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The 'Unique Role' of Government Lawyers in Canada

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Discussions and depictions of lawyers in Canada largely ignore a significant segment of the legal population: government lawyers. Canada is a modern liberal democratic state with a significant public sector employing a large number of lawyers in many public sector settings. Lawyers who work directly for the executive branch – government lawyers – are a special subset of public lawyers. These government lawyers are 'unique' in many respects. They do not have paying clients as do private sector lawyers. Their client is 'the Crown' – an abstract emanation of the state. This article explains the unique role of government lawyers in Canada as derived from the historic and legislative responsibilities of the Attorney General. It then addresses questions that arise for government lawyers in Canada in public law litigation.

Keywords: government, public law, Attorney General, public litigation, Crown law, public sector lawyering, Canadian constitutional law, Canada, Constitution

1. Introduction: Competing Conceptions of the Government Lawyer in Canada

According to Canada's Department of Justice, lawyers working within the department have 'a unique role'.[1] The Oxford English Dictionary defines 'unique' as 'having no like or equal; standing alone in comparison with others, freq. by reason of superior excellence; unequalled, unparalleled, unrivalled'.[2] Government lawyers in Canada are 'unique' because they represent 'the Crown' – the legal and constitutional emanation of the state in Canada.[3] The Crown is a

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[1] Government of Canada, Department of Justice, 'Department of Justice Values and Ethics Code', http://www.justice.gc.ca/eng/rp-pr/cp-pm/vec-cve/intro.html.

[2] Oxford English Dictionary (2nd edn, Clarendon Press 1989), sv 'unique'.

[3] House of Commons Canada, 'Parliamentary Framework: Role of the Crown and the Governor General', http://www.parl.gc.ca/About/House/compendium/web-content/c_d_rolecrowngovernorgeneral-e.htm.

concept rather than a tangible figure; it cannot be seen or touched. While they are not invisible like their client, government lawyers exist in the shadows of the Canadian legal system.

In a sense, government lawyers are both everywhere and nowhere in Canada. As legal advisers on state power, and often also as its authorised defenders, government lawyers clearly play an important, if not critical, role in the Canadian legal system. Their prominence is enhanced because Canada is a federal state with jurisdiction divided between a federal government and ten provincial governments.[4] Federalism generates many legal and constitutional issues for government lawyers in Canada. Numerically, an estimated 15 to 25 per cent of Canadian lawyers work in the public sector, depending on the jurisdiction.[5] Canada's largest 'law firm' is actually the federal Department of Justice and not one of the large law firms with offices in multiple Canadian cities.[6] Canada's Department of Justice employs around 5,000 persons, about half of whom are lawyers.[7] With over 2,400 lawyers (not including prosecutors[8]), it is more than twice the size of the largest Canadian law firm.[9] More lawyers work in the Department of Justice than the total number of lawyers working in some of Canada's ten provinces.[10] The federal Department of Justice has offices in 17 cities across Canada and has 42 practice groups specialising in tax, Aboriginal law, transportation, immigration, civil litigation, terrorism, international law and many other areas. It advises Cabinet

[4] Constitution Act 1867 (UK), Preamble, ss 91, 92. There are also three 'territories' in Northern Canada which do not enjoy the same extent of powers as provinces and also have much smaller populations: Nunavut, the Yukon, and the Northwest Territories. For ease of reference, throughout this article I refer simply to 'provinces' or 'provincial' lawyers. These references should be taken to include the territories.

[5] No comprehensive figures are available. The range of 15 to 25% is taken from statistics of individual provincial law societies: Law Society of Upper Canada, '2014 Annual Report', http://www.annualreport.lsuc.on.ca/2014/en/annual-report-data.html#employment-type-lawyers (reporting that 15% of Ontario lawyers work in government); Law Society of Saskatchewan, 'Annual Report 2014', 5, 'Allocation of Practitioners … (not including Students-at-Law)', http://www.lawsociety.sk.ca/media/113643/AR2014op.pdf (reporting that 308 out of 1,663 lawyers (18.5%) were working either for the federal or provincial governments); Nova Scotia Barristers' Society, 'Statistical Snapshot: Autumn 2014', http://cdn2.nsbs.org/sites/default/files/cms/menu-pdf/2014statsnapshot.pdf (26.1%); Barreau du Quebec, 'Barreau-mètre 2015', 22, Graphique 12: Type de Pratique des Avocats en 2013–2014, http://www.barreau.qc.ca/pdf/publications/barreau-metre-2015.pdf (reporting that 22.7% of Quebec lawyers worked either for the provincial government (17.2%) or the federal government (5.5%). Another 2.9% worked for a municipality and 13.6% for a public or para-public company).

[6] Kim Covert, 'A New Way of Working at Canada's Biggest Law Firm', *The National*, 23 April 2015, http://www.nationalmagazine.ca/Blog/April-2015/A-new-way-of-working-at-Canada-s-biggest-law-firm.aspx.

[7] Government of Canada, Department of Justice, 'Organization of the Department of Justice', http://www.justice.gc.ca/eng/abt-apd/org.html.

[8] Federal prosecutors are not part of the Department of Justice; they are part of the Public Prosecution Service of Canada: 'Public Prosecution Service of Canada', http://www.ppsc-sppc.gc.ca/eng.

[9] These figures are as at 31 March 2014: Government of Canada, Department of Justice, 'Workforce Representation and Availability as of March 31, 2014' (on file with author).

[10] More lawyers (2,400) work in the federal Department of Justice than the total number of lawyers in the following jurisdictions: New Brunswick (1,757); Newfoundland and Labrador (951); Prince Edward Island (307); Yukon (295); North West Territories (627); Nunavut (219). The number of lawyers in Saskatchewan (2,469) is roughly equal to the number working in the Department of Justice: Federation of Law Societies of Canada, '2012 Statistical Report', http://flsc.ca/wp-content/uploads/2015/03/2012-statistical-report.pdf.

ministers and government agencies;[11] it is also the most frequent intervener at the Supreme Court of Canada.[12]

Government lawyers are a subset of public sector lawyers. The latter group of lawyers work for governments and other public entities like public utilities, publicly owned corporations, regulators and courts. Government lawyers are public sector lawyers who advise and litigate on behalf of the executive branch of government at any of the three levels of government in Canada: federal, provincial or municipal.

My work and this article focus on the responsibilities of the government lawyer at the federal and provincial levels because of the unique constitutional role and responsibilities of the Attorney General at each of these two levels of government in Canada.[13] There is no constitutional equivalent to the Attorney General at the municipal level of government in Canada; there are no municipal 'District Attorneys' in Canada in the way that there are in the United States (US). Under the Canadian Constitution, municipalities are wholly creatures of the provinces that created them; they have no independent constitutional existence.[14] For this reason, there are no municipal equivalents of federal and provincial Attorneys General, and the lawyers working for municipalities are not in a parallel position with their federal and provincial counterparts.

Lawyers working in the federal Department of Justice and its provincial counterparts are significant actors in the Canadian legal system, both in terms of their sheer numbers as well as the substance of their work. The fundamental characteristic that explains the uniqueness of government lawyers is their unique (in the sense of one of a kind having no like or equal[15]) client: the Crown.[16]

Yet government lawyers and their work have been largely ignored in Canada. They are barely acknowledged in codes of conduct for lawyers enacted by provincial law societies;[17] they are under-represented in the governance and activities of many law societies and legal

[11] Government of Canada, Department of Justice, 'Canada's Department of Justice', http://www.justice.gc.ca/eng/abt-apd/recru/ap-dp.html. The Department has a budget of $900 million. It has 17 regional offices and sub-offices and 42 Departmental Legal Services Units (DLSUs) co-located with client departments and agencies: Government of Canada, Department of Justice, 'Report on Plans and Priorities 2009–10', http://www.tbs-sct.gc.ca/rpp/2009-2010/inst/jus/jus00-eng.asp.

[12] Donald R Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (University of Toronto Press 2008).

