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THE CASE FOR INTRODUCING SPECIFIC ETHICAL STANDARDS

FOR

LEGISLATIVE DRAFTERS

© M. Deborah MacNair

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ABSTRACT

Little is known about the craft of legislative drafting. A legislative drafter in Canada is always presumed to be a lawyer and, as a result, to possess the ethical standards, skill and knowledge which are associated with, and expected of, members of a legal profession. A further presumption is that lawyers possess those ethical qualities, including honesty and integrity, which are part and parcel of the various professional codes of conduct which govern the behavior of lawyers.

The Canadian Bar Association, in its introduction to the *Code of Professional Conduct*, sets out the objective for the preparation of its code in general terms as follows:

> In order to satisfy [the] need for legal services adequately, lawyers and the quality of service they provide must command the confidence and respect of the public. This can only be achieved if lawyers establish and maintain a reputation for both integrity and high standards of legal skill and care.

This statement highlights the need for all lawyers to be vigilant about the quality of legal services they provide and the ethical standards they follow. By extension, I argue that specific provisions for ethical and professional conduct assist lawyers in maintaining a high standard of skill.

In this thesis I examine the question of whether there should be specific ethical and related professional standards adopted within an existing code of professional conduct, such as the Canadian Bar Association's *Code of Professional Conduct*, for those who are responsible for drafting legislation and regulations in Canada. There are no such

provisions in Canada at present. Some provincial law societies, including Alberta and Nova Scotia, have examined the issue of separate ethical rules for public sector practitioners but their professional codes are silent with respect to any specific obligations on those drafting legislation or regulations. Using the examples of conflict of interest, the duty of confidentiality, the obligation to safeguard solicitor-client privilege and lobbying, I argue that specific standards are necessary because it is necessary to maintain uniform professional standards.

Those who draft legislation and regulations are in a unique position. While there are private sector practitioners who draft, by far the larger number of practitioners are found in a public sector government setting at the federal, provincial or municipal level. Therefore the employer is the Crown, a legislative assembly, the Senate, the House of Commons or a corporate body. This employment relationship creates specific duties and obligations for drafters. Yet these employees remain as legal professionals, with all that professional status implies, including the need to enroll as a member of a law society, the requirement to maintain insurance, the establishment of a solicitor's relationship to the client and the obligation to maintain solicitor-client privilege and the avoidance of conflict of interest. The result is complex and needs to be examined.

In this thesis I argue that the unique position of legislative drafters requires careful analysis of their professional responsibilities, including the ethical standards that apply to them, and that the results of this analysis should be codified. Chapter 4 of this thesis suggests a way in which these provisions could be codified in the Canadian Bar Association's *Code of Professional Conduct*.

While the focus of my research will be the situation in Canada, I am including limited comparative information from the United States.

Thesis Statement

The Canadian Bar Association's *Code of Professional Conduct*, the national voluntary guidelines for the professional conduct of lawyers, should be amended to provide additional, specific ethical provisions for legislative drafters. Legislative drafters are public sector lawyers who have significant responsibilities on behalf of the Crown in the drafting of regulations and statutes and express provisions would provide certainty, instill pride and encourage a shared understanding within the drafting community of those ethical standards.

I will establish this need by demonstrating that ethics is a serious issue for legislative drafters as public sector lawyers, by exploring their role in the legislative process, by justifying the utility of using an existing mechanism in the form of the Canadian Bar Association's *Code of Professional Conduct* and by highlighting the ethical issues faced by legislative drafters in the course of their work. I will conclude by drafting concrete proposals in the form of amendments to the *Code of Professional Conduct*.

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FOR

LEGISLATIVE DRAFTERS

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CHAPTER 1

1. Introduction

A serious debate about ethics is occurring in the public and private sectors. Ethical standards are the subject of intense study and discussion in the public service,[1] Parliament,[2] in many professions and in business.[3] Lawyers are not immune from this debate.[4]

A brief survey of recent journals, parliamentary debates and government documents reveals the nature of the debate. The Special Joint Committee on a Code of Conduct for the Senate and the House of Commons proposed in 1997 that Parliament adopt a code of conduct to establish general standards for parliamentarians for financial disclosure, the receipt of gifts and dealings with contractors. Legislation has not yet been passed.[5] The federal

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[1] *A Strong Foundation*, The Report of the Study Team on Public Service Values and Ethics (Ottawa: 1996).
[2] Second Report of the Special Joint Committee on a Code of Conduct in *House of Commons Debates*, HC-148 (20 March 1997) at 9281; Report of the Special Joint Committee on a Code of Conduct by Senator Nino in *Sessional Papers* (1997) No. 2/35-622
[3] Lynn Sharp Paine, "Managing for Organizational Integrity" (March-April 1994) Harv. Bus. Rev. 106. Ms. Paine uses examples such as the aerospace and defense contractor, Martin Marietta Corporation. This company implemented an ethics program that consisted of a code of conduct and training, following allegations of fraud and mismanagement.
[4] At a conference on legal ethics in 1993 former Supreme Court of Canada Justice Bertha Wilson indicated that lawyers should put the public before their own self-interest and update their codes of conduct: "Lawyers need to put public before self-interest: Wilson", *Law Times* (March 15-21, 1993).
[5] *Supra* note 2.

Competition Bureau has established guidelines that include ethical rules for corporations in order to improve compliance with the law and to encourage better business practices.[6] Ethics is gaining gradual acceptance as a legitimate area of expertise of a law practice.[7] The corporate community is looking closely at ethical issues as they relate to corporate governance, including the well being of employees, the duties of members of boards of directors and service to the client.[8] Commentators are revisiting the issue of whistleblowing and the ethical duties of public officials.[9] The Supreme Court of Canada has looked at how public officials' exercise their public duties and, in particular, issues related to conflict of interest and improper receipt of benefits.[10]

2. Why lawyers?

There have always been ethical nuances to the practice of law.

Since the 1920's the ethical standards of lawyers have been incorporated as part of the professional codes of conduct. These ethical standards, along with professional rules of responsibility, are generally referred to as codes of professional conduct and lawyers are expected to follow them as part of the licensing requirements of each law society. A

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[6] *Corporate Compliance Programs*, Director of Investigation and Research, Competition Bureau (Ottawa: 1997).
[7] Anne Giardini, "Corporate Ethics" (1997) 6 The National 30 (Ottawa: Canadian Bar Association, 1997).
[8] James Gillies, *Boardroom Renaissance, Power, Morality and Performance in the Modern Corporation* (Toronto: McGraw-Hill Ryerson Limited, 1992).
[9] Louis-Paul Cullen and Sophie Perrault, "Environment: The Case of the Whistleblowing Employee" (1994) 4 Canadian Corporate Counsel 4.
[10] *R.* v. *Hinchey*, [1996] 3 S.C.R. 1128 [hereinafter *Hinchey*].

lawyer can be disciplined for breach of the code. Professional rules of responsibility include standards of practice which require regulation, such as the disclosure of fees, and they are usually cast in prohibitive language (The lawyer shall not stipulate for, charge or accept any fee that is not fully disclosed, fair and reasonable).[11] Ethical standards tend to be general statements encouraging moral behavior (The lawyer must discharge with integrity all duties owed to clients, the court, and other members of the profession and the public).[12]

While the Canadian Bar Association, the national voluntary association for lawyers, and law societies have developed professional and ethical standards, the standards have been formulated mainly for the private bar and have little relevance for those segments of the legal profession that do not fall within the concept of the traditional practice of law. There are lawyers, like legislative drafters, who work in the public sector, academics and in-house counsel employed by corporations, who have been largely overlooked in the development of these standards.

Nevertheless, the moral dimension of a lawyer's work changes over time, in keeping with the changes to the practice of law and, consequently, ethical standards need to be reviewed from time to time even if only to ensure these rules remain relevant to all sectors of the legal profession. As an example, the Law Society of Upper Canada is in the process of

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[11] *Code of Professional Conduct*, Canadian Bar Association, Chapter XI (Ottawa: Canadian Bar Association, 1987) [hereinafter *CBA Code*].
[12] *Ibid.*, Chapter I.

conducting a major review of its *Rules of Professional Conduct,*[13] a document that includes both ethical and professional standards. The new draft *Rules* are wider in scope and now include more detailed references to the ethical obligations of government lawyers. The last review of these rules was in 1987, with some further amendments in 1992.

There is some disillusionment within the legal profession that the practice of law has become more of a business than a professional calling.[14] Moreover, the public remains critical of lawyers, who they perceive as self-interested and lacking good moral standards. Recently the debate about the integrity of lawyers was revived in a series of articles in the *Ottawa Citizen.*[15] The articles featured stories of lawyers who had stolen money from clients. This provoked an immediate response from many Ontario lawyers in defence of the integrity of the legal profession, including Gavin MacKenzie, a leading writer on legal ethics in Canada.[16]

There is some confusion as to whether ethics still has a role to play in the practice of law. In his book, *Professional Conduct for Lawyers,* Beverly G. Smith examines the issue of what constitutes acceptable professional conduct for lawyers in the context of what is a professional:

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[13] *Proposed Draft Rules of Professional Conduct*, Task Force on Review of the Rules of Professional Conduct, Law Society of Upper Canada, April 29, 1999; online: QUICKLAW, db mpro, *Gavin MacKenzie's Professional Responsibility Netletter* (Toronto: January, 1999).
[14] Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, Mass.: Harvard University Press, 1993).
[14] November, 1998.
[15] November, 1998.
[16] Gavin MacKenzie, "Unsavoury Lessons", *Law Times* Vol. 10, No.1; online: QUICKLAW, db mpro, *Gavin MacKenzie's Professional Responsibility Netletter* (Toronto: January, 1999); **see also** Gavin MacKenzie, *Lawyers and Ethics, Professional Responsibility and Discipline* (Toronto: Carswell, 1993)

> Who is a professional today? One might answer that a professional is a person who professes to have particular knowledge and expertise in a subject, and who usually uses that knowledge and expertise as a means of livelihood. That answer would suggest that a person skilled in playing baseball could be a professional as much as a person skilled in law, medicine or theology. Indeed, one sometimes hears of such a person being referred to as professional baseball player.
> Roscoe Pound has enunciated a definition of a profession, and therefore of a professional, which may give direction. He said that a profession is "a group of men pursuing a learned art as a common calling in the spirit of no less a public service because it may incidentally be a means of livelihood."[1] The new elements added by this definition to knowledge and skill in one's field of learning and expertise are "a learned art" and "the spirit of public service". The emphasis is that the offering of the knowledge and the skill in service to the public is primary to the matter of earning a livelihood. While the baseball player has expertise he has not acquired a learned art, at least in the historic concept of that term; and while he may or may not be motivated by a spirit of service to the public, that motivation, Pound indicates, has been included by society in its concept of professionals.[17]

Mr. Smith is correct in saying that the practice of law is both a profession and a business. It is the mixture of business practices with the professional practice of law that is responsible, in part, for some of the current debate on ethics. His comments reflect the dilemma that most lawyers face in their practice. On the one hand, the practice of law is viewed as a calling; on the other hand it is a business motivated by profit. This creates the tension which, in my view, is at the center of the debate about more ethical accountability. In other words, is it possible to earn money and adhere to exacting professional and ethical standards at the same time?

