lawyers are eligible for Queen's Counsel appointments in a province but there is also a similar appointment made at the prerogative of the federal Crown for lawyers, including those from the private sector, who provide legal services to the federal Crown. Currently there is a moratorium on the appointment of federal Queen's Counsel.

The Treasury Board is self-insured and the Department of Justice does not generally pay for professional insurance.[44] Instead, Justice lawyers are covered by the Treasury Board's *Policy on the Indemnification of and Legal Assistance for Crown Servants*.[45]

Public sector lawyers are required to maintain an active practising status with at least one law society in Canada as a condition of employment, an expense which, at the option of each employee, is paid for by the Department. The Department has its own discipline and grievance procedure. Justice lawyers do not belong to a union and they have a separate compensation plan. While lawyers who work for the Department of Justice are precluded from forming employee organizations, they have a right to grieve under the *Public Service Staff Relations Act*.[46]

Mobility is an advantage as it permits Justice lawyers to acquire different skills and knowledge. Justice lawyers tend to change jobs more frequently throughout their career as there are a variety of opportunities to change jobs within the Department. For example, since the Department is organized into legal services and regional offices, in addition to Headquarters, it is easier to transfer from one part of the Department to the other or to move to different parts of the country. There is added flexibility as the government has a variety of leave arrangements, including

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[43] See generally <http://canada.gc.ca> (date accessed: March 30, 2001).

[44] The Department still pays a portion of the professional indemnity insurance for lawyers in active practise in the Atlantic Regional Office in Nova Scotia.

[45] See generally the Treasury Board internet website at <http:// www.tbs-sct.gc.ca> (date accessed: March 30, 2001).

[46] *Supra* note 17.

exchanges with the private sector.[47]

The Department also has a long history of bilingualism and bijuralism.[48] Justice lawyers tend to be bilingual as the Department is governed by the *Official Languages Act*.[49] Lawyers may have civil law or common law training (or both) in recognition of the fact that there are two systems of law in the country. Sometimes special projects are undertaken, such as harmonizing federal law and civil law of the Province of Quebec. There is also the daily business of government. For example, notaires[50] from the Civil Law and Corporate Management Sector conduct the business of the Crown for property matters in the Province of Quebec.

Lawyers work with many other professionals, including criminologists, historians, accountants, human resource professionals, communications professionals, paralegals, engineers, policy analysts, sociologists and teachers. This brings a distinctive multidisciplinary approach to the legal work of the Department.[51] Justice lawyers are likely to belong to more than one law society because of the nature of the practice. As a result, Justice lawyers are more likely to have the opportunity to practice in the north as part of the flying squad of lawyers, a roster of lawyers across the country who help to relieve lawyers working in the north.

As a public servant, the Justice lawyer is bound by different rules as compared to the private practitioner. For example, on appointment to the public service, the public sector lawyer swears or affirms an oath of loyalty to the Crown.[52] As well, rules with respect to conflict of interest are very important. As public servants, lawyers are expected to adhere to the government's *Conflict of Interest and Post-*

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[47] The Interchange Canada program, which is managed by the Public Service Commission, is an example of such a program. The Department has its own exchange program, Visitors and Professional Interchange Program.

[48] Bijuralism is the term which describes the interaction between the two systems of law, civil and common law.

[49] R.S.C. 1985, c.31(4th Supp.).

[50] Lawyers in the Province of Quebec are either notaires, who are governed by the *Notorial Act*,R.S.Q. 1993, c. N-2 or members of the Barreau du Québec, who are subject to *An Act respecting the Barreau du Québec*, R.S.Q. 1993, c. B-1.

[51] There are roughly 500 employees in the administration and foreign service category, 200 technical staff, 80 employees in the scientific category and 50 students.

[52] *Supra* note 11, Schedule III. The oath is called an oath of solemn affirmation of office and secrecy.

Employment Code for the Public Service (Code).[53] The *Code* regulates the receipt of gifts and benefits from individuals and activities outside of government, as well as employment and post-employment. Public servants can have other jobs and work as volunteers but they are subject to rules on double-dipping;[54] henceforth, Justice lawyers cannot practise law other than for the Crown. Lastly, there are specific provisions for the conduct of officials in public office, such as bribery, and which are set out in sections 118-122 of the *Criminal Code*.[55]

When lawyers join the Department they are subject to security checks and, after appointment, they must follow the government's *Security Policy*.[56] This policy sets out how to treat confidential information, including the classification of classified information. The concept of classified information is much different than a lawyer's understanding of "solicitor-client privilege" or the "duty of confidentiality."

There are also limitations on the freedom of expression. Public servants are bound by certain rules, customs and conventions, including the convention of anonymity. Members of the public service accept certain limitations to their actions, including limitations on the right to express political views, participate in political campaigns or to criticize the government.[57] These limitations are not absolute barriers. Justice lawyers participate in various professional organizations, teach at law schools and bar admission courses, act as speakers at conferences and publish.

Departure from the public service either to retire or to undertake further work has some implications for all public servants. When public servants leave the public service they are subject to special rules with respect to ongoing contact with the government, including lobbying and contracting. For example, if a lawyer leaves the public service and receives a pension they may receive a reduced fee under a contract because they receive a pension.

With respect to government in general, the Department is different from other departments because of the average age of its employees. It is still described as a

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[53] *Supra* note 45.

[54] *Ibid.* human resources, compensation.

[55] R.S.C. 1985, c. C-45.

[56] *Supra* note 45.

[57] See generally the case of *Fraser* v. *Canada (Public Service Staff Relations Board)*, [1985] 2 S.C.R. 455.

young department as forty-eight percent of employees are under thirty-nine years of age. In the rest of the public service thirty-seven percent of employees are of the same age or younger. The Department is a small department by government standards but, when compared with law firms, it is large. There are approximately 3000 employees in the Department and 1800 lawyers across the country. While often referred to as a "law firm," it has a complex role which takes it a step beyond the traditional law firm model and closer to what are known as multidisciplinary firms in the private sector.

The Practice of Law

The federal practice of law is derived from a combination of statute, constitutional practice, policy and the common and civil law.