[13] *Krieger v Law Society of Alberta* 2002 SCC 65, paras 26–32. For the purposes of this article, I bracket those lawyers who work on policy development within federal and provincial ministries of justice. These lawyers are not providing 'legal' advice or services when they are providing policy advice.

[14] *Citizens' Legal Challenge Inc v Ontario (Attorney General)* (1997) 36 OR (3d) 733, 153 DLR (4th) 299 (CA), paras 11–14; *AG Ontario v AG Dominion* [1896] AC 348, 363–64, [1896] UKPC 20; *Shell Canada Products Ltd v City of Vancouver* [1994] 1 SCR 231, 273.

[15] n 2.

[16] See Deborah MacNair, 'In the Service of the Crown: Are Ethical Obligations Different for Government Counsel?' (2006) 84 *Canadian Bar Review* 501, 506–07; and Deborah MacNair, 'The Role of the Federal Public Sector Lawyer: From Polyester to Silk' (2001) 50 *University of New Brunswick Law Journal* 125, 132; John C Tait, 'The Public Service Lawyer, Service to the Client and the Rule of Law' (1997) 23 *Commonwealth Law Bulletin* 542, 545.

[17] eg, Federation of Law Societies of Canada, 'Model Code of Professional Conduct', 10 October 2014, http://flsc.ca/wp-content/uploads/2014/12/conduct1.pdf. This Model Code has been adopted by most provincial law societies.

organisations;[18] their role has largely been ignored by the courts; and until recently they were under-theorised in Canadian academic scholarship.[19] Government lawyers are often invisible in Canadian discussions about legal ethics or the regulation of the legal profession. For these reasons, Allan Hutchinson has rightly called government lawyers 'the orphans of legal ethics' in Canada because so 'little energy has been directed towards defining and defending the role and duties of government lawyers'.[20] This contrasts sharply with the strong and robust scholarship that exists regarding the top government lawyer, the Attorney General.[21] As it is

[18] It was exceptional that in 2014–15 the heads of both the regulator of lawyers in Ontario – Canada's most populous province with 14 million residents – and the advocacy association for lawyers in that province were both government lawyers: Law Society of Upper Canada, 'Janet E. Minor, Law Society Treasurer', http://www.lsuc.on.ca/treasurer, and Ontario Bar Association, 'Board of Directors', http://www.oba.org/About-US/Governance/Board-of-Directors. Janet Minor was the first career government lawyer to head the Law Society of Upper Canada in its more than 200 years of existence: Daniel Fish, 'Q&A – Janet Minor, Incoming LSUC Treasurer', *Precedent*, 4 July 2014, http://lawandstyle.ca/law/janet-minor-lsuc-treasurer.

[19] Recent contributions to the academic literature in Canada include the following: Brent Cotter, 'Lawyers Representing Public Government and a Duty of "Fair Dealing"', paper presented at the Canadian Bar Association, Alberta Law Conference, March 2008, contained in Alice C Woolley and others, *Lawyers' Ethics and Professional Regulation* (Lexis Nexis 2008) 472; John Mark Keyes, 'The Professional Responsibilities of Legislative Counsel' (2009) 3 *Journal of Parliamentary and Political Law* 453; MacNair (2001) (n 16); Deborah MacNair, 'Solicitor-Client Privilege and the Crown: When is a Privilege a Privilege?' (2003) 82 *Canadian Bar Review* 213; MacNair (2006) (n 16); Tait (n 16); Allan C Hutchinson, '"In the Public Interest": The Responsibilities and Rights of Government Lawyers' (2008) 46 *Osgoode Hall Law Journal* 105; Joshua Wilner, 'Service to the Nation: A Living Legal Value for Justice Lawyers in Canada' (2009) 32(1) *Dalhousie Law Journal* 177; Malliha Wilson, Taia Wong and Kevin Hille, 'Professionalism and the Public Interest' (2011) 38 *Advocates' Quarterly* 1; Michael H Morris and Sandra Nishikawa, 'The Orphans of Legal Ethics: Why Government Lawyers are Different – And How We Protect and Promote that Difference in Service of the Rule of Law and the Public Interest' (2013) 26 *Canadian Journal of Administrative Law and Practice* 171; and Patrick J Monahan, '"In the Public Interest": Understanding the Special Role of the Government Lawyer' (2013) 63 *Supreme Court Law Review* (2d Series) 43. My own contribution can be found at Adam Dodek, 'Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law' (2010) 33 *Dalhousie Law Journal* 1.

The paucity of attention to government lawyers in Canada compares poorly with the attention given to the subject in the US: see, eg, Nick J Badgerow, 'Walking the Line: Government Lawyer Ethics' (2003) 12 *Kansas Journal of Law and Public Policy* 437; Steven K Berenson, 'Hard Bargaining on Behalf of the Government Tortfeasor: A Study in Governmental Lawyer Ethics' (2005) 56 *Case Western Reserve Law Review* 345; Kristina Hammond, 'Plugging the Leaks: Applying the Model Rules to Leaks Made by Government Lawyers' (2005) 18 *Georgetown Journal of Legal Ethics* 783; Anna P Hemingway, 'Conflicting Obligations' (2000) 9 *Widener Journal of Public Law* 227; Gerald B Lefcourt, 'Fighting Fire with Fire: Private Attorneys Using the Same Investigative Techniques as Government Attorneys; The Ethical and Legal Considerations for Attorneys Conducting Investigations' (2007) 36 *Hofstra Law Review* 397; Gregory B LeDonne, 'Revisiting the McDade Amendment: Finding the Appropriate Solution for the Federal Government Lawyer' (2007) 44 *Harvard Journal on Legislation* 231; Nancy Leong, 'Attorney–Client Privilege in the Public Sector: A Survey of Government Attorneys' (2007) 20 *Georgetown Journal of Legal Ethics* 163; Maureen A Sanders, 'Government Attorneys and the Ethical Rules: Good Souls in Limbo' (1993) 7 *Brigham Young Journal of Public Law* 39; Jessica Shpall, 'A Shakeup for the Duty of Confidentiality: The Competing Priorities of a Government Attorney in California' (2008) 41 *Loyola of Los Angeles Law Review* 701; W Bradley Wendel, 'Government Lawyers, Democracy, and the Rule of Law' (2009) *Fordham Law Review* 1333; Note, 'Government Counsel and their Obligations' (2008) 121 *Harvard Law Review* 1409; Note 'Rethinking the Professional Responsibilities of Federal Agency Lawyers' (2002) 115 *Harvard Law Review* 1170.

[20] Hutchinson, ibid 106.

[21] See John Ll J Edwards, 'The Office of Attorney General: New Levels of Public Expectations and Accountability' in Philip C Stenning (ed), *Accountability for Criminal Justice: Selected Essays* (University of

acknowledged in Canada that the Attorney General normally acts through his or her agents,[22] understanding the role and responsibilities of this office is the key to unlocking the uncertain status of government lawyers.[23] This has been the basis of my argument that government lawyers are 'custodians of the rule of law' and, as such, owe higher duties in both public law and legal ethics compared with other lawyers.[24] These concerns for the rule of law are particularly prevalent in public law litigation.