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[17] B. G. Smith, *Professional Conduct for Lawyers* (Toronto: Butterworths, 1989) at 1.

In the section that follows I will look briefly at the nature of ethics and legal ethics in order to provide some background for the arguments presented in this thesis.

3. Ethics and legal ethics

What is the nature of ethics? Ethics is about moral choices, what is right and what is wrong.[18] While it is not my intention to explore in great detail the nature of ethics, it is important to understand that there are two schools of thought on the origins of ethical behavior. The empiricists advance the theory that individuals are governed by their experience, learned over time, and which determines how they make their moral choice. However, others would ascribe ethical choice to intuition or an innate feeling – "either you have it or you don't".[19]

This discussion is relevant to the extent that the need for express standards is linked to whether ethical conduct is learned from interpreting rules or if it simply comes naturally and can therefore be left to individual judgment. The better view, in my opinion, is that for a lawyer it is a combination of both instinct and written guidance. At the present time many lawyers, particularly those who are not part of the mainstream practice of law, are required to respond to their situation by adapting rules drafted primarily for another

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[18] Joseph Cropsey, ed., *A Dialogue Between A Philosopher And A Student Of the Common Laws Of England*, lst ed. (Chicago: the University of Chicago Press, 1971); **see also** B. G. Smith, *ibid.*at 3.
[19] J.D. Ground, *Professional Responsibility*, c.1, Bar admission course for the Law Society of Upper Canada(Toronto: 1997).

audience. As a result, they are left to rely too heavily on instinct. Some further guidance is necessary.

There are a few characteristics of ethics that should be kept in mind.

The premise of good ethical behavior is the promotion of ideals that are shared. In a large group, such as the legal profession, ethical standards operate as a shared moral code. A large component of ethics is integrity, which is usually described as "acting in a principled way" or "doing the right thing". Lastly, ethics is linked to values such as honesty, moral courage and truthfulness which are equally difficult to define and which usually evolve as widely held beliefs over time.

Ethics should be distinguished from values. Values are enduring beliefs such as honesty and objectivity, which influence attitudes, actions, and the choices we make and, unlike ethical choices, they do not involve a choice between right and wrong.

Values frame our perception of what is ethically right or wrong and include concepts like honor, pride, duty and compassion. The tasting of a grape at the market without first purchasing it provides some insight into the distinction. Some may argue that the market expects its customers to taste grapes in order for them to sample the merchandise. Others may say that the taking of the grape is improper and is theft from the market whether or not the customer ultimately decides to buy the grapes. The value at stake is honesty; the ethical dilemma is whether it is morally wrong, and therefore unethical, to make the choice to

sample the grape without first purchasing it. The decision to take the grape is a decision between right and wrong. In the case of a lawyer, the raising of a technical defence by a more seasoned lawyer to win a case against a junior lawyer may be viewed as sharp practice but acceptable. Others would argue it is unethical to use procedural rules in order to win and that such conduct brings the legal profession into disrepute.

What is legal ethics?

Lawyers have developed their own body of ethics, legal ethics. In many of the discussions on ethics it is assumed that everyone understands what is meant by "legal ethics". Legal ethics is the compilation of ethical principles that apply to lawyers. As Gavin MacKenzie, a leading writer on lawyers' ethics, points out there has been very little written in Canada on the subject of legal ethics.[20] In contrast, a lot of debate on this issue has occurred in the United States.[21] Most Canadian texts focus on the rules and their application and there is very little discussion of theory. The following approach to legal ethics has been taken by the Americans and is a useful analysis for the Canadian context:

> What are the principles of legal ethics and where are they found? The philosophers consider legal ethics a highly specialized body of lawyers' and judges' thought found in codes drafted by the organized bar (notably the ABA Code of Professional Responsibility and, before, 1970, the ABA Canons of Professional

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[20] MacKenzie, *supra* note 16 at 4-5.

[21] Monroe H. Freedman, *Lawyers' Ethics in an Adversary System* (New York: Bobbs-Merrill, 1975); Monroe H. Freedman, *Understanding Lawyers' Ethics* (New York: Matthew Bender & Co., 1990); David Luban (ed.), *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (Totowa, New Jersey: Rowan & Allenhead, 1983); David Luban (ed.), *The Ethics of Lawyers* (New York: New York University Press, 1994); Charles Wolfram, *Modern Legal Ethics* (St. Paul, Minnesota: West, 1986).

> Ethics), as well as in bar association ethics opinions, case law, and scholarly texts.[22]

The situation is similar in Canada. The body of rules referred to as legal ethics in this country can be found in the *CBA Code,*[23] the rules of professional conduct of the law societies, the decisions of discipline committees of the various law societies and the case law.

4. Codes-where to find ethical rules for lawyers

How are ethical standards enunciated and applied? As mentioned earlier,[24] there is a body of legal thought, which is known as "legal ethics". Lawyers'standards may be left unwritten and unspoken but the central body of thought appears as general principles in a code. There is a lot of room for uncertainty and, in additional to legal and intellectual analysis, these principles may require an individual decision with respect to the appropriate moral choice. Most codes set out the general principles as positive, albeit vague, obligations rather than as prohibitions:

> The uncertainty of the application of the rules relating to professional integrity is largely by reason of the fact that the rules are hortative and not prescriptive. They are drafted in language that urges what is good and laudable and the espousal of uncorrupted virtue, uprightness, honesty and sincerity in one's

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[22] Ted Schneyer, "Moral Philosophy's Standard Misconception of Legal Ethics" (1984, No.4) Wisconsin Law Review 1529 at 1533-1534.
[23] *Supra* note 11.
[24] *Supra* at 7.

> professional conduct. They are drafted in this manner for at least two reasons.
> Firstly, the general ethical language permits the rules to apply to all conduct of every nature of a lawyer which depending on intent or motive can be ethical or unethical; and
> Secondly, it would seem that the rules are drafted with the intent that they would be regarded as educational on the assumption that ethics can be taught and learned and lawyers will want to obey them. A lawyer is constantly exhorted through professional conduct rules, call to the bar ceremonies, bar dinners and the like of the need and the duty to practice with integrity.
> There is a creed of conduct in the profession. It is based upon integrity and the rules relating thereto. They are not easy to apply. The ability to apply them correctly is acquired through constant awareness of ethical situations and practice in making the right ethical choices. All professional ethics are directed towards the things to be sought and the things to be avoided in the interest of the chief good, aim and purpose of the profession.[25]

The rules that have been developed by the law societies and the Canadian Bar Association to govern the conduct of lawyers are referred to as professional rules of conduct or codes of conduct. According to the Supreme Court of Canada, these professional rules of conduct are not binding on the courts but they express the collective views of the members of the legal profession.[26]

As noted above, codes of professional conduct perform two main functions. They set out professional rules and ethical responsibilities. The purposes of these codes are varied. They conveniently provide an easily consulted compilation of ethical and related professional rules of behavior; they are also advanced as methods of encouraging responsible behavior by creating awareness of standards that must be met, by providing

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[25] J. D. Ground, *supra* note 18.
[26] *MacDonald Estate* v. *Martin*, [1990] 3 S.C.R. 1235, at 1254.

broad declarations of values, and suggesting how they are relevant, and, finally, by providing a remedy to those to whom duties are owed in case of a breach.

Codes, which are general in nature and that, require interpretation and judgment by the individual, are perhaps the most apt mechanism in setting ethical and general professional standards. Since codes are framed in general terms, they permit subjectivity in interpretation and, consequently, some flexibility in separating "right" choices from "wrong" choices. Subjectivity is not the ultimate goal, because this would detract from the common understanding, about the application of the standards by members of the profession. But subjectivity allows for a range of judgments within limits of ethical behaviour.

In most cases a code of professional conduct will state the obvious. For example, there is a professional conduct rule that requires lawyers to act with integrity. This is a both a legal rule and an ethical rule. It is a legal rule in the sense it is part of the professional rules of conduct that a lawyer must observe as part of the licensing requirements for becoming a lawyer. Failure to observe the rule may result in discipline by a law society. It is an ethical rule because a lawyer is making moral judgments between what is right or wrong.[27] Thus it is a combination of high moral duty and professional obligation.

Despite the ongoing debate about the relevancy of codes of professional conduct, I believe they are still a useful tool for conveying ethical standards to members of the legal

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[27] *Ibid.*

profession. These codes have been in place a long time, they set out general principles for guidance and they do act as a source of collective thought on general standards for the legal profession.

5. Why specific ethical provisions for legislative drafters?

As the legal profession continues to evolve, some academics have expressed an interest in re-examining the application of professional standards to those members of the legal profession, including Crown prosecutors and legislative drafters, who have not been the main focus of the current professional codes of conduct.[28]

Some research has been conducted on this subject in the United States that supports this argument. According to Professor Purdy:

> Legislative drafters should be given the responsibility and authority to engage more actively in the legislative process. Reconsidering current drafting practices, and implementing guidelines of professional conduct for the drafter are two suggested ways of improving both legislation and the plight of legislative drafters.
> ...
> Legislative drafting is one particular area, which has been insufficiently examined. Legislation has significant impact on societal growth, and control over legislative expression, exercised to a considerable extent by lawyers, needs to be exercised in a responsible way. Although the number of lawyers acting as legislative drafters is small compared to those engaged in private

[28] Susan W. Brenner and James Geoffrey Durham, "Towards Resolving Prosecutor Conflicts of Interest", (1993) 6 Georgetown Journal of Legal Ethics 415; David A. Marcello, "The Ethics and Politics of Legislative drafting", (1996) 70 Tulane Law Review 2437; Roger Purdy, "Professional Responsibility for Legislative Drafters: Suggested Guidelines and Discussion of Ethics and Role Problems", 11 Seton Hall Legislative Journal 67.