The Department of Justice is often described as the oldest and biggest law firm in the country.[58] It employs in-house counsel and supplements the delivery of legal services through legal agents, who are lawyers from the private sector. The federal practice of law is framed by the *Department of Justice Act*[59] and the modern constitutional system of government. One of the more challenging adjustments for a federal lawyer is to understand how the Department functions and fits in the overall system of government. While the federal practice of law is often treated as non-traditional, it is in fact the conventional practice of law but from a different perspective and employing different skills. The practice is also diverse. Lawyers may be asked to help develop policy, draft legislation and regulations, draft contracts, conduct a criminal case as a Crown prosecutor, defend or initiate a civil action, intervene before the Supreme Court of Canada, appear before a parliamentary committee or a commission of inquiry.

The practice of law occurs within a recognized hierarchy. The *Department of Justice Act*[60] is the core statute which sets out the role of the Minister of Justice and Attorney General of Canada, the Minister responsible for the Department of Justice and, consequently, the role of Justice lawyers. It is a very brief statute but one which

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[58] O. Lippert, "The Cost of Justice-The Department That Is," (1999) 23 (8) Can. Law. 14. For a more detailed history of the evolution of legal services within the federal government and the role of the Department, see generally Canada, Royal Commission on Government Organization (the Glassco Commission) (Ottawa: Queen's Printer, 1962).

[59] *Supra* note 29.

[60] *Ibid.*

provides a general framework. The Mission Statement for employees complements the statute by setting general objectives and establishing employment standards.

The Department of Justice, along with private practitioners, has had to learn to adapt to, and cope with, changes to how legal services are provided to clients. For example, the payment for legal services,[61] internal structure of the Department, the use of computers, timekeeping and the development of the territories have all affected how the Department conducts law. The level of "computer literacy" has increased dramatically due, in part, to the electronic network that connects each regional headquarter and office across the country.

Federal public sector lawyers faces many challenges in their work. It is misleading to think of the Department as "just another law firm." As noted previously, a federal practitioner wears two hats, those of public servant and lawyer. This may bring into play competing interests. The private practitioner has a more well-defined role with a single focus, the paying client, and this is emulated at law school and bar admission. In their work, however, public sector lawyers may assume unique roles which do not exist in private practice. As an example, lawyers who develop policy help prepare proposals to amend or create legislation and provide assistance in developing strategic positions in litigation.

Along with the unique role they must fill, the public sector lawyer has to look to various sources for guidance, including the definition of "public servant" in the case law, such as in the case of *Gingras* v. *Canada*:

> At the hearing, counsel for the appellant properly noted the distinction that should be made between "public service" and "Public Service," the first and wider concept taking in all aspects of the federal administration and the second, narrower, concept covering only those parts of the federal administration for which the employer was deemed to be Her Majesty represented by the Treasury Board . Learned counsel accordingly invited the court to distinguish between the Treasury Board acting in its capacity as manager of the entire federal administration and when it acts in its capacity as employer for only certain parts of the federal administration.[62]

As the Department of Justice's Working Group on Legal Advice concluded:

> We believe that lawyers practising law in the federal public service face many challenges that our colleagues in private practice do not have. In addition to our

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[61] The Department has its own Client Driven Services Directorate which provides advice on the cost of legal services.

[62] *Gingras* v. *Canada* (1994), 165 N.R. 101(F.C.A.) at 115.

> responsibilities as officers of the court, we are officers of the Crown. We work for a client engaged in complex activities across the country and around the world. We work in a political environment but we must keep our distance from politics. And we have a duty not only to our client but, as public servants, to Canadian society as a whole.[63]

What is Different About Federal Lawyers?

The nature of the law which is part of a federal practice tends to be different. Administrative and constitutional law, for example, are fundamental to the conduct of a federal practice. It is unlikely that federal practitioners will come into contact with traditional private law matters except to the extent they are part of a federal statute or flow from a provincial matter. The Crown is the defendant in *Charter* litigation and the Attorney General conducts criminal litigation under the *Criminal Code* and a variety of other statutes.[64] The skill of the interpretation of statutes and regulations is important because of the organizational structure of government. There are unique areas of practice because, by their nature, they are matters of federal interest. Aboriginal and admiralty law are but two examples.

Those who practice litigation, including administrative law, are more likely to practice before the Federal Court, the Tax Court or the Supreme Court of Canada. There is a tendency by other members of the legal profession and members of the public to hold public sector lawyers to a higher standard before the courts because they are public servants. An example of this different role is when Justice lawyers intervene in cases before the Supreme Court of Canada. I will now look briefly at some specific examples of Justice lawyers, the Crown Prosecutor, the legislative drafter, the legal services lawyer, the policy lawyer and the civil litigation lawyer, to illustrate the nature of but some of the examples of the federal practice of law.

Some Examples of Justice lawyers

The Crown Prosecutor

The Assistant Deputy Attorney General, Criminal Law Branch, oversees the work of the Criminal Law Branch of the Department, which includes the work of federal

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[63] *In My Opinion* (Ottawa: Public Works and Government Services Canada, 1995) at iii.

[64] *Supra* note 55; *Fisheries Act*, R.S.C. 1985, c. F-14; *Controlled Drugs and Substances Act* S.C. 1996, c.19.

Crown prosecutors. While some jurisdictions have legislation in place which provides a general framework for the conduct of prosecutors,[65] the rules with respect to outside activities are generally found in the rules of professional conduct,[66] policies or guidelines. Crown prosecutors have a variety of roles within the Department, ranging from the conduct of criminal prosecutions and facilitating the development of policy to negotiating international agreements and providing their expertise to the United Nations as representatives of the Department. In recent years there are also Crown prosecutors who are part of multidisciplinary units with the RCMP for prosecutions in proceeds of crime.[67]

At the federal level prosecutors can obtain guidance from the *Department of Justice Act,*[68] the *Code,*[69] professional rules of conduct, *Crown Counsel Policy Manual*[70] and various prosecution guides[71] which have been developed in the Department. The purpose of the manuals is to provide information about how to do the work, to provide general guidance on standards, including the exercise of prosecutorial discretion in various contexts, and to enhance public understanding of the Crown prosecutor's work.

Much has been written about the role of the Crown prosecutor but surprisingly the professional rules of conduct of the various law societies do not contain much guidance with respect to conflict of interest for public sector lawyers. Ideally, the debate should begin with an examination of the *source* for ethical guidance. Is this something that a lawyer knows instinctively, as an innate sense of right or wrong, or does it come with experience and sound reasoning?

> Of course, ethics are not mere rules but moral obligations dependent upon conscience rather than sanction. This seemingly obvious distinction sometimes eludes lawyers who tend to be preoccupied with the need for certainty and

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[65] See, for example, the *Crown Attorneys Act*, R.S.O. 1990, c. C-49; *Ministry of the Attorney General Act* R.S.O. 1990, c. M-17; *supra* note 29, ss. 2, 5.

