

# Legal Ethics for Government Lawyers: Lessons from Nunavut

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A N D R E W F L A V E L L E M A R T I N \*

## ABSTRACT

While government lawyers face legal ethics issues unique to that practice context, those issues are overlooked in the rules of professional conduct in all but one Canadian jurisdiction: Nunavut. In this comment, I canvass several provisions that are unique to the *Code of Professional Conduct* of the Law Society of Nunavut. These provisions are inexplicably overlooked in the Canadian legal ethics literature to date. I then assess how these provisions address the legal ethics issues unique to government lawyering. Finally, I argue that the Nunavut provisions should be considered a starting point and I consider additional changes that could be made to further recognize the realities of government lawyering.

KEYWORDS: *Legal Ethics; Government Lawyering; Professional Regulation; Law Societies*

## I. INTRODUCTION

Fifteen years ago, Adam Dodek observed that “government lawyers and the work that they do are largely ignored. They are barely acknowledged in codes of conduct, underrepresented in many law societies and undertheorized in academic scholarship. In discussions about legal ethics or the regulation of the legal profession they are often invisible.”<sup>1</sup> While some aspects of this situation have improved –

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<sup>1</sup> Adam M Dodek, “Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law” (2010) 33:1 Dal LJ 1 at 4-5.

particularly with the growth of academic scholarship on legal ethics for government lawyers<sup>2</sup> as well as some attention to government lawyering in the teaching of legal ethics<sup>3</sup> – government lawyers remain virtually ignored in the rules of professional conduct. Except, as it happens, in Nunavut.

This absence matters for both government lawyers and law societies as regulators of the legal profession. Consider the example of Lawyer Q. Lawyer Q is an employee in the government of Province X, with a legal practice focusing on litigation.<sup>4</sup> Lawyer Q learns that “the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally, or illegally,” thus triggering their professional duty to progressively report up within the organizational client.<sup>5</sup> This duty requires Lawyer Q to first “advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer” and, if there is no change, ultimately to “the board of directors.”<sup>6</sup> In the context of Province X, these roles appear to correspond to the Attorney General (“the chief legal officer”), the Premier (“the chief executive officer”), and the Cabinet (“the board of directors”).<sup>7</sup> While Lawyer Q wants to fulfill their professional duties as a lawyer, they also want to fulfill their duties as a government employee. Not only do the rules of professional conduct not acknowledge the constitutionally-recognized separation of the government bureaucracy from the political level, they do not even acknowledge that government lawyers have specific legal duties as members of the public

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<sup>2</sup> For a recent assessment, see Andrew Flavelle Martin, “Where Are We Going? The Past and Future of Canadian Scholarship on Legal Ethics for Government Lawyers” (2021) 99:2 Can Bar Rev 322 [Martin, “Where”]. See more recently Andrew Flavelle Martin, “Crown Prosecutors and Government Lawyers: A Legal Ethics Analysis of Under-Funding” (2024) 47:4 Man LJ 1; Andrew Flavelle Martin, “Twenty Years After *Krieger v Law Society of Alberta*: Law Society Discipline of Crown Prosecutors and Government Lawyers” (2023) 61:1 Alta L Rev 37; Andrew Flavelle Martin, “Loyalty, Conscience, and Withdrawal: Are Government Lawyers Different?” (2023) 46:3 Man LJ 1; Andrew Flavelle Martin, “Legal Ethics for Government Lawyers: Confronting Doctrinal Gaps” (2022) 60:1 Alta L Rev 169 [Martin, “Gaps”].

<sup>3</sup> Andrew Flavelle Martin & Leslie Walden, “The Incorporation of Government Lawyering in the Teaching of Legal Ethics in Canadian Law Schools” (2022) 9 Can Leg Education Annual Rev 47 [Martin & Walden].

<sup>4</sup> This scenario is adapted from Martin, “Gaps”, *supra* note 2 at 171, Scenario 4.

<sup>5</sup> Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2009, last amended October 2022), r 3.2-8, online: <flsc.ca> [FLSC *Model Code*],

<sup>6</sup> *Ibid.*

<sup>7</sup> Martin, “Gaps”, *supra* note 2 at 196-199.

service that they must fulfil alongside their professional duties as lawyers.<sup>8</sup> It is quite simply inappropriate, if not impossible, for Lawyer Q to raise their concerns directly with the Attorney General, Premier, or Cabinet. It seems impossible to fulfill both their obligations as a government employee and their obligations as a lawyer. So what should Lawyer Q do? As it turns out, Lawyer Q would have significantly more guidance if they practiced in Nunavut.