Toronto Press 1995) 294; John Ll J Edwards, 'The Attorney-General and the Canadian Charter of Rights' (1988) 14 *Commonwealth Law Bulletin* 1444; John Ll J Edwards, 'The Attorney General and the Charter of Rights' in Robert Sharpe (ed), *Charter Litigation* (Butterworths 1987) 45; John Ll J Edwards, *The Attorney General, Politics and the Public Interest* (Sweet and Maxwell 1984); John Ll J Edwards, *The Law Officers of the Crown* (Sweet and Maxwell 1964); Mark J Freiman, 'Convergence of Law and Policy and the Role of the Attorney General' (2002) 16 *Supreme Court Law Review* (2d Series) 335; Gordon F Gregory, 'The Attorney-General in Government' (1987) 36 *University of New Brunswick Law Journal* 59; Grant Huscroft, 'Reconciling Duty and Discretion: The Attorney General in the Charter Era' (2009) 34 *Queen's Law Journal* 769; Grant Huscroft, 'The Attorney General and Charter Challenges to Legislation: Advocate or Adjudicator' (1995) 5 *National Journal of Constitutional Law* 126; Law Reform Commission of Canada, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor* (Law Reform Commission of Canada 1990); Debra M McAllister, 'The Attorney General's Role as Guardian of the Public Interest in Charter Litigation' (2002) 21 *Windsor Yearbook of Access to Justice* 47; Graeme G Mitchell, 'The Impact of the *Charter* on the Public Policy Process: The Attorney General' in Patrick Monahan and Marie Finkelstein (eds), *The Impact of the Charter on the Public Policy Process* (York University Centre for Public Law and Public Policy 1993) 77; Kent Roach, 'Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law' (2006) 31 *Queen's Law Journal* 598; Kent Roach, 'The Attorney General and the *Charter* Revisited' (2000) 50 *University of Toronto Law Journal* 1; The Hon Marc Rosenberg, 'The Attorney General and the Administration of Criminal Justice' (2009) 34 *Queen's Law Journal* 813; Ian G Scott, 'The Role of the Attorney General and the Charter of Rights' (1986–87) 29 *Queen's Law Journal* 187; Lori Sterling and Heather MacKay, 'The Independence of the Attorney General in the Civil Law Sphere' (2009) 34 *Queen's Law Journal* 891; The Hon Ian Scott, 'Law, Policy, and the Role of the Attorney General: Constancy and Change in the 1980s' (1989) 39 *University of Toronto Law Journal* 109; The Hon R Roy McMurtry, 'The Office of the Attorney General' in Derek Mendes da Costa (ed), *The Cambridge Lectures* (Butterworths 1981).

[22] *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560, as embraced by the Supreme Court of Canada in *R v Harrison* [1976] SCJ No 22, para 14; *R v NDT Ventures Ltd* [2001] NJ No 363 (CA); *Ahmad v Public Service Commission* [1974] 2 FC 644 (CA); *CAE Metal Abrasive Division of Canadian Bronze Co Ltd v Deputy Minister of National Revenue Customs and Excise* [1985] 1 FC 481 (CA). See also the Interpretation Act, RSC 1970, c I-23, ss 1, 24(2). Cf Morris and Nishikawa (n 19) 175; Criminal Code, RSC 1985, c C-46, ss 2, 785, 813, 822(4); Crown Attorneys Act, RSO 1990, c C49, s 10. Certain duties of the Attorney General are considered to be non-delegable; for example, the Attorney General is required to examine every government bill and regulation to determine its compliance with the Canadian Bill of Rights and the Canadian Charter of Rights and Freedoms, and personally report any inconsistency with either document to the House of Commons: Canadian Bill of Rights, SC 1960, c 44, s 3; Department of Justice Act, RSC 1985, c J-2, s 4.1.

[23] I acknowledge that the situation of government lawyers is more complex than is presented here. Lawyers working for the Attorney General may adopt various roles: they provide legal advice to others in government; they represent the Crown and the Attorney General in civil litigation and regulatory proceedings; and they provide policy advice to the Attorney General as Minister of Justice responsible for the development of justice policy. In addition, in provinces without a separate Public Prosecution Service, prosecutors are also under the direct supervision of the Attorney General. For the purposes of this article, I recognise that the position of lawyers who provide policy rather than legal advice to the Attorney General is anomalous because, while they are lawyers, they are not acting *qua* lawyers in providing policy advice. For the purposes of the analysis of the ethical duties of government lawyers, such lawyers should be considered policy analysts who happen to be lawyers rather than lawyers who happen to be providing policy advice: their primary role is in providing *policy* not *legal* services.

[24] Dodek (n 19) 19–28.

This article thus addresses a major question in public law: the unique role of government lawyers and, specifically, it analyses the role of these lawyers in Canada in public law litigation. The article has two substantive parts in addition to this introduction. In Section 2, I discuss the special role of government lawyers in Canada. Section 3 turns squarely to their role in public law litigation and the tensions that arise therefrom for these lawyers, followed by a brief conclusion.

2. THE SPECIAL ROLE OF GOVERNMENT LAWYERS IN CANADA

Elsewhere, I have argued that government lawyers in Canada should be subject to higher ethical duties than those imposed on private sector lawyers.[25] This is not the law in Canada, and only a single case has directly addressed the issue.[26] This proposition remains surprisingly (to me) controversial, especially in light of the willingness of US courts to impose higher duties on government lawyers.[27]

My argument in favour of imposing higher ethical duties on government lawyers is derived from two sources: (i) public law generally, and (ii) the special role of the Attorney General which is recognised in Canadian law. As a matter of public law, government lawyers clearly represent the powerful interests of the state. However, I have asserted that they also exercise public power directly – through the discretion that they exercise in the acts of legal interpretation, providing legal advice, and litigation techniques. As representatives of the Attorney General, government lawyers must act to protect and promote the rule of law because their 'boss' – the Attorney General – is recognised as the 'guardian of the rule of law'.

Government lawyers who have written on the subject argue compellingly that as agents of the Attorney General they have 'special duties', but they strongly resist the notion that those special public law duties translate into higher ethical duties.[28] This debate between a *higher* as opposed to a different duty is interesting and important theoretically, but it may be a distinction without much of a practical difference. As Michael Morris and Sandra Nishikawa have written, while courts have explicitly rejected the idea of any separate or higher duty for government lawyers, 'the Courts, other lawyers, and the public at large expect government lawyers to act differently, rendering the question of whether they should be subject to higher ethical duties somewhat academic'.[29] However, this distinction may be one with a difference in certain cases, including public law litigation, as discussed below.

[25] ibid.
[26] *Everingham v Ontario* (1991) 84 DLR (4th) 354, [1991] OJ No 3578 (Ont CJ (Gen Div) (Borins J), varied (1992) 8 OR (3d) 121 (Div Ct).
[27] eg, *May Department Stores v Williamson* 549 F 2d 1147, 1150 (per Lay J, concurring); *Bulloch v United States* 763 F 2d 1115 (10th Circ 1985), cert denied 474 US 1086 (1986) (per McKay J, dissenting) (chastising counsel for failing to make full disclosure during discovery); *Douglas v Donovan* 704 F 2d 1276 (DC Cir 1983) (failing to disclose the existence of a settlement on the basis that government counsel owe a different or higher duty); *Braun v Harris* (ED Wis 1980), cited by MacNair (2006) (n 16) 515.
[28] Wilson, Wong and Hille (n 19), Morris and Nishikawa (n 19), and Monahan (n 19).
[29] Morris and Nishikawa (n 19) 172.

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The role of, and the tensions for, government lawyers in administrative proceedings is directly tied to the characteristics of the Attorney General. In Canada, the responsibilities of the Attorney General and Minister of Justice are fused in a single office. As Attorney General, the office holder is the legal adviser to the executive and responsible for conducting out all litigation in which the government is involved. As Minister of Justice, the same person has responsibility for all matters relating to the development and supervision of justice policy. It is because of these dual roles that it is said that the Attorney General often wears 'two hats': the one partisan or political, the other constitutional and at times independent. As Morris and Nishikawa have acknowledged, '[t]here is a natural and historic tension in those two roles'.[30]

Wearing the political hat, the Attorney General is a member of the Cabinet, almost always an elected member of the legislature,[31] a member of the governing political party and active in partisan affairs of his or her political party. Several Attorneys General at the federal and provincial level have successfully moved on to assume the leadership of their party and become Prime Minister or provincial premier.[32] Historically, at the federal level, the office of Attorney General has been a launching pad for the politically ambitious, perhaps because until recently lawyers dominated Canadian politics.[33]

Canadian Attorneys General wear a second hat, often referred to as 'their Attorney General hat'.[34] In this role, the Attorney General exercises powers recognised under the Canadian Constitution and under statute as belonging to the Attorney General and Solicitor General of England 'by law or usage'.[35] The Attorney General serves as the Chief Legal Officer of the Crown, charged with advising the executive and representing the Crown in court. In some matters, the Attorney General exercises complete independence from partisan concerns, as recognised by constitutional convention. This independence is most notable in decisions regarding prosecutions, but it extends to other areas such as public interest injunctions. However, Canadian Attorneys General do not exercise complete independence in most civil matters, although it is accepted that partisan or political concerns may appropriately influence the Attorney General's actions in this area.[36]

[30] ibid 175.