[66] See, for example, the Canadian Bar Association, *Code of Professional Conduct* (Ottawa: 1987); *supra* note 8, r. 4 and 5.

[67] For example, there are special units in Calgary, Alberta and Fredericton, New Brunswick.

[68] *Supra* note 29.

[69] *Supra* note 53.

[70] *Supra* note 30.

[71] These Guides were developed by the Department to assist legal agents in the prosecution of largely regulatory offences (e.g. *Aeronautics Act, Copyright Act*).

> enforceability, but as Stephen Parker has pointed out ethics involve the ethos or 'shared culture.' Within the wider legal community ethical issues are worked out by a 'persuasive marginal discretion guided by a few fundamental legal rules and constrained by circumstances of practice.[72]

Therefore prosecutors must meet a high standard in carrying out their duties, which I will now discuss below.

As I mentioned earlier, sections 4 and 5 of the *Department of Justice Act*[73] provide a framework for roles and responsibilities of all Justice lawyers. Section 4 sets out the duties and responsibilities of the *Minister of Justice*; section 5 is the parallel provision for the Attorney General.[74] Briefly, the role of the Attorney General is to provide legal advice and to conduct litigation on behalf of the Crown. It is the Attorney General who is perceived to be the guardian of the public interest.

There is guidance available for Crown prosecutors, most notably in the *Crown Counsel Policy Manual*.[75] It is a useful compilation of the prosecution policies of the Attorney General of Canada. In the foreword to the manual, the former Minister of Justice describes this role as follows:

> The role of Crown counsel is not set out fully in any statute. It has grown from common law roots and has been shaped by both provincial and federal law. Throughout history, it has been characterised by the concept of independence and fairness. In particular, the notion of independence of the Attorney General is the cornerstone of the criminal law process. In this regard, the often referred to statement concerning the role of the Attorney General, which one of my predecessors, the Honourable Ron Basford, made in 1978, is still the governing principle today - that is, although the Attorney General is entitled to seek information and advice from others, the decision to prosecute or not to prosecute must be made according only to the sufficiency of the evidence and the public interest and must not be influenced by irrelevant considerations such as the political implications of the decision.

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[72] K. Crispin, "Prosecutorial Ethics," in Parker and Sampford, ed., Legal Ethics and Legal Practice: Contemporary Issues (Oxford: Clarendon Press, 1995) 171 at 176.

[73] *Supra* note 29.

[74] For a discussion of the role of the Attorney General see generally J. L. J. Edwards, *The Law Officers of the Crown: A Study of the Offices of the Attorney-General and Solicitor-General of England, with an Account of the Office of the Director of Public Prosecutions of England* (London: Sweet & Maxwell, 1964); J. L. J. Edwards, *The Attorney General, Politics and Public Interest* (London: Sweet & Maxwell, 1984).

[75] *Supra* note 30.

> Fairness should also characterise the conduct of Crown counsel. As advocate, Crown counsel must present to the court all credible evidence relevant to the alleged crime. This must be done firmly and may be pressed of its legitimate strength, but it must also be done fairly, without any notion of winning or losing. The function has been described as quasi-judicial in nature. As well, the criminal law confers on the Attorney General broad discretionary powers, which, in daily practice, are mainly exercised by Crown counsel. Crown counsel may stay proceedings, elect the mode of trial, accept pleas of guilty to lesser offences and decide to appeal, all in the public interest. Courts generally do not interfere with this discretion unless it has been exercised for an oblique motive, offends the right to a fair trial or amounts to an abuse of process. Accordingly, counsel must exercise this discretion with integrity and impartiality in good faith and according to the highest ethical standards.[76]

Inevitably, a Crown Prosecutor's work brings into play special implications with respect to conflict of interest and other professional conduct issues. These implications are described in the following excerpt, "The Duties and Responsibilities of Crown Counsel," from the *Crown Counsel Policy Manual*:

> Crown counsel are not employed by the departments and agencies to which they provide legal advice. At all times, counsel remain representatives of the Attorney General of Canada. Counsel should be aware that policies of the Attorney General may conflict with those of the departments and agencies. Conflicts could, for example, arise between a department's enforcement policy and the Attorney General's prosecution policy. Crown counsel shall at all times comply with the policies of the Attorney General. If policies conflict, counsel shall advise the department or agency of the conflict and resolve the matter under the usual consultation process established for resolving conflicts.
>
> Counsel should also be careful to avoid a conflict of interest or the appearance of a conflict of interest...[77]

Legislative Drafters

The Department's legislative drafters are found in Legislative Services, a separate branch in the Department. The Chief Legislative Counsel is responsible for this branch and reports directly to the Deputy Minister. Those who draft bills are in the Legislation Section, which is distinct from those who draft regulations as part of the

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[76] *Supra* note 30.

[77] *Ibid.* at I-9-1- and I-9-2.

Regulations Section. Legislative drafters are usually trained as lawyers and, in addition, may have received training in legislative drafting.

The role of legislative drafter is unique within the legal profession and has evolved gradually within the federal government since the Second World War. While there are private practitioners who draft legislation and regulations, in addition to those employed by Parliament, most of the drafters are found in the provincial, territorial and federal governments, the legislative assemblies and Parliament. As noted earlier, sections 4 and 4.1 of the *Department of Justice Act*[78] provide the legal framework for their role. The main role of the legislative drafters is to put into concrete form the policy proposals approved by Cabinet by drafting all government bills and amendments to bills. This requires a technical skill in the art and craft of drafting as well as knowledge of constitutional, administrative and other substantive areas of the law.

The regulatory drafters follow the mandate set out for the Department in the *Statutory Instruments Act,*[79] which provides for the publication and registration of "statutory instruments," which includes regulations, as noted above. They review all regulations to ensure they comply with the *Bill of Rights*[80] and the *Charter*[81] through a process known as "blue-stamping." The preparation of regulations for government is part of a larger process for the development, drafting, approval and publication of regulations.[82] The drafting of legislation and regulations is done in French and English and, as is the case for legislative drafters, they draft in teams of two lawyers.

It is the legislative drafters who often appear before parliamentary legislative committees to provide the factual background to the development of a government bill. The Legislation Section is also responsible for the Miscellaneous Statute Law Amendment Program which is a regular technical updating of statutes that need minor changes.

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[78] *Supra* note 29.

[79] *Supra* note 31.