The nascent Canadian literature on legal ethics for government lawyers identifies several respects in which the rules of professional conduct for lawyers largely do not recognize the existence of government lawyers or the special practice challenges facing such lawyers. Most of these analyses focus on the *Model Code of Professional Conduct* of the Federation of Law Societies of Canada, as those provisions have largely been adopted by individual law societies. However, the existing Canadian literature has inexplicably ignored unique provisions in the *Code of Professional Conduct* of the Law Society of Nunavut, as originally adopted in 2016,<sup>9</sup> that address the special context of government lawyering. While the Codes of Conduct of some Canadian law societies differ from the Federation *Model Code*, only the Nunavut *Code of Professional Conduct* squarely addresses any of these issues unique to government lawyers. In this short commentary, I (1) canvass these key gaps as identified in the existing legal ethics literature, (2) analyze and assess how unique provisions in the Nunavut *Code of Professional Conduct* address these gaps, (3) provide recommendations for further revisions to the *Model Code* and the Codes of Conduct of Canadian law societies other than that of Nunavut, (4) discuss why these provisions have not, but should, spread to other jurisdictions, and (5) provide broader reflections and conclusions.

## II. GOVERNMENT LAWYERING AND THE FEDERATION *MODEL CODE*

There are several respects in which the Federation *Model Code* fails to consider the unique issues facing government lawyers.

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<sup>8</sup> See e.g. *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69, 1991 CanLII 60 (SCC) [Osborne].

<sup>9</sup> Law Society of Nunavut, *Code of Professional Conduct* (Nunavut: LSN, 2016, last amended 2022), online: <[https://www.lawsociety.nu.ca/sites/default/files/public/NU%20Code%20of%20Conduct\\_%20Adopted%20June%2016%202022%20FINAL.pdf](https://www.lawsociety.nu.ca/sites/default/files/public/NU%20Code%20of%20Conduct_%20Adopted%20June%2016%202022%20FINAL.pdf)> [Nunavut Code]. The provisions I discuss here were not affected by the 2022 amendments.

A fundamental issue is that the Federation *Model Code* does not acknowledge that government lawyers have legal duties as public servants as well as their legal duties as lawyers, or that those sets of duties, as I have put it elsewhere, “do not mesh neatly.”<sup>10</sup> These points of potential tension are varied. They range from political activity and activism (Do the political activity rights of public servants conflict with the lawyer’s duty of loyalty to the client?)<sup>11</sup> to whistleblowing (Do legislated exceptions to the public service duty of secrecy affect the lawyer’s duty of confidentiality?),<sup>12</sup> to the ability of government lawyers to seek legal ethics advice independent of the client’s knowledge or consent (Does the ethics advice exception to the lawyer’s duty of confidentiality prevail over the public service duty of secrecy?).<sup>13</sup>

Neither does the Federation *Model Code* go further and provide any guidance as to how to integrate or navigate these differing sets of duties. Indeed, neither the *Model Code* nor the existing body of reported discipline decisions seem to even consider that the legal duties of government lawyers as public servants may in some circumstances prevail over their obligations as lawyers.

Instead, at most, government lawyers are left with blanket unsupported and, with respect, apparently simplistic declarations that their duties as public servants must yield to their duties as lawyers. For example, Bencher Anand of the Ontario Law Society Tribunal once held that “[i]t is trite law that an in house corporate or government lawyer, or indeed an associate or partner within a private law firm, may have to choose between the direction or policy of the organization and the rules and requirements of the Law Society.”<sup>14</sup> I have elsewhere critiqued this statement as unsupported and incomplete:

[W]hile this proposition may be true of a lawyer in private practice, with great respect, I observe that the Tribunal provided no authority applying this holding to a government lawyer. Indeed, and again with great respect, there appears to be no

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<sup>10</sup> Martin, “Gaps”, *supra* note 2 at 202.

<sup>11</sup> See e.g. Andrew Flavelle Martin, “Legal Ethics and the Political Activity of Government Lawyers” (2018) 49:2 Ottawa L Rev 263 [Martin, “Political Activity”]; Andrew Flavelle Martin, “The Government Lawyer as Activist: A Legal Ethics Analysis” (2020) 41 Windsor Rev Leg Soc Issues 28.

<sup>12</sup> See e.g. Martin, “Gaps”, *supra* note 2 at 178-182.

<sup>13</sup> *Ibid* at 182-183, discussing FLSC *Model Code*, *supra* note 5, r 3.3-6: “A lawyer may disclose confidential information to another lawyer to secure legal or ethical advice about the lawyer’s proposed conduct.”