> practice, the impact of their ultimate product may be disproportionate. Yet, little attention or guidance is afforded these aspects of the legal system and lawyers' activities.[29]

In this thesis, I am suggesting that the practice of law has changed, that the duties of lawyers have changed, and that it is always timely to review and tighten up existing practice to ensure ethical accountability. Legislative drafters, as a small sample of public sector lawyers, provide an interesting example of where to begin a review of ethical standards.

Since legislative drafters are often lawyers, whether they practice in the private or public sectors, with a significant impact on the interpretation and the implementation of the law, there is a need to examine whether, in the exercise of their profession, they should be expected to adhere to accepted ethical standards.

First, some clarification about the terms I use in this thesis.

There is no precise way to describe a legislative drafter because, as I discuss in Chapter 2, various terms are used to describe them. Some of the common terms include legal drafter, legislative drafter, drafter, legislative counsel and regulatory counsel. These terms seem to have been used indiscriminately and for no particular reason other than to distinguish these practitioners because of the unique nature of their work. In most cases the choice of the term is derived from the product, legislation or regulations, which adds to the confusion.

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[29] *Ibid.*

Some of the misunderstanding about legislative drafters has developed as a result of the failure to separate their work as a technician from their work as a lawyer. This may be due in part to the fact that not all legislative drafters are lawyers. Legislative drafters have often been perceived as scribes and technicians who simply draft legislation or regulations, but in no way advise on their content or legal ramifications. Throughout this thesis I use the terms "legislative drafter" and "drafter" interchangeably and I will assume that a legislative drafter includes those who draft both legislation and regulations.

I will use the expression "code of professional conduct" to describe a compilation of ethical and professional duties. Although many of the codes that apply to lawyers are referred to as "codes of professional conduct", codes are a mixture of ethical standards and professional duties. For example, and as I mentioned at briefly at the beginning of this chapter,[30] the codes contain provisions for professional obligations relating to advertising, conflict of interest, harassment, fees and dealing with the media. They also contain ethical standards for advice to clients, advocacy and withdrawal from a file.

In this thesis I make the case for the need for specific provisions for ethical standards for Canadian legislative drafters, by amending the *CBA Code,*[31] and I review some of the elements such a code should contain in Chapter 4. I do not intend to enter into the debate as to whether legislative drafters should be, or need to be, lawyers.

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[30] *Supra* at 3.
[31] *Supra* note 11.

Legislation has a direct impact on society and, in particular, the perception Canadians have about the system of justice. No official estimate is available of the number of lawyers who are legislative drafters.[32] The number of those who draft either on a part-time or full-time basis is probably small in comparison to the number of those who are private practitioners. However, the impact of their work on the daily lives of Canadians is significant.

While there has been some interest in providing more information about the legislative drafter and the legislative process[33], the need for additional ethical standards has not been addressed. The validity of legislation may be attacked in the courts but rarely is the quality of legislative drafting the focus of the debate[34]. Legislation is always under attack outside of the courts but here too it is usually for other reasons: the public may no longer view the legislation as relevant, Parliament may be criticized for not following the process for the passage of legislation correctly, an individual may challenge the validity of legislation in light of the *Charter*[35] or the legislation may need technical updating.

Lawyers who draft legislation exercise an important function in developing the law. They provide an interesting example of a class of specialists whose practice could be dealt with

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[32] There are approximately 1800 lawyers in the Department of Justice as of July 31, 1999. Legislative Services is composed of approximately 65 lawyers. This latter figure does not take into account the lawyers who provide drafting services in either the legal service units or other areas of the Department. See generally, Department of Justice 1997-98 *Estimates, Part III, Expenditure Plan*. It is estimated there are approximately 10, 000 public sector lawyers in Canada: see "Calling all public sector lawyers", *The National*, Canadian Bar Association, Volume 5, No.3, May, 1996, p.38.

[33] *Guide to the Making of Statutes and Regulations*, Department of Justice (Ottawa:1995).

[34] *Council of Haida Nation and Miles Richardson v. The Minister of Forests and the attorney General of British Columbia and MacMillan Bloedel Limited*, unreported, B.C.C.A., November 7, 1997; *Her Majesty the Queen v. Tom Baird & Associates Ltd.*, unreported, F.C.A., November 18, 1997.

[35] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

in specific provisions added to existing professional codes of conduct to encourage awareness by lawyers of the need for sound ethical practices.

It is not my position that the proposed amendments that I outline in Chapter 4 are a complete answer to those who advocate that the ethical conduct of lawyers should be improved. Nor am I suggesting that a complete and separate code of conduct is necessary for each class of specialists. But the adoption of specific provisions to address ethical issues, even on a limited basis, I would argue, is one part of the solution. There is a need to document "best practices", such as the adoption of standard documents for obtaining client instructions, similar to retainer letters used in private practice, so that solutions to problems are commonly shared and discussed. Ongoing legal education is vital. Training in specialized areas, such as drafting techniques, has to be continuous and focused.

Minor amendments to an existing code of professional conduct should be sufficient and would help to achieve the following: recognition that legislative drafters are legal professionals, clarification for them as to what ethical standards apply to them and an acknowledgment by the legal profession that such guidance will enhance the quality of the product, the law, which is passed by Parliament.

6. Amend the CBA Code?[36]

The *CBA Code*[37] is a good starting point as a primary document where the ethical standards for legislative drafters can be inserted.

First of all, many of the law societies look to the Canadian Bar Association for leadership. In fact, the Association first approved a document called the *Canons of Legal Ethics* as early as 1920.[38] Each of the law societies then went on to adopt or amend it in the form of rules or a code. Although it was last amended in 1987, the *CBA Code*[39] has stood the test of time and it serves as a model for other codes subsequently developed by the provincial and territorial law societies.

Secondly, it was developed as a national code for all of the legal profession, which can be applied on a voluntary basis. In the case of lawyers who work for the federal government, for example, it could be adopted as a separate national code by the federal Crown without the need for any intervention by a law society or legislature. It is a self-contained document. Some provincial law societies, including Newfoundland, Prince Edward Island, the Yukon and the Northwest Territories, have chosen to adopt it in its entirety, rather than develop one of their own.

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[36] *Supra* note 11.
[37] *Ibid.*
[38] Gavin MacKenzie, Lawyers & Ethics, *supra* note 16 at 25-2.
[39] *Ibid.*

On the assumption that the *CBA Code*[40] is the national code of professional conduct for the legal profession at large, there is a need to incorporate in this document specific ethical and professional standard provisions for legislative drafters. In this thesis I set out the arguments in favor of establishing a number of provisions, in the form of amendments to the *CBA Code.*[41] I recommend changes in this form because lawyers are used to reading and interpreting codes of professional conduct. The format of a code lends itself to statements of broad general standards that can be adapted easily by simply changing the commentaries that elaborate upon, and follow, every rule of professional conduct. There are those who may disagree, in part. Gavin MacKenzie, in a very brief comment at the beginning of his text, *Lawyers &Ethics: Professional Responsibility and Discipline* is of the view that continuous updating of standards of professional conduct does not enhance confidence of the public in the legal profession:

> But rules of professional conduct have only a limited role to play in enhancing public confidence in the profession. The influence that such rules have on lawyers' attitudes and behavior, moreover, is slight. Little real progress is likely to be achieved by continually re-writing these rules.
> What is needed in addition to rules of professional conduct is a searching and methodical re-examination by lawyers of their roles in a rapidly changing society. Canadian rules of professional conduct are based for the most part on the traditional model of the sole practitioner who has competent, individual clients in a general practice. To a considerable extent, this traditional model has been overtaken as a result of the great diversity of clients, lawyers, and contexts in which legal services are provided.[42]

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[40] *Ibid.*
[41] *Ibid.*
[42] MacKenzie, *supra* note 16 at 2-3.

While I agree with Mr. MacKenzie that continuous updating is costly and unnecessary, I do think that codes need to be reviewed periodically to ensure that they remain useful and relevant for the audience that relies on them for protection and guidance. This is the case, in my view, for legislative drafters.

7. Conclusion

I have set out the objective of the thesis in Chapter 1. Chapter 2 contains a brief overview of the legal and policy framework for the governance of lawyers. I also explore in greater detail the role of the legislative drafter. The case for establishing provisions for ethics for legislative drafters will be developed in Chapter 3 by examining specific examples of issues that arise in the course of the legislative drafter's work, including the unique nature of the solicitor-client relationship, the duty of confidentiality and conflict of interest. In the last chapter, Chapter 4, I set out the proposed draft of the amendments. This will involve identifying those elements, over and above the provisions in the existing *CBA Code*[43], where special elaboration of ethical duties and responsibilities for legislative drafters is required.

[43] *Supra* note 11.

THE CONTEXT: LEGAL AND POLICY FRAMEWORK

CHAPTER 2

Introduction

In this Chapter I describe the legal and policy framework for the governance of legislative drafters. Legislative drafters are unique legal practitioners and therefore it is necessary to understand the nature of their role, the functions they perform as lawyers, the professional standards they are expected to follow and the nature of their employment setting. This discussion sets the stage for Chapter 3 where I identify those ethical issues faced by legislative drafters in their work which support the need for change to the existing framework as it relates to ethical standards.

There are three main elements of the legal and policy framework for legislative drafters that I review in this Chapter:

1. the role of the legislative drafter.
2. the constitutional jurisdiction of the federal Crown, the provincial Crown and the law society to regulate ethical and professional standards of legislative drafters.
3. the current ethical and professional standards for legislative drafters.