[80] *Supra* note 32.

[81] *Supra* note 33.

[82] *Regulatory Process* (Treasury Board: Ottawa, 1996). See online <http://publiservice.pco-bcp.gc.ca/pubs/cover_e.htm> (date accessed: March 30, 2001).

The role of the legislative and regulatory drafters is central to the law-making process of government. It is a little-known part of the legal profession but one which has significant implications for the approval and development of federal law. Federal statutes and regulations are standards which apply generally to all Canadians and drafters have an onerous responsibility within the overall system of justice.

Legal Advisors

The majority of legal advisors are found in the Legal Operations Sector, which is the largest sector in the Department. The *Department of Justice Act* contemplates their primary role in section 5.[83] Legal advisory work is largely solicitor work. The Associate Deputy Minister, Legal Operations, is the senior official responsible for the largest division of the Department.

The units that provide legal advisory services are called regional offices, sub-offices and legal services units. The legal services units vary in size and location but most are located in the various Departments and agencies throughout government in the National Capital Region.[84] The Regional Offices, as their name suggests, are located across the country. While the main focus of the legal services units is legal advisory in nature, the regional offices are largely responsible for the conduct of litigation. There are some exceptions. For example, lawyers at the Treasury Board legal services unit appear before the Public Service Staff Relations Board and the Federal Court of Canada on staff relations matters.[85] In all cases the provision of advice involves coordination with the central advisory and litigation units in Ottawa. In addition, there are units across the country, such as Quebec City and Fredericton, which are responsible for proceeds of crime matters (money laundering).[86] There are other legal advisory positions in Headquarters. Some of these provide expert advice in specialized areas including official languages, international, administrative, *Charter* and human rights law.

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[83] *Supra* note 29.

[84] The legal services unit for Veterans Affairs Canada is located in Charlottetown, Prince Edward Island and the legal services unit for the Atlantic Canada Opportunities Agency is in Moncton, New Brunswick. There is a sub-office of the Prairies and Northwest Territories Regional Office, Edmonton, in Calgary, Alberta.

[85] Other examples include lawyers from the legal services at Foreign Services, International Trade, who appear before international trade tribunals, and lawyers at the RCMP legal services who appear before the Public Complaints Commission.

[86] *Proceeds of Crime Act (Money Laundering)*, S.C. 1991, c.26.

The legal advisor "advise[s] the heads of the several departments of the Government on all matters of law connected with such departments."[87] The legal services units are usually located on the premises of the host Department. While knowledge of *Charter* and administrative law are at the core of a Justice's lawyer's practice, the practice of each unit mirrors the statutory and policy functions of the host Department. For example, the legal services unit at Fisheries and Oceans, as the name suggests, provides legal advisory services concerning those matters which fall within the mandate of the Minister of Fisheries and Oceans, such as the *Fisheries Act*.[88] The legal services lawyer is the gatekeeper into each of the Departments where they are located. Their role is complex and demanding. While maintaining a link with the Department of Justice, they must also become familiar with the internal operations of the department they serve. In this respect they resemble corporate counsel for a large corporation. Another important role is to facilitate litigation work. While the role of the legal services lawyer may vary from department to department, these lawyers perform an important service by assisting in obtaining instructions, preparing documents for court, attending hearings and reviewing judgments in anticipation of an appeal.

Policy Lawyers

The Minister of Justice, like any Minister in Cabinet, is responsible for bringing forward policy proposals to cabinet in relation to matters which fall under the Minister's responsibility. The Minister is responsible for approximately forty-eight statutes, the most famous being the *Criminal Code*. Responsibility for the Policy Sector falls under the Senior Assistant Deputy Minister, Policy Sector.

Lawyers who work on the development of policy proposals are involved at all stages of the development, approval and implementation of the legislation, often with professionals from other areas including research analysts, criminologists and statisticians. Because of the nature of their duties, they work closely with legislative and regulatory drafters. Their work involves knowledge of the Cabinet and legislative process as well as government decision-making. Often they will be involved in complex negotiations and consultations leading up to the approval of legislation. In addition, they may perform a central role in the meetings held between officials of the Department of Justice and the provincial and territorial governments.

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[87] *Supra* note 29, s. 5.

[88] R.S.C. 1985, c. F-14.

The policy lawyer has an invaluable role in the development of litigation strategy. Since they are often aware of research and policy development around the world they can help litigators prepare a factum, especially before the appellate courts, and coordinate the overall preparation of the case within the Department by bringing together the required expertise, including research and statistics, which must be brought to bear on a particular case. Some examples of sections in the Department where these lawyers work include the Child Support Team, the National Crime Prevention Centre, the Criminal Law Policy Section and the Family, Children and Youth Policy Section.

Civil Litigators

The basis for the Department's role in litigation is found mainly in section 5 of the *Department of Justice Act*.[89] The Assistant Deputy Attorney General, Civil Litigation, is responsible for the coordination and supervision of civil litigation, including admiralty litigation, within the Department. The Assistant Deputy Attorney General, Tax Law Services, has a separate responsibility for tax litigation as does the Assistant Deputy Attorney General, Citizenship and Immigration, for citizenship and immigration matters. The Assistant Deputy Attorney General, Aboriginal Law, facilitates the coordination of aboriginal litigation. Litigation is provided by a central advisory service in the National Capital Region as well as by lawyers in the legal services units and the regions. The Quebec Regional Office in Montreal, along with a central unit in Ottawa, is responsible for litigation the Province of Quebec.

The core of the civil litigator's function is to appear before the courts on behalf of the Attorney General in both civil and criminal matters. As discussed earlier, the jurisdiction over matters in the criminal courts is split between the provinces and the federal government. In civil matters the lawyers are known for their knowledge of the procedure of the Federal Court and the Supreme Court of Canada because they appear frequently before these courts. However, since the adoption of changes to the jurisdiction of the Federal Court in 1992, civil litigators appear more frequently before the superior courts of the provinces where jurisdiction is split with the Federal Court. Lawyers appear at all levels of the court system, including small claims court, provincial and federal courts, and various administrative tribunals.

While the Attorney General rarely intervenes in civil cases where the Crown is

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[89] *Supra* note 29.

not a party, except those constitutional cases which are brought before the Supreme Court of Canada, there are specific instances in which the role of the federal Crown is taken for granted. The Federal Court and the Supreme Court of Canada are central to the work of the civil litigator. Actions against the federal Crown may be brought in either a provincial court or the Federal Court. If there is an overlap in jurisdiction, the Crown has the prerogative to choose the court forum.[90] The Federal Court has jurisdiction for proceedings involving prerogative, declaratory or injunctive relief against the Crown and therefore lawyers who practice civil litigation are familiar with judicial review.