<sup>14</sup> *Law Society of Ontario v Regan*, 2018 ONLSTH 167 at para 37, *aff’d* 2021 ONLSTA 6 at paras 117-32, quoted e.g. in Martin, “Gaps”, *supra* note 2 at 193.

such authority. I would accept that it is trite law that lawyers cannot contract out of their professional obligations, but in my view, that proposition does not resolve the dilemma facing government lawyers... If the law society were to demand that the government lawyer breach the relevant legislation, it would arguably be requiring unlawful conduct. Such a requirement would be extraordinary.<sup>15</sup>

In other words, with great respect to Bencher Anand, as he then was, even if that is trite law in the case of government lawyers, it is true only on its narrowest terms. That is, a government lawyer may have to choose between government's mere "direction or policy" and law society requirements – but the government lawyer cannot simply "choose" between the law governing public servants and law society requirements. The direction or policy of a corporation or a law firm are fundamentally different than the direction or policy of the government insofar as that "direction or policy" is often set out in statute or common law and thus has the force of law.<sup>16</sup> Thus, in effect Bencher Anand appears to be suggesting that government lawyers must choose between the law governing the public service and the requirements of the law society – and appears to imply that the law society will expect, and can and should legitimately expect, the government lawyer to choose law society requirements.<sup>17</sup>

A second concern in the literature and among practicing government lawyers has been the connection between withdrawal and resignation. The Federation *Model Code* does recognize that for lawyers for an organizational client, "[i]n some but not all cases, withdrawal means resigning from his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter."<sup>18</sup> Government lawyers in the literature, however, note that their lived reality is more complex. For example, Eric Boucher emphasizes not only that government lawyers often develop specialized skills that are not easily transferable to private practice but that "[n]o one wants to have to decide between resigning with limited prospects and going along with legally suspect instructions while faced with a mortgage, one kid in daycare and another in braces."<sup>19</sup> Likewise, Jennifer Leitch asserts that "[w]here the only client a lawyer has is also their employer, it is not practically feasible to suggest that the lawyer will simply withdraw from the case. In fact, the only option available to that government lawyer

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<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> FLSC *Model Code*, *supra* note 5, r 3.2-8, commentary 5.

<sup>19</sup> Eric Pierre Boucher, "Civil Crown Counsel: Lore Masters of the Rule of Law" (2018) 12 Can J Parliamentary & Political L 463 at 485.

may be resignation. However, practically speaking, this seems an untenable position for many government lawyers.”<sup>20</sup> Leitch thus proposes that “any development of ‘government-specific’ legal ethics must take account of this specific tension and, in so doing, create a space for the government lawyer to adopt an ethical position that is different than her employer,” thus allowing that government lawyer to avoid resignation.<sup>21</sup> In contrast, I have elsewhere criticized Leitch’s proposed approach on the basis that “if government lawyers find the implications of their professional obligations ‘untenable’, they should choose a different practice [setting] instead of torquing those obligations to their comfort.”<sup>22</sup>

A third concern is that the Federation *Model Code* does not recognize that its rules on reporting up within an organizational client do not account for the hierarchical practice setting of government lawyers, in which any given lawyer is not atomistic but likely works within a chain that may include a senior lawyer, a director, an associate deputy Attorney General, and even the deputy Attorney General.<sup>23</sup> The Federation *Model Code* places the duty to report up on the individual lawyer – even if their superior lawyer in the chain disagrees, that first individual lawyer ostensibly maintains the responsibility to report up all the way to the Attorney General (as “chief legal officer”) the Premier (as “chief executive officer”) and Cabinet (as the “Board of Directors”). Moreover, the potential result is that the client receives conflicting advice from different lawyers on the same issue.<sup>24</sup>

### III. GOVERNMENT LAWYERING AND THE NUNAVUT *CODE* PROVISIONS

While the Codes of Conduct of some Canadian law societies differ from the Federation *Model Code*, the Nunavut *Code of Professional Conduct* squarely addresses some of the special legal ethics issues unique to government lawyers in ways that none of the other Codes do. These provisions in the Nunavut *Code* are important in at least four main ways.

First, at a foundational level, the Nunavut *Code* in its provisions on organizational clients recognizes the distinction between lawyers in private practice who happen to represent organizations versus in-house counsel or

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<sup>20</sup> Jennifer Leitch, “A Less Private Practice: Government Lawyers and Legal Ethics” (2020) 43:1 Dal LJ 315 at 324, as quoted e.g. in Martin, “Gaps”, *supra* note 2 at 199, note 177.

<sup>21</sup> Leitch, *supra* note 20 at 324.

<sup>22</sup> Martin, “Where”, *supra* note 2 at 341.

<sup>23</sup> Martin, “Gaps”, *supra* note 2 at 197-198.