[31] By convention in Canada, all members of the Cabinet must have been elected as members of Parliament (MPs) or members of their provincial legislative assembly, or must intend to seek election in the immediate future.

[32] For example, Canada's first Prime Minister, Sir John A MacDonald, was Attorney General prior to Confederation and served as Attorney General (1867–73) during his first term as Prime Minister. Prime Minister Sir John Thompson (1885–91, 1891–92, 1892–94) served as Attorney General prior to becoming, and while Prime Minister. Prime Ministers RB Bennett (1921), Louis St Laurent (1941–46, 1948), Pierre Trudeau (1967–68), John Turner (1968–72), Jean Chretien (1980–82) and Kim Campbell (1990–93) also served as Attorney General.

[33] Adam Dodek, 'Lawyers, Guns and Money: Lawyers and Power in Canadian Society' in David L Blaikie, The Hon Thomas A Cromwell and Darrel Pink (eds), *Why Good Lawyers Matter* (Irwin Law 2012) 57.

[34] The Hon Allan Rock, Minister of Justice and Attorney General of Canada, 'Observations of Public Service', (speech delivered to a joint meeting of the Empire Club of Canada and the Canadian Club of Toronto, 24 March 1995), in *The Empire Club of Canada Addresses* (The Empire Club Foundation 1995) 155–68.

[35] Constitution Act 1867 (UK), ss 63, 134 and 135; Department of Justice Act (n 22) s 5(a); Ministry of the Attorney General Act, RSO 1990, c M-17, s 5(d).

[36] McMurtry (n 21) 1, 4–5.

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The tension between the independent and the partisan Attorney General is well recognised.[37] However, Canadian Attorneys General often point to their political role as supporting their independent role, asserting that being included in the political Cabinet allows the Attorney General to be a participant in political decision making and able to press rule of law concerns. It is claimed that there is a greater likelihood of the Attorney General's legal advice being accepted and followed by the executive precisely because he or she is a member of the political executive in the form of the Cabinet.

This assertion contrasts with the Israeli experience where the Attorney General is not political in the sense of being an elected politician, and is not a member of the Cabinet; however, his or her legal advice is binding on the government and the position is completely independent.[38] In Israel, the Attorney General may refuse to defend a governmental decision, and government agencies have tried unsuccessfully to circumvent the Attorney General by retaining private counsel.[39] This is not the case in Canada. The legal advice of government lawyers is not binding on government officials;[40] the Attorney General does not publicly oppose other members of the executive, and does not refuse to defend a government position with which he or she disagrees and obtain separate representation to oppose the government; this has never happened in the history of Canada.[41] The Canadian system requires the Attorney General to iron out all differences of opinion internally. This is expressed in the dictum that the Crown must 'speak with one voice' – that is, there can be only one single legal position for the executive at each level of government.[42] This legal position may be expressed by the Attorney General but it is not necessarily determined by the Attorney General. In the Canadian case, if the Attorney General believes that the government is refusing to accept and act on legal advice and insists on taking action that the Attorney General believes to be unconstitutional or an affront to the rule of law, in theory the Attorney General should resign. This has occurred rarely in Canada.[43]

The Attorney General is the 'adviser in chief' in all legal matters, but not necessarily the 'decider in chief'.[44] This means that the Attorney General in Canada is the chief legal officer

[37] eg, Sterling and Mackay (n 21) 902.
[38] Yoav Dotan, *Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel* (Cambridge University Press 2014) 54–56.
[39] Dotan, ibid 59, citing HCJ 4267/93 *Amitai – Citizens for Judicial Watch v The Government of Israel* 1993 PD 47(5) 441, 475.
[40] Edwards (1987) (n 21) 53.
[41] eg, Sterling and Mackay (n 21) 900.
[42] Because Canada is a federal state, powers are divided between the federal government and the provinces. Thus, the Crown is designated as 'Her Majesty the Queen in Right of Canada', or 'Her Majesty the Queen in Right of Alberta', or 'Her Majesty the Queen in Right of Nova Scotia', etc. When we say 'the Crown must speak with one voice', we mean that there is a unitary legal position for each level of government. Of course, the legal position for the federal government may differ from that of specific provinces (and often does). This is the nature of federalism in Canada.
[43] In 1988, the Attorney General of British Columbia, the Hon Brian RD Smith QC, resigned because the Premier refused to follow his advice regarding legally required funding for abortion procedures in that province; Mr Smith announced his resignation publicly on the floor of the legislature: BC Hansard, 34th Parl, 2nd Sess, 5498, 28 June 1988.
[44] cf John Kreiser, 'Bush: The Decider-in-Chief', 20 April 2006, http://www.cbsnews.com/news/bush-the-decider-in-chief; and George W Bush, *Decision Points* (Crown 2010). cf Sterling and Mackay (n 21) 894 ('in the civil sphere, the Attorney General often acts an advisor and not as a decision-maker').

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of the Crown but is not the chief legal decision maker in all matters; this is typically the role of other government ministers.[45] Almost all government lawyers are Department of Justice lawyers and report to the Attorney General, even if they are located or 'seconded' to another ministry.[46] Thus, those other ministers receive legal advice from government lawyers who are under the supervision of the Attorney General.

At the federal level, the Department of Justice Act provides that the Minister of Justice[47]

> is the official legal adviser of the Governor General and the legal member of the Queen's Privy Council for Canada [the Cabinet] 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.

Similar provisions exist under provincial laws.[48]

Neither the Attorney General nor government officials are bound by the legal advice provided by government lawyers. In fact, the Attorney General, and government officials with the approval of the Attorney General, may seek outside legal advice on a matter for various reasons. This occurred in 2013 when the Prime Minister 'nominated' Justice Marc Nadon of the Federal Court of Appeal to a seat in the Supreme Court of Canada, which by statute was required to be filled by a judge from Quebec. There was a legal question as to whether a judge of the Federal Court or Federal Court of Appeal met the statutory requirements for appointment to the Supreme Court from Quebec. The federal government had sought outside legal advice from two retired Supreme Court justices and from Peter Hogg, the foremost constitutional law scholar in Canada.[49] In a rare move, the federal government published the legal opinion it had received from a former Supreme Court justice simultaneously with its announcing the nomination

[45] Morris and Nishikawa (n 19) 176, quoting Tait (n 16) 548 ('While government lawyers can be influential in giving legal advice to government Ministers and departments, it is the latter who must "decide, within the rule of law, on what the public interest is for government officials"'). One exception is the Attorney General's duty to report inconsistencies with the Canadian Bill of Rights and the Canadian Charter of Rights described in n 22.
[46] At the federal level, these are now referred to as 'Departmental Legal Service Units' (DLSUs): Government of Canada, 'Various Roles of Lawyers at the Department of Justice', http://www.justice.gc.ca/eng/abt-apd/recru/lr-ra.html.
[47] Department of Justice Act (n 22) s 4.
[48] Ministry of the Attorney General Act (n 35) s 5; An Act Respecting the Office of the Attorney General, SNB 2008, c A-16.5; Department of Justice Act, RSM 1987, c J-35, CCSM c J-35; Justice and Attorney General Act, SS 1983, c J-4.3; Government Organization Act, RSA 2000, c G-10, Sch 9; Attorney General Act, RSBC 1996, c 22; An Act respecting the Ministère de la Justice, RSQ c M-19; Executive Council Act, SNL 1995, c E-16.1, s 4; Department of Justice Notice, 2003, NLR 85/03; Public Service Act, RSNS 1989, c 376, s 29.
[49] Prime Minister of Canada, 'Qualification of a Member of the Federal Court with 10 Years of Experience as a Member of Québec Bar to be Appointed to the Supreme Court of Canada', 30 September 2013, https://web.archive.org/web/20131018094213/http:/www.pm.gc.ca/eng/news/2013/09/30/qualification-member-federal-court-10-years-experience-member-quebec-bar-be.