1. The role of the legislative drafter

Duality of role as public official and lawyer

One of the most difficult aspects of the role is the need of the drafter to wear different hats. This requires numerous skills that are not normally part of law school training. It is a role that evolves over time and demands speed, accuracy, clarity and operational knowledge of the substantive subject area of the law.

As legislative drafters are usually employed by governments' at all three levels (federal, provincial and territorial, and municipal), they are both public servants and lawyers. There is often a fine line between the responsibilities of a legislative drafter as a public servant and as a legal professional. The division of constitutional power between the various levels of government must also be kept in mind - for those in the federal public sector, for example, legislative drafters are employees of the federal Crown.

As public servants they are objective, neutral and non-partisan advisors within a large bureaucracy.

For those who are federal government lawyers, legislative drafters perform the role as independent advisors to the Crown, on behalf of the Minister of Justice and Attorney General of Canada, rather than as corporate counsel to a specific government department. In the case of legislative drafters who work for legislative assemblies or Parliament they

report to the House of Commons, the Senate or the provincial legislative assembly, rather than to individual members.

This may create some confusion as to whether their obligations as public servants, employees of Parliament or legislative assemblies, override their professional obligations as lawyers. For example, as legal practitioners, legislative drafters may be subject to codes of professional conduct of law societies but they may also be subject to other codes such as conflict of interest codes, to address those individual interests which arise with respect to the intermingling of their public duties and private interests as citizens. Other statutes may apply, such as the *Criminal Code,*[44] simply because, in addition to everything else, they are exercising a public duty and hold a position of trust.

Nature of the work

Legislative drafting has been described as both an art and a profession. There are several factors that serve to distinguish the practice of the legislative drafter from other legal practitioners.

- The legislative drafter may or may not be a public servant. In Canada legislative drafters are normally practicing in a public sector environment, whether at the federal, provincial or municipal levels of government.
- The drafter may or may not be a lawyer. In Canada the rule of thumb is that a drafter will be a lawyer with a practicing status in one of the provinces or territories of Canada. While they are trained as lawyers, none of the rules of professional conduct of the provincial or territorial law societies or the Canadian Bar Association refer specifically to the legislative drafter.

[44] *Criminal Code*, S.C. 1985, c. C-46, ss. 118-126.

- The drafter does not require specialized training in drafting although many have now acquired certification as legislative drafters through the training program offered at the University of Ottawa. No distinction is normally made, for training purposes, between drafting legislation, regulations, rules or other specialized documents. Some drafters simply receive their training through experience on the job.

- The drafter is the wordsmith who puts pen to hand and reduces ideas to a written text. While some may argue that this is a technical skill it falls in between traditional editing and taking dictation.

- Some have questioned whether legislative drafting constitutes the practice of the law. The Law Society of Upper Canada is silent on the issue of what is the "practice of law". However, for those jurisdictions which do define the "practice of law", such as the Law Society of British Columbia, the definition does not refer to the legislative drafter.

- A legislative drafter needs an appreciation of language, including grammar, as well as knowledge of the technical requirements of legislative form.

- The legislative drafter is often perceived as having a distinct, independent role similar to Crown prosecutors and "judicial-like" in nature. In other words, there is an importance to their role given the special part they play within government, Parliament and the Legislative Assembly.

- The legislative drafter has a duty to be non-partisan. While the drafter may be putting forward legislation for the Parliament or government of the day they must still stay out of the political fray and remain impartial.

- The legislative drafter does not control the final product. Before a statute or regulation becomes law, there will be many, including members of the legislature, consultants and members of the public, who will provide their input.

Several commentators have looked at the role of the legislative drafter but, with some exceptions, the major preoccupation has been with the legislative process and the craft of drafting rather than with an examination of the application of the skill or ethical duties,

which may attach to the profession.[45] Legislative drafting is often not distinguished from the drafting of contracts, wills, deeds, policy documents and court pleadings. Robert Dick describes legal drafting as follows:

> Legal drafting is legal thinking made visible. This visible legal thinking is to precipitate legal rights, duties, privileges and functions in definitive form. It is the formulation and preparation of legal documents such as deeds, contracts, leases, wills and trust agreements. In effect, preparing legal documents is like drafting statutes between the parties, setting out relationships and ground rules in a codified form. Pleadings, however, in contrast with documents, are not definitive legal documents. A court pleading attempts to persuade, but a contract, will, lease, or even a statute, does not. For instance, in a negligence action, the statement of claim may state that the defendant's car "careened across the highway and violently struck the plaintiff's car". The elements of emotion and persuasion are too obvious.[46]

Professor John Mark Keyes[47] has very clearly identified the essential elements of the role of the legislative drafter in his article on legal drafting. Professor Keyes agrees with Reed Dickerson that the two essential elements of legal drafting are *thinking* and *composing*. In reviewing the role of the legal drafter Professor Keyes notes that:

> In contrast to other forms of communication, legal documents must be clear and accurate before they are made. This requirement underscores how complex the drafter's role is. The drafter must not only appreciate what a legal document is intended to accomplish, but must also know how language works to convey meaning. In addition, the fact that legal documents embody, as opposed to merely describing, the law suggests that a drafter is much more than a stenographer. The drafter is in fact involved in

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[45] Barbara Child, *Drafting Legal Documents* (St. Paul, Minn.: West Publishing, 1988); John Mark Keyes, *Casebook on Legal Drafting* (Ottawa: University of Ottawa, 1997); Robert C. Dick, *Legal Drafting* (Toronto: Carswell, 1985); Reed Dickerson, *The Fundamentals of Legal Drafting*, 2nd ed. (Little, Brown & Co., Toronto: 1986).

[46] *Ibid.* at 1.

[47] *Supra*, note 43.

> determining the effect that the legal document will eventually have.[48]

Legislative drafters have an unenviable task. They must draw from the context around them, and reduce to written form, what is understood to be a law. Based on written or oral instructions they must capture concepts and freeze them in time. They must also understand the concept behind the proposed change. The reader of the text must be able to grasp from the written text all the legal rights, duties and obligations that are created or imposed. The audience or the reader of the text cannot always be easily identified when the text is prepared. A legislative drafter writes literally for everyone. Scrutiny may occur at a much later stage, before the courts, by administrators, by legislators during an amending process, or never at all. It is a skill that is difficult to evaluate. However, failure to meet acceptable standards may result in the necessity to amend a statute or litigation.

The need to identify drafting standards and to increase the awareness of the legislative drafter about their own profession has come about, in part, because of the interest of academics and, in part, because many professionals are taking on the responsibility of clarifying how they do their work with a view to enhancing their relationship with clients. In other words, if clients understand what the legislative drafter does, then there is a benefit to the legal system because both the drafter and the client are working towards a clear, well-defined objective.

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[48] *Ibid.* at 1.

In the *Guide to the Making of Federal Acts and Regulations* the federal Department of Justice sets out the objectives to the *Guide* in the following terms:

> The Guide aims to help government officials participate more effectively in the making of Acts and regulations. It describes the roles of those involved as well as the steps to be followed in order to produce legislation that accomplishes the government's goals and respects the principles and policies that underlie our legal system.[49]

Summary

In summary, the role of the drafter is multi-faceted and includes a bundle of skills. The role may vary depending on the employer, the client, the appreciation of the role by the individual drafter, the applicable standards, the technical knowledge and skill of the drafter and the professional link of the drafter to the legal profession.

There are many activities that help to define the role. At the first, and very basic, level is the drafter as a scribe. It is the drafter who holds the pen (or the mouse), sits at the keyboard and transcribes the instructions in written form. To this is added the drafter as a facilitator, giving precision and clarity to written or oral instructions, but as a neutral intermediary. At the same time, and at another level, the drafter is a technician, relying on technical knowledge of language and style, to create and compose. As a researcher, the fourth level, the drafter adds depth to the precision of the work and clarifies for the client the written product based on shared understanding of how others have treated similar

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[49] *Supra* note 34, c.3.

problems. Fifthly, the drafter is also a communicator in the broadest sense because of the need to provide access to the public, and others, a shared knowledge and understanding of the law. As a matter of practice the drafter may be called upon to attend hearings of parliamentary committees to provide factual information for the interpretation of legislative provisions. The legislative drafter is also the thinker, the one who analyses the need for, and the placement of, a particular provision. It is the legislative drafter who provides the links to other statutes and who places the legislation or regulations within the existing constitutional and other legal framework. At yet another level the legislative drafter is the healthy skeptic who provokes discussion and thought. Throughout all of this process the drafter also acts as a legal advisor, relying on an acquired knowledge and skill that is attributed to the profession of lawyering.

The identification of a legislative drafter as a lawyer adds both confusion and clarity to the role of the drafter and creates expectations for the client. It creates confusion because the skill of legal drafting is not the traditional practice of law. The benchmarks that are there for a lawyer in private practice are not there for the legislative drafter. But in the mind of the client there is probably the expectation that there is an added duty or burden much along the lines of what would be expected for the average practitioner.

Moreover, when the drafter works in a public sector environment there is the added expectation that part of the role of the drafter will be to act in the public interest. More than other legal practitioners, the legislative drafter's role is to ensure that the development and elaboration of the law includes respect for the rule of law and adherence to it, even

though the ultimate responsibility for compliance with the Charter[50] may rest with others.[51] Moreover, the drafter may in fact resemble an advocate if the provisions are challenged and the drafter is regarded as the sole source of specialized knowledge of the development of the legislation. Administrators who implement the legislation or the regulations may question the drafter about the interpretation of a provision, with the result that the drafter may advocate one interpretation over another.

Part of the role of the legislative drafter flows from the status as a public servant or an employee of a large institution. Similar to what occurs when links are made to the legal profession, membership in the public service brings with it a whole range of other attributes - service in the public interest, anonymity, impartiality, duty of loyalty, objectivity. This adds yet another layer of complexity. At a more general level, and perhaps at the extreme end of the spectrum, the drafter can be viewed as one of the gatekeepers to provide access to the law. It is with their expertise that the law is made definitive. While this may appear too dramatic for some, and incomprehensible to others, it should underscore the impact of drafters on the daily lives of the average citizen. There is no doubt that their role is underestimated, whether it be the skill they bring to the development of the law, the interpretation of statutes and regulations, the use of language or the capturing of concepts in the written word so that everyone can understand the law.