<sup>24</sup> *Ibid* at 198.

government lawyers who represent a single organization full-time as an employee. The Nunavut Code does so by reconceptualizing and narrowing FLSC rule 3.2-3 on organizational clients to apply to lawyers in private practice and creating a new parallel rule 3.2-3A on in-house counsel and government lawyers: “A lawyer in corporate or government service must consider the corporation or government to be the lawyer's client.”<sup>25</sup> While recognizing that the government lawyer or in-house counsel must act in the best interests of the government or organization, the commentary to this new rule also explicitly recognizes that it is for the corporation or government to determine those best interests “subject to limitations imposed by law or professional ethics.”<sup>26</sup>

Second, the commentary to this new rule recognizes that government lawyers have legal duties as public servants as well as their duties as lawyers: “A lawyer in government service may also have statutory duties under federal, provincial or territorial legislation, as well as broader general and ethical duties as a public servant.”<sup>27</sup>

Third, the Nunavut Code explicitly recognizes the overlap between withdrawal and resignation does not have to be complete. Like the Federation Model Code, the Nunavut Code notes that withdrawal for an organizational client may result in resignation: “In some but not all cases, withdrawal means resigning from his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter.”<sup>28</sup> However, the Nunavut Code explicitly adds the counterfactual, i.e. that “a corporate or government lawyer may ‘withdraw’ from a given matter by refusing to implement the client's instructions in that matter, while continuing to advise the corporation or government in other respects.”<sup>29</sup> Moreover, the Nunavut Code expresses an explicit preference for alternatives to resignation:

In the case of a profound and fundamental disagreement between lawyer and client or a pervasive institutional policy of illegality involving the lawyer, withdrawal may also entail resignation. In most cases, however, a preferable approach is to refer the contentious matter to outside counsel, seek alternative instructions from other levels of authority in the corporation or government, or take similar action that falls short of resignation.<sup>30</sup>

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<sup>25</sup> Nunavut Code, *supra* note 9, r 3.2-3A. Contrast FLSC Model Code, *supra* note 5, r 3.2-3.

<sup>26</sup> Nunavut Code, *supra* note 9, r 3.2-3A, commentary 2.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*, r 3.2-8, commentary 5.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

Thus, while not resolving the practical problems expressed by both Boucher and Leitch, these provisions emphasize that withdrawal does not always necessarily lead to resignation.

Fourth, the Nunavut *Code* recognizes that for government lawyers, one of the ways that progressively reporting up to the ministerial and Cabinet level is problematic is that it requires public servants to communicate directly with the political level of government. This gap in the existing rules of professional conduct has largely, though not entirely, been overlooked in the legal ethics literature. As Elizabeth Sanderson emphasizes, the neutrality of the public service – a constitutional convention – requires that the Deputy Minister is the interface, link, or connector between the public service and their democratically legitimate political masters.<sup>31</sup> Sanderson does not, however, frame the rules on reporting up as a specific problem given this convention. The Nunavut *Code* recognizes that the government lawyer is required to report up within the civil service component of the client, as opposed to the political masters at the apex of the client:

A lawyer in government service or acting for a government or public body should be aware of and respect the separation of the public service from the political level. While such a lawyer must advise progressively the next highest person within the public service and use any other mechanisms lawfully available to them, the lawyer should not violate the separation of the public service from the political level unless authorized to do so.<sup>32</sup>

This particular aspect of the reporting-up problem for government lawyers was at most implicit on a generous reading of the existing literature. This new provision does reflect Sanderson's work in recognizing and emphasizing the role of the Deputy Attorney General.<sup>33</sup> Thus, of all these additions in the Nunavut *Code*, this addition best demonstrates a keen awareness of roles and responsibilities within government and the proper place of the civil service and makes a substantive change that greatly reduces the problematic implications of the rules of professional conduct for government lawyers. It does nonetheless assume, without stating it explicitly, that the Deputy Attorney General (despite themselves being a government lawyer) is the appropriate interface, link, or connector with the political realm and thus must report up to the Attorney General and the Premier or Cabinet. Without this interface, link, or connector, there would be *no* connection between the bureaucracy and their political masters.

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<sup>31</sup> See e.g. Elizabeth Sanderson, *Government Lawyering: Duties and Ethical Challenges of Government Lawyers* (Toronto: LexisNexis Canada, 2018) at 213 [Sanderson], citing Osborne, *supra* note 8.

<sup>32</sup> Nunavut *Code*, *supra* note 9, r 3.2-8, commentary 5.1.

<sup>33</sup> Sanderson, *supra* note 31 at 211-226 (Chapter 5).