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of Justice Nadon to the Supreme Court.[50] Despite the legal uncertainty over Justice Nadon's eligibility for appointment, the Prime Minister confirmed the appointment. A legal challenge was launched on the day on which Justice Nadon was sworn in as a Supreme Court judge. The government subsequently brought a reference directly to the Supreme Court of Canada, asking the court to rule on the eligibility of Justice Nadon. In a 6:1 decision, the Court invalidated the appointment, thereby implicitly rejecting the legal advice of its former colleagues.[51]

Several enumerated responsibilities of the Attorney General are particularly relevant to public law proceedings. Thus, for instance, the relevant Ontario statute provides that the Attorney General of that province[52]

> shall see that the administration of public affairs is in accordance with the law; … shall advise the heads of the ministries and agencies of Government upon all matters of law connected with such ministries and agencies; … [and] shall conduct and regulate all litigation for and against the Crown or any ministry or agency of Government in respect of any subject within the authority or jurisdiction of the Legislature.

3. The Unique Duties of the Government Lawyer Applied: Public Law Litigation

3.1. Public Law Responsibilities

As a general matter, government lawyers in Canada advise and represent the executive branch. The legislative branch – the federal Parliament and the provincial legislative assemblies – have their own, independent legal advisers. However, government lawyers do intersect with the legislative branch in certain matters. It is not uncommon for them to appear before parliamentary committees, often with the Minister of Justice or as the Minister's representatives, in order to explain and clarify legislation. In so doing, they are clearly acting as representatives of the Department of Justice. They explain proposed legislation that has been sponsored by the executive to be considered for adoption by the legislature.

In court, government lawyers defend legislation enacted by Parliament when it has been challenged. Unlike Israel, government lawyers in Canada do not argue that certain laws are unconstitutional and should be declared invalid. In rare instances, government lawyers have conceded the unconstitutionality of legislation and have been reprimanded by the Supreme Court of Canada.[53] Under the Canadian Charter of Rights and Freedoms, there is a two-part test for determining whether legislation is unconstitutional. First, the claimant bears the burden of proof of

[50] ibid.
[51] Supreme Court of Canada, Reference re Supreme Court Act, ss 5 and 6, 2014 SCC 21, [2014] 1 SCR 433.
[52] Ministry of the Attorney General Act (n 35) s 5.
[53] *Schachter v Canada* [1992] 2 SCR 679. See also the comments of the joint dissent in *R v Sharpe* 2001 SCC 2, [2001] 1 SCR 45, paras 150–51 (stating, at para 151, that 'it is unfortunate that the Crown conceded that the right

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showing that a constitutionally protected right has been infringed; second, the government then has the onus of demonstrating that the infringement is 'reasonable and demonstrably justified in a free and democratic society'.[54] It is not uncommon for government lawyers to concede a prima facie violation of a constitutionally protected right and focus on the second element of justifying that infringement as a reasonable limitation. However, conceding that legislation is unconstitutional in its entirety and cannot be justified is exceedingly rare because it conflicts with accepted notions of separation of powers and the role of the Attorney General.

It is generally accepted in Canada that both the power and the responsibility of constitutional judicial review resides with the courts. Since Canada's creation in 1867, its courts have exercised the power of judicial review over legislation on federalism grounds. The legitimacy of this power was accepted. The Constitution Act of 1982 made this power of judicial review explicit and expanded it to include all matters under the Constitution, most notably the Canadian Charter of Rights and Freedoms. Section 52 of the Constitution Act, 1982, provides that '[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect'.[55] This provision was understood by those involved in the constitutional reform process to explicitly recognise the power of judicial review. Thus, there is no Canadian equivalent to *Marbury v Madison*[56] or *Bank Mizrahi*[57] in which the US Supreme Court and the Supreme Court of Israel, respectively, declared that they had the power of judicial review. Those decisions have been the subject of debate and criticism ever since. In Canada, it is accepted that it is both the power and the duty of the courts to exercise judicial review, which explains why the courts frown on constitutional concessions by government lawyers. Such actions are seen to inhibit the courts in exercising their constitutional responsibilities. Criticism is expressed in terms of concessions 'precluding' the court from undertaking an analysis of a constitutional provision on its merits or 'depriving' the court of access to evidence necessary for the court to do its job.[58]

Another explanation as to why government lawyers in Canada do not argue that particular provisions are unconstitutional is because to do so would be completely inimical to the general understanding of the role of the Attorney General in Canada. One of the understood responsibilities of the Attorney General is to 'see that the administration of public affairs is in accordance with the law'.[59] The Attorney General is also 'the official legal adviser of the Governor General and the legal members of the Queen's Privy Council for Canada'.[60] This means that if the Attorney General, being a member of the Cabinet, determines that legislation is unconstitutional, it would be incumbent on him or her to so advise the Cabinet and the responsible Minister and

to free expression was violated in this appeal in all respects, thereby depriving the Court of the opportunity to fully explore the content and scope of s. 2(*b*) as it applies in this case').

[54] *R v Oakes* [1986] 1 SCR 103.

[55] Constitution Act, 1982, enacted as Schedule B to the Canada Act 1982 (UK).

[56] *Marbury v Madison* 5 US (Cranch) 137.

[57] CA 6821/93 *United Bank Mizrahi v Migdal Cooperative Village* 1995 49(4) PD 221.

[58] *Schachter* (n 53).

[59] Department of Justice Act (n 22) s 4(a).

[60] ibid s 4.

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advise them to change or repeal the legislation. To ignore such advice from the Attorney General would mean in essence that the government was ignoring the advice that it was acting unconstitutionally; most commentators agree that in such circumstances the Attorney General could not continue in office and must resign. These were the general circumstances surrounding the resignation of Attorney General Brian Smith in British Columbia in 1986.[61]

Finally, in Canada, the federal Cabinet may ask the Supreme Court for an advisory opinion on any legal question that it submits to the Court, including the constitutionality of an existing or a proposed statute.[62] Similar powers exist for provincial governments.[63] Thus, if a government has reason to question the constitutionality of any current legislation, the means exist for it to refer the matter to the courts for an advisory opinion.

For these reasons, government lawyers rarely concede the unconstitutionality of legislation and do not ask the courts to declare legislation unconstitutional. If they were to so ask, they would be conceding that the government was not acting according to the law and that the Attorney General had failed in his or her constitutional responsibilities.

There is one instance at the federal level where government lawyers are involved indirectly in advising the legislative branch of government. This relates to the statutory responsibility of the Minister of Justice to examine every government bill introduced in the House of Commons and every draft regulation to determine whether any of the provisions contained in the instrument in question are 'inconsistent' with the Canadian Charter of Rights and Freedoms or the Canadian Bill of Rights.[64] The relevant legislation requires the Minister to 'report any inconsistency to the House of Commons at the first convenient opportunity'.[65] There has never been such a report, although many statutes have been found to violate the Canadian Charter of Rights and Freedoms[66] (and only one statute has been found to violate the Canadian Bill of Rights since it was enacted in 1960[67]).