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[50] *Supra* note 36.

[51] Under the *Department of Justice Act, infra,* note 53, it is the Minister of Justice and Attorney General of Canada who certifies before Parliament that the proposed legislation complies with the Charter and the Bill of Rights.

Unlike lawyers who appear as advocates before the courts, legislative drafters are less visible and, as mentioned previously, less traditional in their practice of law. Since they usually work as part of a larger organization they become part of that organization's structure and hierarchy. Therefore it is very difficult to isolate with precision those attributes which define the work of the drafter in contrast to their role as a member of the organization. Their role is as much how they define it as an individual drafter as it is how it is defined by the organization that employs them. Those who work as consultants or as private practitioners are likely to closely resemble the private practitioner in many of their work habits although it is still necessary for them to retain the distinctness that the profession of legal drafting requires as part of their practice.

One attribute, which is often understated, is that of independence. In the government sector the legislative drafter is set apart from other lawyers because it is recognized there is a different, possibly higher duty that is owed to the Crown. In the federal Department of Justice, for example, the importance of this aspect is recognized in the organizational structure. The Chief Legislative Counsel, who is responsible for all legislative services, reports directly to the Deputy Minister.

Ideally, the drafter does not play an active part of the policy process that precedes the approval of a policy, the Cabinet decision-making process or the parliamentary process that follows. When the legislative drafter does become involved it is to merely to clarify, suggest or explain. This is a fine line to draw and requires a difficult balancing act. For example, when the drafter is asked to appear before a parliamentary committee it is to

provide factual explanations and not to present policy positions on behalf of the responsible Minister or personal views.[52] Reed Dickerson has commented as follows:

> The draftsman of statutes is in an especially sensitive position. His client, a legislator, a legislative committee, or an administrative official is presumably knowledgeable in matters of policy; indeed, policy-determining authority has been officially conferred on him. A legislative draftsman, although entitled to point out policy considerations involved in the draft, must take every precaution against the unwelcome injection of his own views into the policy features of the bill. To emphasize the vicarious position of the legislative draftsman, Middleton Beaman, late Legislative Counsel of the House of Representatives, once exaggerated the point by remarking that the draftsman must be an "intellectual eunuch". He must also be an emotional oyster. However deeply he may feel about the wisdom of the policy he is called upon to express, he must submerge his own feelings and act with scrupulous objectivity. Within the bounds of legality and professional morality, he must do his utmost to carry out his client's purpose even when he strongly disagrees with it.[53]

2. Constitutional jurisdiction

There are constitutional issues to consider because legislative drafters work for different levels of government, Parliament and the legislative assemblies and the private sector. In order to understand the legal and policy framework that applies, it is necessary to take into consideration where legislative drafters are employed (provincial, territorial and federal, Parliament or a legislative assembly) and the particular area of the public sector that

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[52] See discussion *infra* on conflict of interest in the form of personal bias at 74 et sub.
[53] *Supra* note 46 at pp. 10-11.

employs them (government, federal Parliament, provincial or territorial legislative assembly).

There are two main issues to consider with respect to the regulation of the profession by the law society. One is the regulation of legislative drafters, in terms of the substantive skills they bring to their work, and the other is the governance of their professional and ethical standards.

The legal profession is described as "self-regulating" because law societies are established by provincial or territorial law, they remain independent from government, once they are established, and they administer everything for their membership from licensing to discipline.

The jurisdiction of any law society over legislative drafters is not clear. There are potential tiers, which overlap with each other to some extent - the law society, the "profession" of legislative drafters and the federal or provincial Crown, as both the legal entities of government and employer.

The issue of the jurisdiction over the licensing of federal professionals has been examined by the courts with respect to the constitutional division of power between the federal and provincial levels of government. In the case of *The Queen in Right of Canada v. Lefebvre et al*,[54] the Federal Court of Appeal decided that chemists employed by the then

[54] (1980) 2 F.C. 199; leave to appeal refused, (1980) 1 S.C.R. ix.

Department of Health and Welfare did not have to belong to the Order of Chemists in the Province of Quebec in order to perform their functions as part of the federal public service. The province maintained that any federal regulation was an intrusion into property and civil rights under section 92(13) of the *Constitution Act, 1867*. The Court disagreed with the province. Mr. Justice Pratte stated, on behalf of the Court, that:

> ... the performance by the federal government of the administrative functions pertaining to it requires that there be a federal Public Service. The power to regulate hiring of its employees, like that of regulating their working conditions, seems to me to belong exclusively to the Federal Parliament. It is for this reason that, in my opinion, statutes such as the Professional Code and the Professional Chemists Act cannot be applied to federal employees on account of acts, which they perform in the course of their duties. If that were not so, it would amount to saying that each of the ten provinces could establish as it saw fit the standards of compliance that the federal government should meet in hiring its personnel. I cannot accept such a condition.[55]

The courts have not considered the specific case of federal lawyers. Based on the statements in the *Lefebvre* case,[56] it is reasonable to conclude that the law society does not regulate federal legislative drafters, including their mandate or the licensing requirements that apply to them. Federal lawyers who work for Parliament would be in a similar situation. It is also reasonable to assume that provincial legislative assemblies would claim jurisdiction over their employees.

The authority of a law society to regulate all members of the legal profession has rarely been explored in the courts. However, there has been some judicial activity recently with

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[55] *Ibid.* at 203-4.
[56] *Ibid.*

respect to the jurisdiction of the law society over Crown prosecutors. This is relevant to the extent that traditionally legislative drafters, like prosecutors, have had an independent, quasi-judicial role within the public sector. Although they perform much different functions, they are public sector lawyers who have a very onerous responsibility.

In the case of *Krieger* v. *The Law Society of Alberta,*[57] the Alberta Court of Queen's Bench held that the Law Society of Alberta did have the jurisdiction to review the discretion exercised by a provincial Crown prosecutor where the case was founded on an allegation of mala fides. This decision is on appeal. There is previous authority from the British Court of Appeal to the effect that the Law Society of British Columbia could not inquire into discretion of a provincial Crown prosecutor to determine if criminal charges should proceed.[58]

The *Krieger* case is evidence of a growing pressure by the general public on the law societies to hold its members accountable. The provision which is at issue in the case is Chapter 10, rule 28, of the Alberta *Code of Professional Conduct*:

> When engaged as a prosecutor, a lawyer exercises a public function involving much discretion and power. Accordingly:
> (a) a lawyer's prime duty is not to seek to convict, but to see that justice is done through a fair trial on the merits;
> (b) a lawyer must act fairly and dispassionately;
> (c) a lawyer must not do anything that might prevent an accused from being represented by or communicating with counsel;
> (d) a lawyer must make timely disclosure to the accused or defence counsel (or to the court if the accused is not represented) of all known relevant facts and witnesses, whether tending towards guilt or innocence.

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[57] Court File 9601-07392, A.D. 1996[hereinafter *Krieger*].
[58] *Re Hoem et al and Law Society of B.C.* (1985), 63 B.C.L.R. 1(B.C.C.A.).

> Commentary
> ... the application of Rule #28 to crown prosecutors is not intended to establish policy nor to interfere with the proper exercise of prosecutorial discretion. Rather, the Law Society's scrutiny of conduct involving an exercise of discretion will be limited to circumstances in which the discretion was exercised dishonestly or in bad faith. Examples are:
> - an exercise of discretion intended to obstruct, pervert or defeat the course of justice;
> - an exercise of discretion undertaken for the personal advantage of the crown prosecutor;
> – an exercise of discretion intended to deprive an individual of equality before and under the law by reason of discrimination on the basis of race, creed, color, national or ethnic origin, gender, religion, marital status, sexual orientation, age, mental or physical disability or any similar personal attribute.

The rule came into existence as a result of the case law on timely and full disclosure by the Crown in criminal cases, but it addresses the full range of issues over which prosecutors exercise discretion. It has proved controversial.[59] On the one hand, there are those who argue that a law society can review the exercise of the Crown prosecutor's discretion for discipline purposes where there has been an exercise of bad faith or the lawyer has acted dishonestly.[60] On the other hand there are those who argue that a Crown prosecutor is immune from such scrutiny and that only the courts can review the exercise of a prosecutor's discretion.[61] Another argument in the case has been that the law society, by enacting a rule on the subject of disclosure in a criminal case, is trying to enact criminal law, which is beyond its constitutional jurisdiction.

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[59] *R.* v. *Stinchcombe* (1991) 68 C.C.C. 1.
[60] *Re: Cunliffe and the Law Society of British Columbia; re Bledsoe and the Law Society of British Columbia* (1984), 13 C.C.C. (3d) 560.
[61] *Hoem et al and the Law Society of British Columbia, supra*, note 59.

The case is an example of an emerging trend whereby the courts are exhibiting an interest in reviewing certain aspects of the conduct of public sector lawyers. It is unlikely at this point to see similar case law for legislative drafters because they do not appear before the courts, the discretion they exercise is much different and they are less visible. But the issues raised by their role must nonetheless be addressed.

However, it is noteworthy that in recent years when new rules are introduced by the Federation of Law Societies, and incorporated into legislation by the law societies, government lawyers are usually exempted from the requirements, which are applied to private practitioners.

In some jurisdictions such as Ontario there is a separate statute for Crown prosecutors.[62] In Canada today there are no separate statutes, which apply only to regulate legislative drafters as a profession. In the case of federal legislative drafters the federal *Department of Justice Act*[63] is the source of the mandate of the Minister of Justice and Attorney General of Canada. The provisions with respect to legislative services as follows:

> 4. The Minister is the official legal adviser of the Governor General and the legal member of the Queen's Privy Council for Canada and shall...
>
> > (c) advise on 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

[62] *Crown Attorneys Act*, R.S.O. 1990, c. 49.
[63] *Supra* note 53.

> 4.1 Subject to subsection (2), the Minister shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and every Bill introduced in or presented to the House of Commons by a Minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity.
>
> (2) A regulation need not be examined in accordance with subsection (1) if prior to being made it was examined as a proposed regulation in accordance with section 3 of the *Statutory Instruments Act* to ensure that it was not inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms*.[64]

These sections provide a broad mandate within which legislative drafters can act. They are given a broad discretion to develop their role, not unlike prosecutors. There is a lot of room for interpretation of their role, a fact which is important to keep in mind when assessing what ethical and professional standards should apply to them.