As is the case in the private sector, lawyers who practise civil litigation have adapted to ongoing changes within the legal profession with respect to settlements. Dispute resolution is a major component of any federal litigation practice and there is a central advisory section to provide guidance. This has occurred, in part, on the initiative of the Department and as a result to changes in some jurisdictions with respect to case management.

Those who practise civil litigation are keenly aware of the impact of the structure of government on their practice. Two examples may help to illustrate the implications. Claims may be brought against Crown servants under the *Federal Court Act*[91] and sometimes the issue becomes whether the public servant was acting as a Crown servant when the events giving rise to the action occurred.[92] There is also a principle that the Crown is vicariously liable for the actions of its Crown servants. Secondly the determination of whether a particular body is part of government may involve questions such as whether they can be sued in their own name or if Her Majesty is named as defendant.

In some cases lawyers from the private sector are retained as legal agents to act for the Attorney General of Canada. They may be appointed for several reasons. If there is a conflict of interest, and Justice lawyers cannot act, a legal agent provides the necessary independence from the Crown. Secondly, if the case is in a part of the country where it would not be cost efficient to use staff from a regional office, a legal agent may be asked to take over a case. It may also be more efficient to use

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[90] According to the judgment in *McNamara Construction (Western) Ltd.* v. *The Queen*, [1977] 2 S.C.R. 654, for example, most claims in tort and contract cannot be brought in the Federal Court because they are not based on federal law.

[91] R.S.C. 1985, c.F-7.

[92] *Supra* note 29.

legal agents in work which is of a high volume and which exists on an ongoing basis, such is the case for recovery of student loans.

Some Issues

Introduction

Federal practitioners face a number of unique challenges in their work. Since the Crown is the client, there are implications for the application of solicitor-client privilege, the duty of confidentiality and a body of law which is often referred to as federal law. Furthermore, lawyers employed by the Crown must be keenly aware of the special duties and responsibilities which arise because of their status as a public servant, including conflict of interest. The discussion that follows is a brief introduction to some of these issues.

Solicitor-Client Privilege

> The issue of who is their client perplexes government lawyers continually.
>
> If we take as an example a staff lawyer employed by the Ministry of the Attorney General of a province, the possible answers to the question, who is my client? include at least the lawyer's immediate superior, the Deputy Attorney General, the Attorney General, the agencies or other ministries on whose behalf the lawyer appears before courts and tribunals, the government, and the public.
>
> The question is important, and the lack of Canadian authority is surprising. From whom does the lawyer seek instructions? What should she do if the instructions from two or more of these sources conflict? Does she have a duty to keep secret from some of those possible clients communications received in confidence from others? Who, if anyone, can consent to the lawyer representing more than one client in a representation that involves a conflict of interest?[93]

The application of solicitor-client privilege is one of the most difficult issues that a public sector practitioner will face in the course of their practice. While the rules of what is solicitor-client privilege are well-established at common law, they have been developed in a private sector environment and for the private practitioner.

Lawyers in government have a unique client in the Crown. Solicitor-client

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[93] *MacKenzie, supra* note 1 at 21-1 - 21-2.

privilege must be viewed in a different way than it is in the private sector because on a day-to day basis as the lawyer does not interact with one individual. As a matter of practice, a public sector lawyer may interact with several individuals, all with different levels of authority to make decisions.

The Common Law

Before discussing the application of the rules of solicitor-client privilege to the situation of federal lawyers, I will outline briefly the common law rules developed by the courts.

The concept of solicitor-client privilege has evolved over the years in Canada and has been discussed in numerous cases. Justice Lamer (as he then was) stated the modern version of the rule as covering a confidential communication with a client for the purpose of seeking legal advice.[94]

There is now a separate line of authority which applies to the context of public sector lawyers. It is recognized as a basic principle that public sector lawyers can claim solicitor-client privilege for privileged communications for the same reasons as private lawyers do. Lawyers who work in government are entitled to claim solicitor-client privilege for confidential communications held with officials on legal matters.

> They are regarded by the law as in every respect in the same position as those who practise in their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges... the communications between the legal advisors and their employer (who is their client) are the subject of the legal professional privilege.[95]

There have been few cases to date in which the issue of the application of solicitor-client privilege in the government context is considered. In the case of

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[94] *Descôteaux et al.* v. *Mierzwinski,* [1982] 1 S.C.R. 860.

[95] *Alfred Crompton Amusement Machines Ltd.* v. *Commissioners of Customs and Excise (No.2)* [1972] 2 All E.R. 353 at 376. See also *Waterford* v. *The Commonwealth of Australia* (1987), 163 C.L.R. 54. The view in the *Alfred Crompton* case has received support subsequently in *Medecine Hat Greenhouses Ltd.* v. *R. et al.* [1979] 1 W.W. R. 296 (Alta. C.A.), *Canada (Minister of Industry, Trade and Commerce)* v. *Central Cartage Co. et al.* (1987), 10 F.T.R. 225, *Johnston & C.H.D. Investments Inc.* v. *Prince Edward Island* (1989), 73 Nfld. & P.E.I.R. 222 (P.E.I.C.A.) and *Weiler* v. *Canada (Department of Justice)* (T. D.), [1991] 3 F.C. 617.

Idziak v. *Canada*,[96] the Supreme Court of Canada had to decide whether a memorandum prepared by government counsel for the purpose of assisting the Minister of Justice in the exercise of his discretion under the *Extradition Act*[97] was subject to solicitor-client privilege. The Court concluded that the memorandum was indeed subject to solicitor-client privilege and that the Justice lawyer did not have to produce it.