While the statutory responsibility and ultimate decision to report an 'inconsistency' lie with the Minister, it is government lawyers who are involved in the actual review of every government bill and regulation. Moreover, government lawyers have developed standards for determining

[61] Sterling and Mackay (n 21) 891–928.
[62] Supreme Court Act, RSC 1985, c S-26, s 53.
[63] Constitutional Question Act, RSBC 1996, c 68, s 1; Constitutional Questions Act, RSNS 1989, c 89, s 3; Court of Appeal Reference Act, RSQ 1975, c R-23, s 1; Courts of Justice Act, RSO 1990, c 43, s 8(1); Judicature Act, RSA 2000, c J-2, s 26(1); Judicature Act, RSNB 1973, c J-2, s 23(1); Judicature Act, RSNL 1990, c J-4, s 13; Judicature Act, RSPEI 1988, c J-2.1, s 7(1); Constitutional Questions Act, CCSM 2002, c C-180, s 1; Constitutional Questions Act, SS 2012, c C-29.01, s 2(1).
[64] Department of Justice Act (n 22) s 4.1 and Canadian Bill of Rights (n 22) s 3.
[65] The language in the two statutes is identical.
[66] eg, the lists in Peter W Hogg and Allison A Bushell, 'The Charter Dialogue between Courts and Legislatures' (1997) 35 *Osgoode Hall Law Journal* 75, 107–24, and Peter W Hogg, Allison A Bushell Thornton and Wade K Wright, 'Charter Dialogue Revisited or "Much Ado About Metaphors"' (2007) 45 *Osgoode Hall Law Journal* 1, 55–65
[67] *R v Drybones* [1970] SCR 282, 298. While the Canadian Bill of Rights (n 22) remains in force, it has largely been superseded in practice by the Canadian Charter of Rights and Freedoms (n 22), which is a constitutional bill of rights; the Canadian Bill of Rights is a more limited statutory bill of rights which applies only to the federal government.

when a government bill or regulation meets the threshold of 'inconsistency' with the Canadian Charter of Rights and Freedoms or the Canadian Bill of Rights. These guidelines or policies remained secret until 2013 when a Department of Justice lawyer, Edgar Schmidt, took the extraordinary step of suing the Attorney General of Canada, claiming that the Minister was and had been in violation of his statutory responsibilities because the Department of Justice had implemented policies requiring its lawyers to assess all government bills and regulations to determine whether they were 'manifestly' or 'certainly' inconsistent with the Charter or the Canadian Bill of Rights. That lawsuit has attracted significant media attention and the trial took place in October 2015. A decision in the action is under reserve. Whatever the outcome, the decision is likely to be appealed against, perhaps all the way to the Supreme Court of Canada.[68] The *Schmidt* case has attracted significant attention within the legal profession and in the broader public precisely because of interest in the role of government lawyers and the Attorney General.

3.2. TENSIONS IN PUBLIC LAW LITIGATION

Several tensions may be identified in the role of government lawyers in public law litigation. These tensions are likely to present more theoretical than practical problems in public law litigation, but they are worth exploring precisely because they raise issues about the role of government lawyers in this area of litigation.

The main tension is between the rhetoric of zealous advocacy and the reality of the commitment to the public interest. The dominant model of law practice in Canada sees the advocate as zealously representing his and her client's rights against the state or another adversary.[69] Canadians have raised generations of lawyers on the inspirational words of Lord Brougham, in his defence of Queen Caroline, that an advocate 'knows but one person in all the world, and that person is his client' and '[t]o save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others'.[70]

The dominant model rests upon the twin notions of moral non-accountability by lawyers for the acts of their clients and zealous advocacy – namely, that the lawyer must do everything possible within the bounds of law to assist the client to prevail. These are the foundations of the Canadian adversarial system of justice.[71] This standard conception continues to dominate Canadian codes of conduct, lawyers' practice, legal education and depictions of lawyers in

[68] The case was heard by the Federal Court. Under the Federal Courts Act, there is a right of appeal against a decision to the Federal Court of Appeal: Federal Courts Act, RSC 1985, c F-7, s 27. There is no automatic right of appeal from the Federal Court of Appeal to the Supreme Court of Canada; the Supreme Court must grant 'leave' or permission to hear the appeal: Supreme Court Act, RSC 1985, c S-26, s 40(1).

[69] Trevor CW Farrow, 'Sustainable Professionalism' (2008) 46 *Osgoode Hall Law Journal* 51, 63–71.

[70] Joseph Nightingale (ed), *Trial of Queen Caroline*, vol 2 (J Robins and Co 1821) 8, quoted in Farrow, ibid 64. See also Woolley and others (n 19) 17, quoting Binnie J in *R v Neil* [2002] 3 SCR 631. Most legal ethics teachers in Canada use the text from Woolley and others.

[71] David Luban, *Legal Ethics and Human Dignity* (Cambridge University Press 2009) 20.

the media and popular culture.[72] This dominant view 'is everywhere in Canadian law'.[73] However, there is growing recognition that this view is flawed both on a descriptive and a normative level.[74] This is especially so for government lawyers.

This standard conception is based on the adversarial model and would thus appear to apply naturally to public law litigation involving government lawyers. The standard conception dominates codes of ethical conduct for Canadian lawyers, which make no distinction between the responsibilities of government and non-government lawyers in litigation, outside the criminal context.[75]

Canadian codes of conduct generally consider lawyers working in government as equivalent to lawyers working in private practice. Indeed, the definition of 'law firm' in codes of conduct expressly includes lawyers working 'in a government, a Crown corporation or any other public body'.[76] These codes of conduct treat government lawyers as a species of a special class of lawyer, but that special class is not 'government'; it is lawyers for an 'organization'.[77] Consequently, in terms of their ethical expectations, government lawyers in Canada are lumped together with lawyers for organisations such as Air Canada, BlackBerry, Tim Horton's and the National Hockey League. Similarly, rules of court and rules of law do not impose any special duties on government lawyers, although the Attorney General through counsel is often afforded special privileges. Thus, on one level, government lawyers should practise the Canadian equivalent of the familiar 'zealous advocacy',[78] representing their client 'resolutely' and honourably within the limits of the law.[79]

This duty applies explicitly to administrative proceedings.[80] Thus, according to this conception, the government lawyer is not only entitled, but has a duty, to 'raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law'.[81] Moreover, this rule states that because the lawyer's function is

[72] Farrow (n 69) 63–69.
[73] David Layton, 'The Criminal Defence Lawyer's Role' (2004) 27 *Dalhousie Law Journal* 379, 381, quoted in Farrow (n 69) 64.
[74] Thanks to Richard Devlin for helping me to make the connection between my analysis of government lawyers and the dominant view of law practice. For examples of critiques or alternative views see, eg, Farrow (n 69); Allan C Hutchinson, 'Legal Ethics for a Fragmented Society: Between Professional and Personal' (1998) 5 *International Journal of the Legal Profession* 175; Allan C Hutchinson, *Legal Ethics and Professional Responsibility* (2nd edn, Irwin Law 2008) Ch 3; David M Tanovich, 'Law's Ambition and the Reconstruction of Role Morality in Canada' (2005) 28 *Dalhousie Law Journal* 267; Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBC Press 2008); and Alice C Woolley, 'Integrity in Zealousness: Comparing the Standard Conceptions of the Canadian and American Lawyer' (1996) 9 *Canadian Journal of Law and Jurisprudence* 61.
[75] *Boucher v The Queen* [1955] SCR 16, 23–24; Federation of Law Societies of Canada, 'Model Code of Professional Conduct' (n 17) r 5.1–3.
[76] 'Model Code of Professional Conduct', ibid, r 1.1–1.
[77] ibid, r 3.2–3.
[78] This term actually does not, and never did, appear in Canadian ethical codes of conduct. However, the US influence has widely penetrated the Canadian legal vernacular: Woolley (n 74).
[79] 'Model Code of Professional Conduct' (n 17) r 5.1–1.
[80] ibid, r 5.1–1, comment [2].
[81] ibid, comment [1]. This duty of partisan advocacy is tempered by the following: 'The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to

'openly and necessarily partisan', 'the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client's case'.[82] This language is particularly notable because of the reference to the duties of the prosecutor; it would thus implicitly envision and embrace government lawyers acting outside the criminal context. According to this model, the role of the government lawyer in administrative proceedings is equivalent to that of the private lawyer: to do everything possible within the bounds of the law to defend the actions of the government body being challenged.