I would now like to turn to a discussion of the professional and ethical standards, as a body of legal ethics that apply to legislative drafters.

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[64] *Supra* note 53.

3. Ethical and professional standards

To some extent there is a void in the application of the professional and ethical rules to legislative drafters. It should be kept in mind that, for the most part, legislative drafters are salaried employees.

Some examples may help to understand the complexity of the situation. The *Parliament of Canada Act*[65] is silent on the role and responsibilities of legislative drafters who work in the House of Commons or the Senate. A similar situation exists in each of the provinces and territories. The various legal mechanisms for the regulation of the profession include the provincial law society statutes, regulations, rules of procedure and professional rules of conduct remain the starting point because they are familiar to most lawyers as a primary tool for guidance on professional issues.[66] There is no comparable federal legislation, regulations or rules for either lawyers or legislative drafters.

As mentioned previously, the Canadian Bar Association has developed its own national code, the *CBA Code.*[67] This document does not have any legal effect except where it has been specifically adopted by a law society as part of their code of professional conduct. Prince Edward Island, the Yukon and the Northwest Territories have adopted the

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[65] S. C. 1985, c.P-1.
[66] *Legal Profession Act*, R.S.A. 1980, c. L-9; *Barristers and Solicitors Act*, R.S.B.C. 1979, c.26; *Law Society Act*, R.S.M. 1970, c.L-100; *Barristers Society Act*, 1931, S.N.B., c.50 as am. by S.N.B. 1954,. c.99; *Law Society Act*, R.S.N. 1970, c.201; *Barristers and Solicitors Act*, R.S.N.S. c.B-2; *Law Society Act*, R.S.O. 1980, c.233; *Law Society and Legal Profession Act*, R.S.P.E.I. 1974, c.L-9; *Bar Act*, R.S.Q. 1977, c.B-1; *Legal Profession Act*, R.S.S. c. L-10.
[67] *Supra* note 11.

CBA Code[68] as their professional code of conduct and all of the remaining law societies have modeled their codes of conduct along the same lines. In all of the other jurisdictions where it has not been adopted formally, compliance is voluntary. It serves two main purposes: it is a national standard for all jurisdictions and for all segments of the legal profession (e.g. law professors, in-house counsel for private corporations) and it acts as a useful basis of comparison where there are gaps or inconsistencies in the provincial and territorial codes.

There are some difficulties in applying law society statutes, regulations and rules. The law society statutes are general in nature and it is normally intended for them to govern the legal profession as a whole. The definition of "lawyer" and "legal services" is imprecise. Most of the case law on the issue of the jurisdiction of the law society to regulate an entire profession relates to unauthorized practice. Standards for admission, the internal structure of the law societies, terms for articling, provision for enforcement, such as discipline committees and procedures, and other procedural matters are normally included in the statutes. The rules and regulations then amplify what is in the statutes by setting out specific administrative details and standards.

There is no jurisprudence as to whether legislative drafters provide a "legal service". This issue arises normally in the context of private legislative drafters who must decide whether to maintain professional liability insurance and the issue is dealt with internally by each law society.

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[68] *Ibid.*

In the case of federal legislative drafters, the Department of Justice has elaborated some limited professional and ethical guidance in the *Guide to the Making of Federal Acts and Regulations*.[69] The *Guide* was developed as a source of information for public officials who are involved in the drafting process. At one level the *Guide* is useful in providing a very basic understanding of the drafter's role and this is evident in the following excerpt:

> As society changes, so does legislative policy in response to the constituents of parliamentarians. Drafting involves transforming government policy into legislative form and style. The drafter's objective is to prepare a bill that will achieve Government's goals. Drafters are also concerned with the coherence and consistency of federal acts as well as their fairness and the integrity of the legal system.
>
> The legislative process sometimes demands quick responses to problems as they arise. It is difficult for drafters to change the course of policy downstream in the process; it is easier for them to intervene upstream. Drafters are active partners, and not merely scribe, who are very involved in giving effect to the policy being expressed in the bill and exercise a policy role on many issues affecting its expression. They are responsible for the implementation of a number of legal principles and policies...
>
> In this way, and by keeping in mind the effectiveness and efficiency of the entire legislative process, the drafter provides valuable advice on a number of matters, such as:
>
> - the contents of the drafting instructions in the memorandum to Cabinet;
> - the time required to draft and print the bill;
> - whether the proposed provisions are appropriate to achieve their objectives;
> - whether there are gaps in the proposals that need to be filled with additional details or whether it is better to leave matters to be dealt with through general provisions;

[69] *Supra* note 34.

- the appropriate form of the provisions;
- the inclusion of certain types of provisions in the bill

> Drafters also provide a sense of perspective. Because they are less involved in developing the underlying policy, they are better able to draft language that will be understood by members of Parliament, the public and the courts, as opposed to those who already know what is intended. Drafters are attuned to the need for clarity and certainty of Acts. This need is met by adhering to drafting conventions that have been established for Acts as well as keeping in mind the rules and principles applied by the courts when they interpret the Acts.[70]

However, the focus of the *Guide* is not ethical standards for lawyers as legislative drafters and therefore, in my view, is not a complete answer to many of the ethical dilemmas faced by legislative drafters. It is nevertheless a useful starting point.

The Supreme Court of Canada has shown an interest in the ethics of public sector lawyering. There are dicta in the cases on disclosure in criminal cases to the effect that it is a breach of professional ethics to fail to exercise good faith in making disclosure, and that a failure to do so is a departure from the accepted ethical behavior.[71] The link made by the court between professional obligations of Crown prosecutors to substantive and procedural obligations is worth noting. It is evidence of a growing awareness by the courts of the significance of the work of lawyers who are responsible for acting on behalf of the Crown.

An additional layer of the legal framework for legislative drafters is the employment setting. This is more complex in a public sector environment, in which legislative drafters

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[70] *Supra* note 34, c.3
[71] *Nelles* v. *R.* (1989), 49 C.C.L.T. 217; *R.* v. *Chaplin* (1995) 96 C.C.C. (3d) 225.

usually find themselves, because the employer can set terms and conditions of employment which are in addition to any professional standards which may apply. Some may belong to unions.

In the case of legislative drafters who work as employees of the Department of Justice, it is the Crown, as represented by Treasury Board, and not the Department of Justice, which is the employer. A department of government does not have a separate legal status to hire lawyers. Department of Justice lawyers are appointed to the public service under the *Public Service Employment Act*[72], as the Public Service Commission is the general appointing authority for public servants. Employment standards are provided for in the *Financial Administration Act*[73] and the regulations enacted under it. Once appointed, the terms and conditions of employment are set generally by Treasury Board. For example, authority for the Crown to apply rules with respect to conflict of interest would be found in this statute.

There are some unique features to public sector employment. On appointment to the federal public service all federal public servants take an oath of loyalty to the Crown. Public servants are generally subject to access and privacy legislation so that there is a possibility that members of the public may apply for access to the records they create. Public servants must adhere to a security policy. While the security policy is analogous to the professional duty of confidentiality, it proceeds on a different basis, with distinct

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[72] S.C. 1985, c. P-33.
[73] S.C. 1985, c. F-11.

standards, in accordance with how the information is classified. In the case of legislative drafters, for example, the policy for the draft legislation, and the draft legislation, are submitted to Cabinet for approval. The rules on the protection of what are referred to as "Cabinet confidences" necessitate the protection of information at all stages prior to the tabling of legislation by the responsible Minister.

Similarly, regulations are drafted and submitted for approval, through a Minister of the Crown, to the Special Committee of Council, a Committee of Cabinet. The *Statutory Instruments Act,*[74] which is referred to in the *Department of Justice Act* noted above,[75] then governs how regulations are published. The penalties for inappropriate disclosure are severe and include discipline as well as a possible prosecution under the *Official Secrets Act.*[76] These rules are important to legislative drafters because they work on files, which have a significant impact on society. The Budget is a good example of this.

There is an entire section of the *Criminal Code*[77] which is devoted to "offences against the administration of law and justice", which includes such offences as bribery, breach of trust and influence peddling. Recent cases, including *R. v. Fisher*[78], *Hinchey*[79] and *R. v Cogger*[80] have highlighted the need for all public servants, including legislative drafters, to be aware of, and understand, the implications of an exchange of benefits by a public

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[74] R.S. 1985, c.S-22.
[75] *Supra* note 53.
[76] R.S. 1985, c.O-5.
[77] *Supra* note 45.
[78] (1994), 88 C.C.C. (3d) 103, 28 C.R. (4th) 63, 17 O.R. 93d) 295 (C.A.), leave to appeal to S.C.C. refused 94 C.C.C. (3d) vii [hereinafter *Fisher*].
[79] *Supra* note 10.
[80] (1997), 148 D.L.R. (4th) 649 (S.C.C.) [hereinafter *Cogger*].

servant with a member of the private sector. All of these cases involved the receipt of benefits, including gifts, by a public official.

In the case of Mr. Fisher, for example, he was charged with accepting a computer system as a benefit contrary to paragraph 121(1)(c) of the *Criminal Code*[81] because the person who gave the computer system had ongoing dealings with the government and the employee did not have written consent to accept a gift as is required by law. While the trial has yet to be completed the case demonstrates how public officials are held to higher standards in their dealings with private business.

The importance of section 121, in public life, was highlighted by the Supreme Court of Canada in *Cogger*.[82] Mr. Cogger, a Senator, was charged in February, 1993 with having accepted a benefit or advantage as consideration for cooperating and assisting Mr. Gerry Montpetit to get government business, contrary to subparagraph 121(1)(a)(ii)(iii). Mr. Cogger received $212,000 over a period of two years and he maintained this was compensation for acting as a lawyer on behalf of clients, and not because he was a Senator. The Supreme Court of Canada concluded that the appeal of the Crown from an acquittal should be allowed, and a new trial was ordered. The Court noted that the Crown does not have to establish that the benefit was conferred because the recipient knew the employment status of the public official. It is enough that Mr. Montpetit conducted business with Mr.

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[81] *Supra* note 45.
[82] *Supra* note 78 at 153.