Another important aspect of solicitor-client privilege is the obligation of Crown prosecutors to make full disclosure to defence counsel during a criminal prosecution; this was recognized by the Supreme Court of Canada in *R.* v. *Stinchcombe*.[98] However, the court did acknowledge that "...the absolute withholding of information which is relevant to the defence can only be justified on the basis of the existence of a legal privilege which excludes the information from disclosure."[99] The courts have also looked at the circumstances under which documents subject to solicitor-client privilege should be disclosed; *R.* v. *Campbell*[100] is a case on point. While the Supreme Court of Canada recognized that government counsel can claim solicitor-client privilege, the Court concluded that the legal advice should be disclosed. The issue in this case was whether the use of a reverse sting by the RCMP was an abuse of process. As the Crown countered the arguments of the accused by arguing that the police acted in good faith by obtaining legal advice before proceeding with the sting, the Court concluded that the divulgence of this reliance was sufficient to warrant disclosure:

> Destruction of the solicitor-client privilege takes more than evidence of the existence of a crime and proof of an anterior consultation with a lawyer. There must be something to suggest that the advice facilitated the crime or that the lawyer otherwise became a "dupe or conspirator." The RCMP, by adopting the position that the decision to proceed with the reverse sting had been taken with the participation and agreement of the Department of Justice, belatedly brought itself within the "future crimes" exception and put in question the continued existence of its privilege.[101]

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[96] [1992] 3 S.C.R. 631.

[97] R.S.C. 1985, c.E-23.

[98] [1991] 3 S.C.R. 326.

[99] *Ibid.* at 340.

[100] [1991] 1 S.C.R. 565.

[101] *Ibid.* per Justice Binnie at 568.

A second case on this point, *Buffalo et al.* v. *Her Majesty the Queen*,[102] examined the issue of solicitor-client privilege in the context of the relationship between the Crown and aboriginal respondents. The Court felt that the ordinary rules did not apply and that in some cases, based on the "trust principle," documents prepared or obtained for the exclusive or dominant use of the bands could be disclosed. The courts have not always agreed about the application of these rules which demonstrates the difficulty this issue poses for public sector lawyers and the courts in properly balancing all of the interests.[103]

Statutory Obligations

The rules with respect to the application of solicitor-client privilege are not limited to the common law. At the federal level lawyers must also keep in mind the obligations of the *Access to Information Act*,[104] the *Privacy Act*[105] and the *Canada Evidence Act*[106] as well as parliamentary rules of procedure. In the case of the first two statutes, for example, the government department can refuse to disclose information on the basis that the documents are subject to solicitor-client privilege.

There are exceptions to disclosure which are relevant to this discussion and which exist because of parliamentary procedure. There is some disagreement as to whether "legal opinions" will be private communications which are subject to disclosure.[107] Normally when public sector lawyers appear before parliamentary committees it is accepted that they will not be asked to produce legal opinions prepared for the Crown. In other situations the rules may not be so clear. This may leave a public sector practitioner, such as a legislative drafter, subject to a double-edged sword. On the one hand, the drafter my be required to apply solicitor-client

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[102] [1995] 3 C.N.L.R. 18 (F.C.A.); see also *Samson Indian Nation and Band* v. *Canada*, [1997] 1 C.N.L.R. 180 (F.C.T.D.); *Samson Indian Nation and Band* v. *Canada* [1998] 2 C.N.L.R. 199 (F.C.A.); *Begetikong Anishnabe* v. *Canada (Minister of Indian Affairs and Northern Development)* (1997), 138 F.T.R. 109.

[103] *Ibid., Buffalo et al.* v. *Her Majesty the Queen.*

[104] R.S.C. 1985, c.A-1.

[105] R.S.C. 1985, c.P-21.

[106] R.S.C. 1985, c. C-5.

[107] Beauchesne maintains legal opinions are subject to disclosure, A. Fraser, W. F. Dawson & J. Holtby, *Beauchesne's Rules and Forms of the House of Commons of Canada with Annotations, Comments & Precedents*, 6th ed. (Toronto: Carswell, 1989); J. G. Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada*, 4th ed. (Toronto: Canada Law Book, 1916) takes the opposite view.

privilege to certain information; on the other hand, Parliament may not recognize the existence of the privilege or feel bound by any government rules in this regard. The same holds true for the duty of confidentiality and the confidentiality of information by statute. Parliament can set its own rules and will not normally be bound by legislation which attempts to regulate the internal proceedings of Parliament.[108]

In summary, the federal practitioners may find themselves in situations where considerable thought must be given to the question of to whom they owe a duty. It may be described as the client, the public interest or the legal profession. Sorting through these complex duties and obligations can be a difficult, challenging task. While lawyers in private practice must follow the standards of ethical conduct "for the protection of the public interest" the expression "public interest" has many different levels of meaning for the public sector practitioner.

Conflict of Interest

Conflict of Interest – Public Servant and Personal Obligations

As noted previously, conflict of interest arises in different contexts for the public service lawyer. In the public sector it is the set of standards, as set out in the *Code*,[109] which governs the intermingling of public duty and private interests and which form part of the terms and conditions of employment of each public servant. It is a different concept than that which is found in a private lawyer's professional rules of conduct.

The general principle is that a public servant should not use their public office for private gain to the detriment of the public interest. Therefore the *Code* has specific provisions with respect to gifts, disclosure of assets, preferential treatment and post-employment rules. The *Code* does not contain a definition of "conflict of interest." The essential ingredient to establish the existence of a conflict of interest for the purposes of the *Code* is "incompatibility" or "differing interests." On the other hand, it does refer to *real, potential* and *apparent* conflict of interest. There is an obvious cross-over between the professional rules of conduct and the *Code* with respect to a common understanding of *real* or *actual* conflict of interest.

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[108] *Williamson* v. *Norris* (1899), 1 Q.B. 7; *House of Commons* v. *CLRB*, [1986] 2 F.C. 372.

[109] *Supra* note 45.

As part of the Stevens Inquiry[110] Mr. Justice Parker set out the criteria for a *real* conflict of interest as the existence of a known private interest which is sufficiently linked to the job responsibilities to be subject to influence.[111] *Apparent* conflict of interest is more difficult to define and there are few cases on point.[112] It is analogous to the principle that justice must not only be done, it must be seen to be done.[113] Accepting the definition set out in *Valente* v. *The Queen*[114] by the Supreme Court of Canada, he concluded that "An apparent conflict of interest exists when there is a reasonable apprehension, which reasonably well-informed persons could properly have, that a conflict of interest exists."[115]

With respect to *potential* conflict of interest, Mr. Justice Parker went on to describe it as:

> Where the public office holder finds himself or herself in a situation in which the existence of some private economic interest could influence the exercise of his or her public duties or responsibilities, the public office holder is in a potential conflict of interest provided that he or she has not yet exercised such duty or responsibility. As soon as the telephone call is placed, or the meeting convened, or the question answered, or the letter drafted, a duty or responsibility of public office has been exercised and the line between potential and real has been crossed.[116]

Conflict of Interest – The Criminal Code

The application of the Criminal Code[117] is also relevant. Recent cases, including *R.* v. *Fisher*[118] and *R.* v. *Hinchey,*[119] highlight the need for all public servants, including

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[110] W. D. Parker, *Commission of Inquiry into the Facts of Allegations of Conflict of Interest Concerning the Honourable Sinclair M. Stevens*,(Ottawa: Minister of Supply and Services, 1987).