The model of zealous advocacy does not square with either the duties or the practice of government lawyers. As Morris and Nishikawa have written, '[t]his paradigm does not fit perfectly with the role of the government lawyer, infused as it is with notions of public service to the larger public interest and the Rule of Law'.[83] Government lawyers know that their client is no ordinary client: 'Government lawyers work for a unique organization: the Crown. There is no private sector equivalent'.[84] Moreover, government lawyers know that the Attorney General has a relationship with the Crown that is very different from that of a private sector lawyer with an ordinary client. In the private sector, the advocate's duty of loyalty to his or her client is almost unconditional, as seen in the famous quote from Lord Brougham in *Queen Caroline's Case*, cited above.[85]

This model of 'zealous representation' is not the appropriate standard of loyalty for government lawyers. Moreover, democratic governments have a responsibility to represent the interests of all citizens,[86] and not just the supporters of the party in power. Ian Scott, former Attorney General of Ontario, stated that '[t]he Attorney General must act in accordance with the interests of those whom the government represents and not simply in the interest of the government to which the Attorney General belongs'.[87] These opposing visions are further complicated by multiple competing considerations that exist for government lawyers in the specific context of judicial review proceedings.

The Crown must have the public interest in mind. As Kent Roach has expressed in terms of the Attorney General, the government lawyer is not simply the government's lawyer.[88] The office of the Attorney General has a unique constitutional status in Canada. It has been described as 'the guardian of the public interest'[89] or 'the defender of the Rule of Law'.[90] Despite Roach's

treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected': ibid.

[82] ibid, comment [3].

[83] Morris and Nishikawa (n 19) 173.

[84] ibid 176.

[85] Nightingale (n 70) 8.

[86] Cotter (n 19).

[87] Scott (1989) (n 21) 120. I am grateful to John Sims for reminding me of these important points.

[88] Roach (2006) (n 21).

[89] Edwards (1964) (n 21) 286–308; Edwards (1984) (n 21) 138–76. On the public interest see M Deborah MacNair, 'In the Name of the Public Good: "Public Interest" as a Legal Standard' (2006) 10 *Canadian Criminal Law Review* 175.

[90] See, eg, Ontario, *Royal Commission Inquiry into Civil Rights: Report No 1* (Queen's Printer 1968) vol 2, 945, and Roach (2006) (n 21).

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assertion that '[t]he case for the Attorney General as defender of the rule of law is not an easy one',[91] Lori Sterling and Heather Mackay conclude that '[t]here is a clear consensus that the Attorney General should actively promote the rule of law'.[92] The Attorney General has a statutory duty to 'see that the administration of public affairs is in accordance with the law'.[93] As Scott explained, 'the Attorney General has a positive duty to ensure that the administration of public affairs complies with the law. Any discussion of the Attorney General's responsibilities must keep this fundamental obligation in mind'.[94] The landmark 1968 McRuer Report into Civil Liberties in Ontario stated:[95]

> The duty of the Attorney General to supervise legislation imposes on him a responsibility to the public that transcends his responsibility to his colleagues in the Cabinet. It requires him to exercise constant vigilance to sustain and defend the Rule of Law against departmental attempts to grasp unhampered arbitrary powers, which may be done in many ways.

Thus, the Attorney General, and through his or her delegates the government lawyers, have a statutory duty to 'see that the administration of public affairs is in accordance with the law'.[96] According to this conception of the role of the government lawyer, their job would not be simply to defend the actions of an impugned public authority on judicial review if there exists a valid basis for doing so, but rather to inquire proactively whether that public authority was acting in accordance with the rule of law. As one leading government lawyer has stated, in most governmental legal departments there is a 'culture' of respect for the rule of law, which informs the work that government lawyers do.[97]

In administrative proceedings, the Crown needs to balance various potentially competing interests in arriving at a legal position:

(1) the policy preferences of the ministry whose actions are the subject of the judicial review;
(2) the policy preferences of the Ministry of the Attorney General;
(3) the political preferences of the government of the day;
(4) the long-term interests of government; and
(5) ensuring consistency in the government's legal position.

The government lawyer potentially plays an important role in helping to balance these varying interests. With regard to the last three interests, a former Ontario Deputy Attorney General

[91] Roach, ibid 600, quoting John Edwards' statement lamenting 'the all-too-common tendency to view the attorney general and his department as no more than the law firm that is always on call to serve the interests of the political party that is in power at the time': Edwards (1995) (n 21) 323.
[92] Sterling and Mackay (n 21) 900.
[93] eg, Ministry of the Attorney General Act (n 35) s 5(b). Similarly, see Department of Justice Act (n 22) s 4(a) ('see that the administration of public affairs is in accordance with law').
[94] Scott (1989) (n 21) 189.
[95] *Royal Commission Inquiry into Civil Rights: Report No 1* (n 90) vol 2, 945 quoted in Scott (1986–87) (n 21) 192.
[96] eg, Department of Justice Act (n 22) s 4(a); Ministry of the Attorney General Act (n 35) s 5(2).
[97] Janet Minor, 'Public Sector and Ethical Culture', *Cavanagh LLP Professionalism Speaker Series*, 11 March 2015, University of Ottawa (Canada) (unpublished).

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wrote that government lawyers, in giving legal advice, must ensure 'that both the short-term interests of this government and the long-term interest of Government with a capital "G" are addressed' and that 'the Crown's legal position [is] consistent and uniform'.[98]

In most cases where government lawyers are defending the actions of a government body on judicial review, these conflicts are unlikely to arise or they are dealt with through the ordinary government process. It is interesting to consider the exceptional and generally rare circumstances in which a stark conflict could arise. The conflicts become most acute where there is a clash between interests (3) and (4): the political preferences of the government of the day and the long-term interests of government. This may arise in a number of contexts but perhaps most notably where government lawyers are called upon to defend policy enacted by a previous government, which is anathema to the political preferences of the government of the day. The political inclination of the government of the day is likely not to defend its predecessor's policy; however, this political desire clashes with the government lawyer's responsibility to defend all validly enacted laws unless and until they have been repealed.

Because the Attorney General is not the 'decider in chief', he or she may be subject to internal and sometimes external political pressures. Senior political officials may not understand why the Attorney General's lawyers – government lawyers – are defending the actions of an administrative body created by a former administration which is now a political adversary. It is not unusual for government lawyers in Canada to be called upon to defend the decisions of administrative officials appointed by the same political adversary who were appointed because of their partisan ties to that political party or politician. It is not easy for government lawyers to resist such political pressure. However, it is one of the responsibilities of the Attorney General and senior public service officials (themselves government lawyers) to do precisely this. Thus, in high-profile cases, senior public service and political officials in the Attorney General's ministry may confer and consult with their counterparts in the ministry responsible for the impugned policy or impugned agenda action in order to arrive at an agreed legal position on the judicial review application. To complicate (or assist) matters, the Privy Council Office (federal) or Cabinet Office (provincial) may become involved. To further complicate matters, the Prime Minister's Office or the Premier's Office may become involved and communicate instructions.

It is important to distinguish between situations that require a balancing of differing interests, as described above, and situations where there is a true clash of interests which raise rule of law concerns. As former Deputy Attorney General of Canada and Deputy Minister of Justice, John Tait, explained,[99]

> If disputes arise at any level relating to whether a possible action clearly offends the rule of law or is unethical, it is the duty of the officials involved, including the public sector lawyer, to raise the matter of a higher authority. The most important matters would in theory go to the Justice Minister and the Prime Minister, although in practice this is not necessary.

[98] Freiman (n 21) 339.
[99] Tait (n 16) 545.

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Again, such situations are relatively rare in Canada because of the strong 'ethical culture' that has developed within governments. As senior government lawyer and leader within the Canadian legal profession, Janet Minor, has explained with reference to Canada's largest provincial government, there exists within Ontario a culture that supports the ability of the Attorney General and his or her lawyers to advise that a proposed course of action potentially infringes the rule of law or the Constitution.[100] As Minor explained, government lawyers in Ontario are able to provide such advice because they are confident that it will be considered 'legitimate advice' – that the advice will be taken seriously.[101] The existence of such an 'ethical culture' supports the rule of law, and where it is eroded the rule of law is threatened.