The Nunavut *Code* recognizes one other important point: it confirms that the government (more properly, however, referred to as the Crown) is the client, not the individual ministry or department: “A lawyer working in a division or department of the government is considered to be working for the government as a whole.”<sup>34</sup> While there is a general consensus that this is a correct statement of the law,<sup>35</sup> it is useful to see it codified by a law society. As Sanderson points out, while there used to be provisions in the Law Society of Alberta *Code of Conduct* that addressed this point, those provisions were “unfortunately” lost after the partial adoption in Alberta of the FLSC *Model Code*.<sup>36</sup> Ideally, however, the client would explicitly be identified as the Crown (in right of the territory, the province, or Canada), as opposed to the government – a point to which I will return below.

By addressing the situation of government lawyers in these several respects, the Nunavut *Code of Professional Conduct* provides important guidance to government lawyers.

#### IV. REMAINING ISSUES AND FUTURE AMENDMENTS

While the Nunavut *Code of Professional Conduct* is an important improvement over the Federation *Model Code* for the four reasons that I discussed in the previous part, there are some important issues that it leaves unresolved.

First, an important but easily remedied shortcoming of these provisions is that they identify the client of the government lawyer as “the government.”<sup>37</sup> The client of a government lawyer is more properly

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<sup>34</sup> Nunavut *Code*, *supra* note 9, r 3.2-3A, commentary 1.

<sup>35</sup> See e.g. Sanderson, *supra* note 31 at 101: “At one level, the answer is quite simple: the client is the Crown.”

<sup>36</sup> *Ibid* at 104; Law Society of Alberta, *Code of Professional Conduct* (as amended June 2009) at 12-1, commentaries G.1 & C.1, online: <<https://web.archive.org/web/20120314000012/http://www.lawsociety.ab.ca/files/regulations/Code.pdf>> [<https://perma.cc/DYN5-WTPV>] [on file with author]. (G.1: “A lawyer working in a division, department or agency of the government or in a corporation ultimately controlled by the Crown is considered to be working for the government as a whole as opposed to that division, department, agency or corporation.”); (C.1: “the client of a lawyer employed by the government is the government itself and not a board, agency, minister or Crown corporation.”)

<sup>37</sup> Nunavut *Code*, *supra* note 9, r 3.2-3A, commentary 1.

described as the Crown (in right of the particular jurisdiction) and not the government.<sup>38</sup>

Second, while these provisions explicitly recognize that government lawyers have a separate set of duties as public servants, they do not explicitly acknowledge that those duties may potentially clash with their duties as lawyers. Nor do they provide any guidance to government lawyers about how these sets of duties interact and how government lawyers might best approach apparent clashes between these sets of duties – and, more importantly, how the law society as a regulator expects government lawyers to approach such apparent clashes.

There are several possible approaches to this situation. On their face, the comments by Benchet Anand quoted above suggest that law societies might expect government lawyers to prioritize their obligations as lawyers. However, as discussed above, that approach would appear to suggest that government lawyers breach their obligations under common law and statute. I assume here that no Canadian law society would take such an approach. Another approach, as I have suggested elsewhere, is that instead of a blanket decision as to whether they are lawyers first or public servants first,<sup>39</sup> government lawyers should instead first approach any apparent clash as a question of law: if there is indeed a clash, which body of law prevails, as a matter of law, over the other?<sup>40</sup> For lawyers for the provincial government this will likely be a matter of statutory interpretation, whereas for lawyers for the federal government this will likely be a matter of paramountcy and federalism.<sup>41</sup> This legal-analysis approach seems to be the most appropriate resolution to any apparent clash. Another way to avoid an

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<sup>38</sup> See e.g. Sanderson, *supra* note 31 at 101: “At one level, the answer is quite simple: the client is the Crown.” On the complexity of the concept of “the Crown,” see also Sanderson at 106: “Government lawyers must and do owe a duty of loyal service to the current elected government in a system of constitutional democracy, but the duty is ultimately to the Crown, something more than the current government. In support of the notion of a stable and enduring Crown, the Crown client to whom the duty of loyalty is owed is as much to past and future governments as it is to the currently-elected government.” See also e.g. Peter W Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed supp (Toronto: Thomson Reuters Canada, 2017), vol 1 (loose-leaf release 1, July 2023), ch 10 at § 10:1; *Seguin v Boyle*, [1922] 1 WWR 1169 at para 35, 63 DLR 369 (JCPC): “the Crown act[s] through the government of the day and its officers”; *UFCW v Parnell Foods Ltd*, [1992] OLRB Rep 1164 at para 18, 17 CLRBR (2d) 1: “The Crown undertakes whatever the government of the day decides it should do”.

<sup>39</sup> Martin, “Gaps”, *supra* note 2 at 172.