Cogger to get access to government money. The Court also noted that "corruption" is not a required element of the *actus reus* or *mens rea* under paragraph 121(1)(a):

> The wording of s. 121(1)(a)(ii) is quite clear. It is also comprehensive. It is designed to prevent government officials from undertaking, for consideration, to act on another person's behalf in conducting business with the government. This is both a clear and honorable goal. Parliament has indicated that it is unacceptable for government officials to accept consideration from individuals for the purpose of conducting business with government on that party's behalf. I see no reason, especially given the clear wording of the section, to insert an additional element, which was not desired by the drafters of the Code.

This line of cases is important to legislative drafters for the reason that they could be approached to reveal the contents of a draft bill for a fee, attend a business luncheon where specific provisions are discussed or be the recipient of a gift for work completed on a major project. It is also interesting to note the importance the Court attached to the express wording of the section and the Court's hesitancy to imply additional elements of the offence in the section, a tribute to the expertise of the legislative drafter.

Lastly, there are rules, in the form of the *Lobbyists Registration Act*[83], which apply when members of the private sector conduct certain business activities with public officials. This legislation governs communications by individuals (including lawyers) with federal public servants in an attempt to influence government decisions. The federal Ethics Counsellor has also introduced a *Lobbyists Code*[84] of conduct recently to supplement the legislation

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[83] R.S. 1985, c. 44 (4th Supp.).
[84] News release, Howard R. Wilson, February 12, 1997 (http://strategis.ic.gc.ca).

with a code of ethics. This legislation is relevant for legislative drafters because they may be approached by lobbyists or they may be asked to participate in discussions with the Minister where lobbyists are present. It is important for drafters to understand the rules that apply when these discussions occur and the obligations on lobbyists to make certain disclosures.

A largely unexplored area is that of liability. This is relevant to consider because the more risk there is for lawyers who are legislative drafters, the more likely the will be expected to act in accordance with well-established professional standards.

In the last fifteen years, courts have handed down a series of judgments with respect to the Crown liability of public servants.[85] The courts have now shown a willingness to assign liability to public officials on the basis of a distinction between policy and operational decision-making. While policy decisions cannot be reviewed for negligence, those decisions which are classified as operational, are likely to attract liability. Failure to inspect a public facility would be an example of this type of case. The liability of the Crown[86] is used synonymously with "tort liability". It has some distinct features: (1) At common law the principle was "the king can do no wrong". This principle has evolved somewhat. The courts will look at whether the statute expressly, or by implication, imposes liability; (2) Crown liability in tort at the federal level,[87] and in eight of the ten provinces (all but British Columbia and Quebec), is vicarious and flows from the status of

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[85] *Tort Liability of Public Authorities, Review of Jurisprudence*, Department of Justice, June, 1996.
[86] *Ibid* at 7-8.
[87] *Crown Liability and Proceedings Act*, R.S. 1985,c.50.

the Crown as an employer. In the case of British Columbia and Quebec liability may also occur because of the application of provincial statute law; (3) The substantive law (the rules with respect to causation, damages, negligence and scope of employment) is governed by the law of the province where the cause of action arose.

While none of the cases in this area have addressed the liability of legislative drafters directly, and have occurred more in relation to licensing, regulatory and law enforcement functions, the range of cases for which professionals and other workers can be found liable is ever expanding.

Cases, which focus on the drafting skills of solicitors, are beginning to appear. A recent case, *Hallmark Financial v. Fraser & Beatty*[88] illustrates this. Hallmark Financial brought an action for damages for breach of contract and negligence against the law firm of Fraser & Beatty and its partner, Colin McNairn. The plaintiff wanted to purchase a general insurance brokerage firm. Mr. McNairn did not draft the letter of intent but he drafted the agreement of purchase and sale. One of its paragraphs was ambiguous and this ambiguity potentially cost the client money. The client sought to recover damages resulting from the sub-standard drafting. Although on the facts the court concluded the lawyer was not negligent, the court was willing to entertain an action in negligence for bad drafting. In this case the issue of negligence revolved around the interpretation of a particular clause on commission income and the court drew a distinction between a legal provision in the

[88] (1990), 1 O.R. (3d) 641 (Ontario Court, General Division).

agreement and the business component of the transaction. The plaintiffs were experienced businessmen and the court took this into consideration in dismissing the plaintiff's action.

This action can be distinguished because it involved a private sector lawyer and at common law lawyers can be liable concurrently in tort and contract.[89] Although there is case law to the effect that the Crown is on equal footing with individuals in terms of the capacity to contract, and the ability to attract liability,[90] it is not known at this point if public sector lawyers, who draft on behalf of the Crown, would ever be held to the same standards of care as are private sector lawyers.

The liability of legislative drafters has not been an issue largely because they are part of a long, complicated process in which their role is ill defined. Some commentators have rightly pointed out that this should be factored into the process because it underscores the importance of their role:

> It is hard to put a price tag on badly constructed legislation. How can we measure the cost of litigating the uncertainties of meaning that are brought about by language that is ambiguous or needlessly vague? And how can we evaluate the cost of finding legislative provisions that have been obscured by inept legislative placement? And, I might add, how frustrating is the effort when ambiguities exist and the search for legislative intent becomes fruitless, as is so often the case?[91]

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[89] *Central Trust Company v. Rafuse & Cordon* (1986), 69 N.R. 321 (S.C.C.).
[90] *J.E. Verrault & Fils Ltée v. Attorney General for Quebec* (1975), 57 D.L.R. (3d) 403.
[91] Leon Jaworski, The American Bar Association's Concern With Legislative Drafting, reprinted in Professionalizing Legislative Drafting: The Federal Experience 11 in Reed Dickerson, *supra* note 43 at 3,5.

4. Conclusion

There is clearly an established legal and policy framework for the governance of lawyers. The application of this set of rules to legislative drafters is ambiguous. Most professional and ethical standards must be inferred, leaving legislative drafters with little ethical guidance.

If legislative drafters are lawyers there is probably a core of rules from which apply by implication regardless of what position a lawyer has in the legal community. Some examples would include the obligation to act with integrity, the duty to be competent and to act in a diligent, conscientious and efficient manner. It is assumed that there are core responsibilities which all lawyers should exercise simply because they are members of the legal profession.

The application of some other rules is less certain. The duty of confidentiality, for example, becomes complicated in a public sector setting. As pointed out above, the employer may establish separate policies with respect to the confidentiality and disclosure of information in relation to government work. The concept of "Cabinet confidences" does not exist for the private practitioner but it is fundamental to the work of the legislative drafter whose work is integral to the Cabinet and legislative process. The obligation to disclose may exist by statute as it does in the case of the *Access to Information Act*[92] for federal lawyers. While there is provision in the legislation for the exemption from

[92] S.C. 1985, c.A-1.

disclosure of solicitor-client information, there is also provision for the severing of information in certain cases. Consequently, this raises the difficult issue of waiver of solicitor-client information if part of a document is severed.

The thorny problems associated with the duty to avoid conflicts of interest become even thornier for a public sector lawyer. The identification of the client - the Crown as opposed to one individual official - is complex and difficult to apply as a practical matter. The obligations on a public official may, at first blush, appear to conflict or, at a very minimum overlap. To begin with, the definition of the client is unclear. Who is the client when a drafter works in a large organizational context - the organization or the individual members? For example, in the case of the Senate and the House of Commons is the client the individual Member of Parliament or Parliament as a collective? Conflict of interest adds a different layer of complexity. In addition to the conflict of interest obligations, which are imposed because drafters are public sector employees, should the ordinary professional obligations, which apply to private practitioners, apply? These conflict of interest rules are based on the early identification of an adverse interest, providing adequate disclosure of the nature of the interest and then obtaining the appropriate consent.

In addition, it is assumed that lawyers will set aside their personal preferences in favor of the client and the public interest. Should this be monitored, if at all? Given the special position of trust occupied by legislative drafters in the legislative process are there special concerns about the application of rules related to lobbying.

In the next chapter, Chapter 3, I outline the arguments in support of the need for improvements to the existing *CBA Code*[93] by including specific provisions that address ethical issues for legislative drafters.

[93] *Supra* note 11.

ETHICAL ISSUES FOR LEGISLATIVE DRAFTERS: THE CASE TO AMEND THE CBA CODE

CHAPTER 3

1. An overview

In previous Chapters I have provided an introduction to the need for improved ethical standards for legislative drafters as well as an overview of the current situation.[94] I concluded Chapter 2 with a highlight of some of the ethical issues faced by legislative drafters because of gaps in the current legal and policy framework.

In this Chapter I set out, firstly, the arguments in support for the need to use the *CBA Code*[95] as a vehicle for change and, secondly, the arguments for and against the need for changes to ethical standards for legislative drafters. I propose that there should be ethical standards for legislative drafters in the form of specific rules and commentaries.

2. Why use a code?

There is a body of literature on the definition of what constitutes a "code" and when it is appropriate to use one. In Chapter 1 I looked briefly at some of the characteristics of codes

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[94] The Federal Bar Association adopted supplemental ethical rules to the Code of Professional Responsibility of the American Bar Association as early as 1970. See C. Normand Poirier, (December, 1974) 60 A.B.A.J. 1541.

[95] *Supra* note 11.

of professional conduct for lawyers. I do not intend, for the purposes of this thesis, to explore this issue in great detail because the practice in the legal profession to date has been to use codes to set out rules of professional conduct for the legal profession.

There are several characteristics of codes that make it a particularly useful tool in this case. Codes have been accepted by the legal profession. Other features include the hortatory and symbolic nature of a code, its readability and the versatility of the form. The rules or general statements of principle, which form part of the code, remain flexible and general enough to evolve over time and, consequently, they do not require amendment on a regular basis. Moreover, the code can be used to acknowledge the importance of creating consistent uniform standards in a profession, which should be based on shared professional and ethical values. As I noted in Chapter 1,[96] codes are used by law societies to regulate the professional behavior of lawyers. Examples include the Law Society of Alberta's *Code of Professional Conduct*[97] and, as noted previously, the *CBA's Code*[98].

Codes do not have to meet the same form requirements, as is the case for statutes and regulations. There is no standard definition of a code. This means that there is some flexibility when codes are drafted and then amended at a later date.