[111] *Ibid.* p. 25.

[112] *Threader and Spinks* v. *Canada,* (1986), 68 N.R. 143 (F.C.A.), [1987] 1 F.C. 41.

[113] *Rex* v. *Sussex Justices Case* (1924), K.B.256; Re *L'Abbé and Blind River* (1904), 7 O.L.R. 230.

[114] [1985] 2 S.C.R. 673.

[115] *Supra* note 110 at 35.

[116] *Supra* note 110 at 29.

[117] *Supra* note 55.

[118] (1994), 88 C.C.C. (3d) 103, 28 C.R. (4th) 63, 17 O.R. (3d) 295 (C.A.), leave to appeal to S.C.C. refused 94 C.C.C. (3d) vii, 119 D.L.R. (4th) vi, 25 C.R.R. (2d) 188.[hereinafter called *Fisher*].

[119] [1996], 3 S.C.R. 1128; (1995) 123 Nfld. P.E.I.R. 222 [hereinafter called *Hinchey*].

public sector lawyers, to be prudent in their interaction with the private sector. While on the face of section 121 of the *Criminal Code*[120] it would appear to target fraud, bribery and influence peddling, the scope of the provision has been interpreted very broadly by the courts. Both *Hinchey* and *Fisher* were decisions involving public servants and the interpretation of paragraph 121(1)(c). Briefly, this provision prohibits the receipt of a benefit, directly or indirectly, by a public employee from an organization with dealings with the government unless the employee has written consent from the appropriate "head of the branch of the government."

In the case of *Fisher*, Mr. Fisher was charged with accepting a computer system as a benefit contrary to paragraph 121(1)(c) because the person who gave the computer system had ongoing dealings with the government and the employee did not have written consent. The Crown succeeded before the Ontario Court of Appeal and the matter was remitted to the Provincial Court (leave to appeal to the Supreme Court of Canada was refused). The Court decided that paragraph 121(1)(c) did not offend section 7 of the *Charter* even though it does not set out a mental element. However, the words "the proof of which lies in him" were struck down because the change of burden offended the presumption of innocence in paragraph 11(d) of the *Charter*.

There is a further elaboration of the application of paragraph 121(1)(c) in the *Hinchey* case. Mr. and Mrs. Hinchey were charged with defrauding a paving company contrary to paragraph 380(1)(a) of the *Criminal Code*[121] and, in addition, accepting a benefit without consent under paragraph 121(1)(c). As part of his duties as a district engineer with the Newfoundland Department of Works, Mr. Hinchey supervised road construction projects. While it is unclear from the evidence who raised the issue of employment, Mrs. Hinchey was placed on the company's payroll as an assistant flag person and received unemployment insurance for twenty weeks despite the fact that she never worked. The Supreme Court of Canada ordered a new trial (Mrs. Hinchey was acquitted of unemployment insurance fraud) for reasons unrelated to the application of this provision. The majority rejected the minority's view that the paragraph requires the Crown to prove "corrupt intention."

These cases are important to public sector lawyers for several reasons. A public sector lawyer may be approached to teach at a University which receives funding from the government, offered a gift or lunch. Mr. Justice Cory (as he then was)

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[120] *Supra* note 55.

[121] *Ibid.*

offered the following for guidance in *R.* v. *Hinchey*:

> The section makes it an offence for an employee to accept or agree to accept from a person who has dealings with the government a commission, reward, advantage or benefit of any kind directly or indirectly, by himself or through a member of his family, unless he has the consent in writing of the government that employs him. Thus if a government employee accepts, on a rainy day, a ride downtown from a friend who does business with the government he has received a benefit. That could hold true as well for the cup of coffee or occasional lunch bought by the friend for the government employee. Obviously the section was never designed to include in its prohibition these very minor benefits. Nor should it apply to the exchange of those lunches and dinners that has long been a pattern of behaviour between old friends. However, benefits on a larger scale might well warrant closer scrutiny and require the obtaining of permission from the government employing the official.[122]

Outside activities and employment are permitted under the *Code*[123] except where it is likely to result in a conflict of interest. A conflict of interest will exist if the proposed activity interferes with the exercise of a public servant's judgment or daily responsibilities.[124] Employees are permitted to be members of volunteer Boards of Directors, maintain their own businesses and teach except where there will be interference with their job responsibilities. But there is an overlap with the criminal law, which must be kept in mind.

Gifts[125] can be accepted if they are offered as a courtesy, they do not interfere with a public servant's objectivity and impartiality and do not compromise the integrity of the government. Again, as with outside employment and volunteer work, the gift or benefit should not interfere with the exercise of judgment or daily responsibilities. If an employee receives a coffee mug after giving a presentation at a seminar the issue of conflict of interest does not generally arise; if the same employee receives a coffee mug as Director of Human Resources and the coffee mug has advertising on it from a temporary help agency the gift should be declined. In the latter case there may be an appearance problem because one company is being favoured over another. There is no dollar value for gifts so the existence of a conflict of interest does not depend on whether it is a coffee mug or an expensive sculpture. The circumstances are always relevant as well as the nature of the function an individual performs.

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[122] *Supra* note 119 at 1179.

[123] *Supra* note 53.

[124] *Ibid.* s. 26.

[125] *Ibid.* ss. 27-29.

Conflict of Interest – Professional Obligations

As a federal public sector lawyer, a Justice lawyer is required to maintain a practising status with a provincial or territorial law society as a condition of employment.[126] Each law society has rules of professional conduct which set out specific provisions with respect to *conflict of interest.* While there is a different constitutional issue concerning jurisdiction over the affairs of federal lawyers, which necessitates certain regulatory limitations, the Department does attempt to respect, to the extent that it can, the regulatory authority of the law society. For example, lawyers who conduct litigation would defer to the authority of the law society in the jurisdiction where they are practising.

As an example, in the area of conflict of interest the most common definition, found in the Canadian Bar Association *Code of Professional Conduct,* appears in different professional rules of conduct throughout the country.[127] Justice lawyers have the same interest in ensuring that rules concerning professional conduct of interest are respected as do private sector lawyers and, where appropriate, they follow the rules of professional conduct for that jurisdiction.