<sup>40</sup> *Ibid*, e.g. at 193-195.

<sup>41</sup> *Ibid*, e.g. at 195.

apparent clash is to interpret the law on the public service as a waiver of a legal duty as a lawyer, if the duty is one that can be waived.<sup>42</sup>

Thus in my view, in the absence of more specific guidance from the rules of professional conduct or the case law, a government lawyer who believes the law on the public service conflicts with the law of lawyering should take several steps. First, determine whether the specific provision in the law on the public service can be reasonably interpreted as a waiver of the legal duty as a lawyer; if not, then determine whether there is another way to comply with both the law on the public service and the law of lawyering; if not, then determine which legal provision prevails as a question of law; finally, if the legal answer is unclear, choose a principled and defensible course of action that respects and honours the spirit of the laws involved.<sup>43</sup> At all of these stages, the government lawyer should seek legal and legal ethics advice.

I thus recommend new commentaries be added after 3.2-3A, commentary 2 (“A lawyer in government service may also have statutory duties under federal, provincial or territorial legislation, as well as broader general and ethical duties as a public servant.”):<sup>44</sup>

[3] The Society expects and requires all members, including those employed in the public service, to comply with all their legal obligations unless such compliance is impossible. A government lawyer who reasonably believes that their obligations as a public servant under statute or common law may conflict with their obligations as a lawyer under this *Code* or statute or common law should first attempt to comply with both sets of obligations. If such compliance reasonably appears to be impossible, the government lawyer should determine which obligation prevails as a matter of law and prioritize that obligation to the extent required by the conflict. The government lawyer is encouraged to seek legal advice and to carefully document in writing the reasons for their decision.<sup>45</sup>

[4] While a government lawyer must comply with statute and common law, under no circumstances can organizational policy or direction from a supervising lawyer

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<sup>42</sup> Martin, “Political Activity”, *supra* note 11 at 300-301.

<sup>43</sup> See also Andrew Flavelle Martin, “Government Lawyers and Legal Ethics: Embracing Complexity While Maintaining Responsibility” (J Donald Mawhinney Lecture in Professional Ethics delivered at the University of British Columbia, 13 March 2023) [unpublished], <https://m.youtube.com/watch?v=kWCxeKxOliw&pp=ygUZTWF3aGlubmV5IGZsYXZlbGxlIGFsbGFyZA%3D%3D>.

<sup>44</sup> Nunavut *Code*, *supra* note 9, r 3.2-2A.

<sup>45</sup> See e.g. Martin, “Gaps”, *supra* note 2 at 189: “a lawyer’s efforts to seek ethical advice may weigh against a finding of misconduct or may be a mitigating factor as to penalty where there has been misconduct.”

absolve a government lawyer – or any lawyer – from compliance with their obligations as a lawyer under this Code or statute or common law.<sup>46</sup>

[5] Government lawyers are reminded that some professional duties can be waived by the client in some circumstances. A statute or regulation on the public service may reasonably be interpreted as a waiver of such a duty.

Note that these proposed commentaries do not attempt to prioritize one set of legal obligations over another – although they do prioritize compliance with the Law Society’s *Code of Conduct* over compliance with any government policies on the public service.

The third unresolved issue is that while the Nunavut *Code* provisions relieve government lawyers generally from the duty to report up to the political realm in violation of the public service-political divide, they are still incomplete. First, as mentioned above, these provisions should state explicitly that this rule does require the Deputy Attorney General, as the government lawyer who is the appropriate interface with the political realm, to report up to the Attorney General (as the “chief legal officer” of the government) and the Premier or Cabinet (as the CEO and Board of the government, respectively). That is, the commentary should be extended to state that while government lawyers must only report as high as the Deputy Attorney General, that Deputy Attorney General – themselves a government lawyer as well, but a unique one – must then report up to the political level. As discussed above, this interconnecting role of the Deputy Attorney General is implicit in an articulation of the divide between the bureaucracy and the political level, but it would be much clearer for all lawyers (as well as law societies) if this interconnecting role were made explicit. This change could be implemented by adding additional language after rule 3.2-8, commentary 1 (the rule and commentary mentioned above on reporting up):<sup>47</sup>

Unless directed otherwise, the Deputy Attorney General (or Deputy Minister of Justice) should function as this interface between the public service and the

<sup>46</sup> See e.g. *ibid* at 197: “There is no mechanism for a supervising lawyer – no matter how sincere and honourably intended – to absolve or relieve a subordinate lawyer of their complete professional responsibility and disciplinary liability to the law society for a failure to follow any of the rules of professional conduct, including this reporting up rule.”