The idea of an 'ethical culture' within government supports the Attorney General's role of functioning essentially as a 'rule of law regulatory agency' in which government lawyers function as 'rule of law regulators'. The Attorney General is responsible for vetting every piece of government legislation, and ensuring its legality and consistency with the Constitution. It is the duty of the Attorney General to raise any such concerns with the appropriate ministry. This regulatory role extends to the administrative field. The federal government and most provinces require the Attorney General to be given notice of every application for judicial review and the Attorney General has the right to participate in the proceedings.[102] Others require only that notice be given to the Attorney General where a constitutional question is raised.[103] As a result of these provisions, there are government lawyers who must spend time reviewing every judicial review application, even in areas which might be considered matters of 'private law', such as labour disputes or student discipline. They reflect a conception that the Attorney General has an interest in each and every judicial review application.[104]

This notice requirement reflects the responsibility of the Attorney General as guardian of the public interest. It is reflected in the explanation of the 1968 Royal Commission Inquiry into Civil Rights in Ontario (chaired by James C McRuer),[105] which led to the adoption of that province's Judicial Procedure Review Act:[106]

> It should be imperative that the Attorney General should be served with notice of all proceedings for judicial review, even though he may not be a party thereto. Such a practice would give the Attorney General an opportunity to fulfil his function as the guardian of the public interest and to bring the legal proceedings of administrative tribunals under the supervision of the Attorney General, which should be a safeguard to the rights of the individual and give guidance to tribunals in the exercise of the powers conferred on them.

[100] Minor (n 97).
[101] ibid.
[102] Canada, Federal Court Rules, r 304; Judicial Review Procedure Act, RSO 1990, c J-1, s 9(4); Judicial Review Procedure Act, RSBC 1996, c 241, s 16; Judicial Review Act, RSPEI 1988, c J-3, s 9; Saskatchewan, Queen's Bench Rules, r 3-56(1); Nova Scotia Civil Procedure Rules, r 7.07.
[103] Administrative Procedures and Jurisdiction Act, RSA 2000, c A-3, s 14.
[104] Thanks to David A Wright for suggesting this point to me and prompting me to think about this issue.
[105] *Royal Commission Inquiry into Civil Rights: Report No 1* (n 90) vol 1, 329.
[106] RSO 1990, c J-1.

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Public lawyers Lori Sterling and Heather Mackay have fleshed out this explanation. Regarding the Attorney General's role as guardian of the public interest, they explain that '[b]ecause a judicial review may touch on broader public interest issues in addition to the issues between the parties, the Attorney General may wish to intervene to make submissions on those issues'.[107] They provide the example of a case where the parties had not addressed the effect of the enactment of a new statute on the production of health care records and the Attorney General intervened in order to bring the issue before the court and make submissions on the appropriate test to apply.[108]

A related, but somewhat separate rationale for the Attorney General's potential intervention in judicial review is his or her responsibility to ensure that the administration of public affairs is carried out in accordance with the law. Sterling and Mackay explain that because administrative tribunals are part of the administration of justice, the Attorney General should intervene to ensure that all relevant issues are brought to the court's attention: '[t]he classic example of this type of intervention occurs where the Attorney General intervenes to set out the appropriate standard of review'.[109]

Another rationale for intervention recognises the role of the Attorney General as 'superintendent of legislation to ensure that it is within jurisdiction'. Judicial review applications often deal with the statutory mandate of a particular tribunal and, as Sterling and Mackay state, government lawyers are 'uniquely situated to educate courts about the legislature's intention with respect to a particular tribunal'.[110] The migration in some provinces of supervisory responsibilities for all administrative bodies to the Attorney General is a recognition of this role.

In Ontario, a centralised law department (the Crown Law Office – Civil Law) receives and evaluates all notices of application for judicial review. In the three-year period between 2012 and 2014 this office received an average of just over 140 notices each year. The Attorney General intervened in only one or two cases each year, representing less than 2 per cent of all cases.[111] Sterling – herself a former Director of the Crown Law Office (Civil) and a former Assistant Deputy Minister, Legal Services Division which oversees that office – and her co-author Mackay explain the process that is followed:[112]

[107] Sterling and Mackay (n 21) 923, citing David J Mullan, *Administrative Law* (Irwin Law 2001) 437.
[108] ibid, citing *Toronto Police Association v Toronto Police Services Board* [2008] OJ No 4380 (Div Ct).
[109] ibid.
[110] ibid: 'This unique expertise is developed through the day-to-day experience of the government lawyer, which, unlike private sector legal work, may involve working with government clients to create a particular administrative tribunal and draft its constituent legislation, as well as access to cabinet materials or government policy documents which discuss the nature of the tribunal, its purpose and intended function. This expertise is also fostered by government lawyers working exclusively on public law issues. Further, in the role of intervenor in a judicial review application, the Attorney General does not generally take a position in support of either one of the parties or with respect to the facts involved in an application. Instead, it is the Attorney General's role to provide a "neutral" third view, generally on a point of law'.
[111] Information provided by Ontario Ministry of the Attorney General, Office of the Assistant Deputy Attorney General, Legal Services Division, 27 January 2015 (on file with author).
[112] Sterling and Mackay (n 21) 925.

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> Typically, counsel in those branches will advise the ministries whose interests are at issue of the notice, or they will distribute the notice across the government in order to canvass what interests may be affected. Counsel will then consider all of the interests at stake. Where there are opposing views, counsel may try to assist in the development of a common 'government' position. In addition, counsel will brief the Attorney General on the views of different ministries. The Attorney General will then decide which interpretation of the law would best serve not just partisan interests, but also the rule of law and the broader public interest.

Writing in 2009, Sterling and Mackay asserted that interventions in judicial reviews were more common at that time than was the case 20 years earlier. They attributed this escalation to 'the increasing complexity of administrative law, and specifically to the Supreme Court's evolving jurisprudence regarding the standard of review, which requires consideration of the expertise of the decision maker and the decision maker's legislative mandate'.[113] They also asserted that '[t]he requirement that the legislature's view be considered frequently leads the Attorney General to intervene to explain why a particular tribunal was created and what decisions the legislature envisioned it making'.[114] Unfortunately, neither the Ontario Ministry of the Attorney General nor any Attorney General's office publish statistics on judicial review applications, so there are no comparative statistics to assess. However, with the number of interventions provided by Ontario – Canada's largest province – of only one or two per year over the past several years (as was suggested to me by a senior government lawyer), we might wonder whether the practice conforms with the original intent of providing notice to the Attorney General.

The lack of any clearly articulated public standard for the Attorney General's intervention in judicial review proceedings creates a rule of law problem. The right to intervene and participate in judicial reviews is a significant power in the hands of the Attorney General. As government departments in Canada are highly bureaucratic entities, I suspect that internal guidelines for intervening in judicial reviews exist in some ministries of justice. If they do not already exist, they should certainly be formulated in order to create objective criteria for the Attorney General's intervention.

The Attorney General should publish and publicise such policies. As explained in the McRuer Report,[115] one of the primary justifications for the requirement of giving notice to the Attorney General of every judicial review is because of the Attorney General's role as 'guardian of the public interest'. The public has a right to know the criteria upon which intervention on behalf of safeguarding its interest is exercised.

4. CONCLUSION

Government lawyers in Canada acknowledge that they are 'unique'. This uniqueness stems both from their principal, the Attorney General, and from their client, the Crown. Canadian statutes

[113] ibid.
[114] ibid.
[115] *Royal Commission Inquiry into Civil Rights: Report No 1* (n 90) vol 1, 329.

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articulate the responsibilities of the Attorney General, but they do not specify how these impact on the role and responsibilities of government lawyers; nor have Canadian justice ministries published policies which explain the role of government lawyers outside the criminal context. This is unfortunate and should be remedied because government lawyers in Canada are significant actors in the Canadian legal system and exercise substantial power within it. Their role is not widely understood and at times their responsibilities are subject to speculation and debate. While government lawyers in Canada are certainly 'unique', there is no need for them to be opaque.