Professional rules of conduct, on occasion, do require some adaptation. Although many of the professional rules of conduct which apply specifically to the legal profession are written from the point of view of the private sector lawyer, they include, for example, some provisions with respect to the role of the Crown prosecutor.[128] Moreover, the Canadian Bar Association's *Code of Professional Conduct* does refer specifically to the duties of a prosecutor in Chapter IV, "The lawyer as advocate." Therefore, for the public service lawyer, conflict of interest is part of both the ethical standards of the public service and the professional rules of conduct.

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[126] All lawyers who work for the Department of Justice are appointed to the "LA" category and are referred to as "excluded" because the Department appoints them and determines the selection standards for their appointment (e.g. skills, experience) other than language skills. The terms of the "exclusion" are set out in the *Exclusion Approval Order for Certain Persons and Positions in the LA Group (Law) in the Department of Justice*, S.I./87-17, P.C. 1986-2858, *C. Gaz.* 1987.II.121. 301.

[127] *Code of Professional Conduct, supra* note 66, Chapter V.

[128] *MacKenzie, supra* note 1.

Joining or Leaving the Department - Martin v. Gray[129]

The Federation of Law Societies, the umbrella organization of the law societies, produced the *Model Rule on Conflicts Arising as a Result of Transfer Between Law Firms*[130] in March, 1994 which was agreed to in principle by all law societies and the Department of Justice. The *Rule* is the product of the concern which followed the judgment in *Martin* v. *Gray*. The main principle from this case is that when lawyers (or articling students) leave or enter a law firm they have certain professional obligations with respect to the safeguarding of the confidential and relevant information they have control over while practising. This case has received a great deal of attention and I will only briefly refer to the facts here.

The facts of *Martin* v. *Gray* are simple. A lawyer who worked for defendant's counsel, first as an articling student and then as a lawyer, joined another firm representing the plaintiff in the same matter. It was agreed that the lawyer had received relevant confidential information about the defendant but her involvement in the file was for a specific, and limited, period of time. The new firm filed affidavits indicating no breach of confidence had occurred and undertook, if necessary, to ask her to work at home. The Supreme Court of Canada concluded there was a conflict of interest. The majority held that there was a rebuttable presumption that confidences are shared by lawyers. There must be clear and convincing evidence that all reasonable measures (e.g. screening mechanisms) have been taken to ensure the lawyer, referred to as the "tainted" lawyer, will not disclose information to members of the new firm. Mr. Justice Sopinka referred to techniques which could be used to prevent the disclosure of information.[131] The test used by the court, the "probability test," is the likelihood of the misuse of a client's information. Of what relevance is this to a federal public sector lawyer?

An employee entering or leaving the Department is subject to this *Rule*. For the purposes of the *Rule* "law firm" is defined to include "one or more members practising ...(e) in a government, a Crown corporation or any other public body."[132]

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[129] *MacDonald Estate* v. *Martin*, [1990] 3 S.C.R. 1235, (1991), 77 D.L.R. (4th) 249 [hereinafter called *Martin* v. *Gray*].

[130] *Model Rule on Conflicts Arising as a Result of Transfer Between Law Firms* , online at <http://www.flsc.ca/english/publications/conflictsrule.htm> (date accessed: March 30, 2001), (hereinafter *Rule*).

[131] These are referred to as "cones of silence" and "Chinese walls."

[132] Supra note 130.

In addition, the *Rule* does not apply to transfers within the Department as long as a lawyer remains an employee. It is far from clear if the *Rule* applies in criminal cases, which leaves some doubt for the application of this principle for Crown prosecutors.[133]

Conclusion

The mission of the Department of Justice is as follows:

> support the Minister of Justice in working to ensure that Canada is a just and law-abiding society with an accessible, efficient and fair system of justice;
>
> provide high-quality legal services and counsel to the Government and to client departments and agencies; and
>
> promote respect for rights and freedoms, the law and the Constitution.[134]

The role of the public sector lawyer is complex and challenging. As the Mission Statement illustrates, Justice lawyers must be equipped with different skills, including an appreciation of the role and organization of government, the Minister's role as Minister of Justice and Attorney General for Canada, the public interest and the role of the Crown. They are subject to employment and obligations by statute which add to their obligations as lawyers.

While private sector lawyers have a duty to the legal profession, clients and the system of justice, which is shared by public sector lawyers, the nature of the duty is often different. Public sector lawyers still observe professional duties and responsibilities, including the application of solicitor-client privilege and the duty of confidentiality.

The duties can be complex. A Justice lawyer is not in a position to speak out publicly against perceived injustice in the administration of justice. This speaking out, generally referred to as "whistleblowing,"[135] is not permissible conduct for reasons related to the lawyer's duty to the Crown and the public servant's duty to the Crown. In the case of a private sector lawyer the lawyer can make criticisms if they

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[133] *R.* v. *Joyal* J.E. 90-527; *R.* v. *Morales* [1993] R.J.O. 2940 (C.A.).

[134] See The Department of Justice online at <http://canada.justice.gc.ca/en/dept/index.html> (date accessed: March 30, 2001).

[135] *Supra* note 57.

are reasonable and are made in good faith.

As mentioned earlier,[136] the nature of the client relationship is different. While private sector lawyers can more easily define their client, the public sector lawyer works with officials at a variety of levels within government where the relationship may be less easy to identify. However, private sector lawyers may encounter similar problems when dealing with large corporations or institutions such as hospitals and universities. The institutional setting adds a layer of complexity which must be taken into consideration.

Public sector lawyers are sometimes held to higher standards because of the Minister's role within the justice system. As they are officers of the court, and as public servants and legal practitioners employed by the Crown, they are held to the standard which is expected of anyone exercising a public duty. Public sector practitioners are subject to requirements by statute which can affect the conduct of the case. Disclosure requirements in criminal prosecutions and access requests during civil litigation are but two examples which illustrate the complexity of the obligations in a public sector practice.

While it is easier to dwell on the differences, there are similarities. Both types of practitioners are committed to a legal profession whose duty is to act with integrity and to exercise a high standard of skill and care while performing legal services. Public sector lawyers are committed to service to the client, respect for the administration of the justice and accepting responsibility to act in a collegial way towards other members of the legal profession. The legal profession is undergoing tremendous change. Public sector lawyering, while often understated, will continue to evolve in concert with that change.

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[136] *Supra* note 1.