<sup>47</sup> Nunavut *Code*, *supra* note 9, r 3.2-8, commentary 5.1: “A lawyer in government service or acting for a government or public body should be aware of and respect the separation of the public service from the political level. While such a lawyer must advise progressively the next highest person within the public service and use any other mechanisms lawfully available to them, the lawyer should not violate the separation of the public service from the political level unless authorized to do so.”

political level. Thus, this rule requires the Deputy Attorney General (or Deputy Minister of Justice) to progressively report up to the Attorney General and then to the Prime Minister or Premier.

Making this imperative explicit would reduce or eliminate any uncertainty as to the proper role of the Deputy Attorney General (or Deputy Minister of Justice).

A fourth unresolved issue is that these provisions do not address the hierarchical structure of lawyering within the public service. As discussed above, the duty to report up still requires a lawyer to inform not just their immediate supervisors but potentially every intervening level of lawyer up to the Deputy Attorney General (as the “chief legal officer” of the public service) and potentially even the Secretary of Cabinet (as the “chief executive officer” of the public service). There is a solid argument for requiring each lawyer only to report up to their immediate supervising lawyer, who would then assess the alleged wrongdoing and, if they agreed, report up to their immediate supervisor, and so on.<sup>48</sup> If the reporting-up rules remain unchanged as to the hierarchy, it should be made explicit in a commentary that a lawyer higher in the hierarchy cannot absolve a lawyer lower in the hierarchy of their legal ethics obligations – including but not limited to the duty to report up. This change could be implemented by adding additional language to the rule and commentary mentioned above on reporting up:<sup>49</sup>

This rule requires a government lawyer to progressively report up within their public service hierarchy, ultimately to the level of the Deputy Attorney General (or Deputy Minister of Justice) and to the Secretary of Cabinet (or other apex public servant), and then to resign if there is no change.

I emphasize here that this particular addition requires careful consideration by each Law Society and should only be adopted by Law Societies that have chosen not to amend the rule on reporting up.<sup>50</sup>

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<sup>48</sup> I made a somewhat similar proposal in Martin, “Gaps”, *supra* note 2 at 199-201.

<sup>49</sup> Nunavut Code, *supra* note 9, r 3.2-8, commentary 5.1: “A lawyer in government service or acting for a government or public body should be aware of and respect the separation of the public service from the political level. While such a lawyer must advise progressively the next highest person within the public service and use any other mechanisms lawfully available to them, the lawyer should not violate the separation of the public service from the political level unless authorized to do so.”

<sup>50</sup> Such an amendment would involve adding a commentary to the rule on reporting up stating that “A lawyer in corporate or government service fulfills their obligations under this rule by reporting the issue to their supervising lawyer. The supervising lawyer, if they determine that this rule is engaged, must then report to their supervising lawyer. This process ends when the matter is reported to the chief legal officer, who if they determine that this rule is engaged must then report to the chief executive officer or

## V. DISCUSSION

There is little public indication as to what inspired these government-lawyer provisions in the Nunavut *Code of Professional Conduct*. A contemporaneous memo to the membership of the Law Society of Nunavut, while acknowledging both the benefits of consistency across Canadian jurisdictions and the need to recognize the characteristics of the practice of law in Nunavut, simply states that “[m]any lawyers in Nunavut practice with government.”<sup>51</sup>

There is also no public indication as to why the Federation of Law Societies has not yet considered these provisions in its amendments to the original *Model Code*. While government lawyers likely comprise a smaller proportion of the Bar in many provinces than they do in Nunavut, that proportion remains significant in ways both quantitative and qualitative.<sup>52</sup> Moreover, the unique considerations of government lawyering apply across Canada. Likewise, none of the provisions in the Nunavut *Code of Professional Conduct* reflect factors or considerations unique or specific to Nunavut. Thus, these provisions could, ideally after broad consultation, be adopted – verbatim or with modifications – into the Codes of Conduct of law societies in other Canadian common-law jurisdictions. They could also inform parallel changes to the Quebec *Code of Professional Conduct of Lawyers*.<sup>53</sup> As discussed above, gaps remain to fully inform the rules of professional conduct with the considerations specific to government lawyering. But the adoption of the Nunavut *Code* provisions as currently written or as a starting point could work either as a first step (if further government-lawyer amendments to the rules of professional conduct are made) or an only step (if further such amendments are never made).

In my view, there remains value in each Canadian jurisdiction having a comprehensive code of conduct that applies to all lawyers in that jurisdiction. The adoption of separate codes for different parts of the profession is problematic, both in members of the profession understanding the obligations of their colleagues in different roles and practice settings and

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Board.” This approach respects the spirit of the existing rule while accounting for hierarchical practice settings.

<sup>51</sup> *Memorandum*, Sacha Paul as Chair of the Model Code Subcommittee to the Law Society of Nunavut Membership (26 May 2016) at 2, online: <[https://web.archive.org/web/20161108235445/https://www.lawsociety.nu.ca/wp-content/uploads/2015/09/Memo\\_re\\_Nunavut\\_Model\\_Code-by-SPaul-May-26-2016.pdf](https://web.archive.org/web/20161108235445/https://www.lawsociety.nu.ca/wp-content/uploads/2015/09/Memo_re_Nunavut_Model_Code-by-SPaul-May-26-2016.pdf)> [<https://perma.cc/K48Q-7A6F>] [on file with author].

<sup>52</sup> See e.g. Martin & Walden, *supra* note 3 at 49.

<sup>53</sup> CQLR c B-1, r 3.1 [CPLC].

in the public having access to a clear account of the obligations imposed on lawyers by each law society. (I emphasize, however, that supplemental guidance specifically for a particular practice setting such as government lawyering, as opposed to a purported code, is quite desirable.<sup>54</sup>) For example, the current *Model Code*, and the codes across the Canadian common-law provinces and territories, explicitly address the special duties and obligations of prosecutors<sup>55</sup> – even though many if not most lawyers do not act as prosecutors, have not and never will, and even though prosecutors have deskbooks that elaborate on those obligations from the perspective of their government or their public prosecution service. As I have noted elsewhere with Leslie Walden, “[m]any, if not most, lawyers will either be government lawyers at some point in their careers or will interact with government lawyers in the course of their practice.”<sup>56</sup> This reality makes the legal ethics obligations of government lawyers relevant and important to the entire profession. These provisions in the *Nunavut Code* should thus be considered elsewhere.

I am not suggesting that these government-lawyering provisions are more important than the other revisions to the FLSC *Model Code* that the Federation of Law Societies of Canada has considered or is presently considering. It seems unnecessary to create a hierarchy of potential revisions. I simply argue that these provisions, among others, are worth considering.

While I acknowledge the value of consistency across Canadian jurisdictions, I emphasize that these government-lawyering provisions unique to Nunavut should not be abandoned for the sake of consistency with the FLSC *Model Code*. In other words, the Law Society of Nunavut

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<sup>54</sup> See e.g. Leslie Walden, *An Ethics and Professionalism Guide for Government Lawyering*, Canadian Legal Information Institute, 2023 CanLIIDocs 2210.

<sup>55</sup> FLSC *Model Code*, *supra* note 5, r 5.1-3, commentary 1: “When engaged as a prosecutor, the lawyer’s primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to defence counsel or directly to an unrepresented accused of all relevant and known facts and witnesses, whether tending to show guilt or innocence.” See also CPCL, *supra* note 53, s 112: “When acting as prosecutor in a criminal or penal matter, the lawyer must act in the public interest and in the interest of the administration of justice and the fairness of the judicial process.”

<sup>56</sup> Martin & Walden, *supra* note 3 at 49. While we were arguing that government lawyering is important to incorporate into legal ethics teaching, parallel arguments would apply for incorporating government lawyering into the rules of professional conduct.

should retain these provisions (and possibly improve on them, as I have suggested) even if the FLSC *Model Code* and the Codes in other Canadian jurisdictions do not adopt them.

## VI. CONCLUSION AND RECOMMENDATIONS

While these provisions of the Nunavut *Code* do not provide a complete solution to the gaps in the Federation *Model Code* as it relates to government lawyers, they provide an important and impressively nuanced starting point. These provisions are not Nunavut-specific in any way that would require them to be amended before they could be adopted in other jurisdictions or in the FLSC *Model Code*, although they could be improved, as I suggested above. Even if they ended up being both the starting point and the ending point, that would be an improvement. The Federation of Law Societies of Canada should consider adding provisions on government lawyers to its *Model Code*, based on these provisions in the Nunavut *Code* as a starting point. In the meantime, individual law societies should consider doing so themselves even before the Federation does. Any such amendments should be the result of a broad and inclusive – and transparent – consultation process. Ideally, this would be the first of multiple rounds of amendments to the FLSC *Model Code* and corresponding provincial and territorial Codes that would better address the issues facing government lawyers.

Ultimately, these amendments are appropriate and necessary (if not sufficient) to provide guidance to a qualitatively and quantitatively important segment of the legal profession in order to assist them in meeting their ethical and legal obligations. It would be unseemly and unfair to leave these potential issues unaddressed and so leave government lawyers to navigate these situations – and live under the shadow of the possibility of these situations materializing – without advance guidance from their respective regulator.