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[96] *Supra* at 8.
[97] The Law Society of Alberta, January 1, 1995.
[98] *Supra* note 11.

An example of where a code that works is the *CBA's Code*.[99] It is self-contained. It consists of nineteen chapters and is approximately eighty-four pages long. It is a brief document, in comparison to most legal texts, because each chapter stands on its own and it is heavily annotated, which accounts for some of its length. It is very easy to read because not only is it relatively short and concise but it contains general rules followed by a Commentary with Guiding Principles. The Commentary and Guiding Principles are annotations to the main text with references to case law, statutes or articles.

The preamble to the *CBA Code*[100] provides a glimpse into the rationale for the use of a code in these circumstances:

> With few exceptions the statutes do not specify the kinds of conduct that will subject a lawyer to discipline. For its part, the Code does not attempt to define professional misconduct or conduct unbecoming, nor does it try to evaluate the relative importance of the various rules or the gravity of a breach of any of them. Those functions are the responsibility of the various governing bodies. The rules that follow are therefore intended to serve as a guide, and the commentaries and notes appended to them are illustrative only. By enunciating general principles of what is and is not acceptable professional conduct, the Code is designed to assist governing bodies and practitioners alike in determining whether in a given case the conduct is acceptable, thus furthering the process of self-government.[101]

An example may help.

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[99] *Ibid.*, p.vii.
[100] *Ibid.*
[101] *Ibid.*

Rule 1, entitled "Chapter l, Integrity", states as follows:

> The lawyer must discharge with integrity all duties owed to clients, the court, and other members of the profession and the public.[102]

This general statement of the Rule is then followed by a section entitled "Commentary", which is divided into three parts, "Guiding principles", "Disciplinary Action" and "Non-Professional Activities". There are four detailed Notes which follow and which elaborate upon the issue of "integrity". Within the space of three pages it is easy to get a snapshot of what the Canadian Bar Association means by "integrity". The application of the Rule in specific circumstances is then left up to the judgment of the individual lawyer.

In summary, the arguments in favor of using the format of a code outweigh any disadvantages. It is a handy source for guidance with respect to the "craft" of lawyering. It remains a standard against which ethical behavior can be tested. The recent changes to the rules with respect to conflict of interest illustrate this point.

Avoiding conflict of interest is at the heart of the relationship between a lawyer and a client. The basic rule is that a lawyer cannot represent both sides to a dispute because their interests are adverse in nature. This rule remained basically unchanged until 1994, when the Federation of Law Societies and the Canadian Bar Association introduced an

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[102] *Ibid.*

amendment, often referred to as the "*Martin v. Gray* rule",[103] to cover the situation where one lawyer leaves a law firm and joins another firm that represents a client on the opposing side. Once the Supreme Court of Canada had rendered a decision on the matter the Canadian Bar Association and the Federation of Law Societies introduced an amendment to the *CBA Code*[104], and amplified the existing rules on adverse interest, without dramatically altering them. The Court concluded that the test for determining whether there is a conflict of interest is whether a reasonably informed individual is satisfied that confidential information will not be used in the new firm. The test consisted of two parts: (1) did the lawyer receive the confidential information in a solicitor-client relationship and (2) was there a risk the information would be used to the client's detriment?[105]

A code cannot exist in a vacuum. In order to understand the importance of incorporating express provisions for the legislative drafter, it is necessary to further explore the case of the legislative drafter.

3. The case for legislative drafters

Beyond presenting an argument for using a code as the instrument for setting a standard, I will address the need for amendment of the *CBA Code.*[106] I will now set out the arguments

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[103] *Conflict of Interest Disqualification: Martin v. Gray and Screening Methods* (Ottawa: Canadian Bar Association, 1993); *Conflicts Arising As a Result of Transfer Between Law Firms*, (Montreal: Federation of Law Societies, 1994); online: www.flsc.ca [hereinafter the *Rule*].
[104] *Supra* note 11.
[105] For a more detailed discussion of the conflict of interest implication see *infra* at 71.
[106] *Ibid.*

both for and against this proposition. In order to do this I will discuss in more detail some examples of ethical dilemmas which legislative drafters must face in their daily work. This will provide some context for the draft proposals that I will make in Chapter 4.

(a) Arguments in favor of amendments

First, I would like to set out the arguments in favor of the establishment of specific provisions in a code. In my view, the benefits outweigh the difficulties of implementing such a change.

Familiarity. As mentioned at the beginning of this Chapter, lawyers are used to codes for the regulation of their professional conduct. The provisions I am proposing would involve the addition of one chapter to the existing code as well as minor changes to some of the Commentaries and Rules.

Onerous duties. Lawyers who draft legislation and regulations have the onerous duty of providing advice to the Crown, which ultimately involves safeguarding, or acting, in the public interest. Although there is no direct accountability by the drafter to the public, as the drafter is normally a salaried employee, the Crown remains accountable through the election of Ministers who form the Cabinet of the day and who are agents of the Crown.

Lack of openness in drafting process. The legislative drafting process is generally not an open process. The main reason for secrecy prior to Cabinet making a decision is the

principle of Cabinet confidentiality. It is argued that the process leading up to a Cabinet decision, and before a Bill is introduced in Parliament, should be protected from intense scrutiny so discussions among Ministers can occur freely without the fear of constant intervention in the decision-making process. Draft Bills and regulations,[107] for example, are drafted on instructions from public officials and are sent to Cabinet, and committees of Cabinet, for approval. Public officials, and the drafters, are obligated to keep confidential the nature of what they are drafting by virtue of their oath of secrecy and oath of allegiance to the Crown but no other standards have been articulated publicly. Once a Bill is ready to be tabled in Parliament it remains confidential until the elected representatives have the opportunity to view it all at the same time or Cabinet decides it can be made public.[108] As a result, the establishment of ethical standards for drafters puts a framework in place to ensure that they adhere to certain standards in what is otherwise a secretive process.

Guidance. Ethical standards provide general guidance and they are a good educational tool. These standards help to build on, and confirm, established custom and practice. These standards are mirrored in the technical rules and conventions which drafters have come to accept as part of the craft.[109]

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[107] There is provision for pre-publication of draft regulations in the *Canada Gazette*, the official publication of the Crown, for the purpose of receiving comments. See the *Federal Regulatory Process*, Treasury Board (Canada:1996).

[108] The Deputy Minister of Justice announced in his speech to the Canadian Bar Association in Edmonton, Alberta on August 23, 1999 that Cabinet decided in March, 1999 to make available draft Bills for public consultation in certain circumstances.

[109] See, for example, "'Themself' and nonsexist style in Canadian legislative drafting", Volume 10, No.1 (1994) *English Today* (Cambridge University Press, 1994) 10.

Affirmation of the importance of the role of drafters. The existing codes already recognize the importance of the role of certain members of the legal profession, namely Crown prosecutors and defense counsel, in the system of justice. In Chapter IX of the *CBA Code,*[110] entitled "The Lawyer as Advocate", for example, there is an express statement of the duty of the prosecutor:

Duties of Prosecutor

> 9. When engaged as a prosecutor, the lawyer's prime duty is not to seek a conviction, but to present before the trial court all available credible evidence relevant to the alleged crime in order that justice may be done through a fair trial upon the merits...

The legislative drafters have an equally important function in the system of justice and they should be given the same ethical recognition. A large part of the responsibility of the drafter is the balancing of duties owed to the client, the public and the legal profession.

Shared values. A code promotes shared values because it sets out those values, such as competency, which should be important to everyone. It is important to articulate those values that support the ethical standards. If drafters have a common understanding of what is expected of them then it is easier for them to act in a professional and responsible manner.

Competency. Competency is difficult to articulate and evaluate. There is always a certain degree of latitude when questions of competence of any professional arise. The courts are

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[110] *Supra* note 11.

usually hesitant to intervene to make a determination of negligence, and for good reason. Frivolous or vexatious suits could be encouraged if the courts were too willing to intervene. In the case of lawyers, for example, they are subject to licensing requirements and, as mentioned in Chapter 2, the legal profession is self-regulating. Moreover, it is usually the exercise of judgment, a subjective state of mind, which is at issue in the case and which is difficult to review in a court.[111]

A code with ethical standards does not remove the possibility of negligence but it helps to reduce the risk by establishing generally accepted objective criteria against which the individual lawyer's judgment can be tested. The code may have to be used in combination with other tools. The Law Society of Upper Canada has established a global definition of competency. While it is very broad, and the focus of it remains the private sector practitioner, it complements the existing code of professional conduct.[112] In contrast, a legislative drafter must have a basic level of competency in drafting technique and other areas of the law. Although it is debatable the extent to which legislative drafters must understand the substance of the law they are drafting,[113] they should have, in my view, a basic understanding of certain substantive areas of the law including constitutional and administrative law. They must understand the nature of the legislative process and their role in it. As an advisor to the Crown they should have a basic knowledge of government

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[111] Stephen M. Grant and Linda R. Rothstein state in their text, *Lawyers' Professional Responsibility* (Toronto: Butterworths, 1989) at page 17 that " a lawyer must meet a standard of reasonable diligence".
[112] Definition of the Competent Lawyer, Law Society of Upper Canada (1997) 3 O.R. at x-xi.
[113] Reed Dickerson, *Professionalizing Legislative Drafting: The Federal Experience* 11 (Reed Dickerson ed. 1973) is of the view the drafter should be familiar with the substance of the law.

and their role within it. At the federal level this would include an understanding of the dual role of the Minister of Justice and the Attorney General.

Accountability. This is relevant to competency. It is difficult to imagine that drafters should have the same accountability at law, as would private practitioners. A code would help to provide a form of indirect accountability by establishing uniform standards, even if minimal, and creating expectations for the quality of service of drafters.

I now examine the arguments against the establishment of specific ethical standards for legislative drafters.

(b) Arguments against amendments

The first question one is compelled to ask is why pay any special attention to drafters?

Singling out drafters. Drafters may feel they have been singled out apart from other members of the legal profession. Legislative drafters should not feel they are being singled out - Crown prosecutors and defense counsel are mentioned in all of the existing codes of professional conduct. There is a reason for this attention. In the case of Crown prosecutors, for example, it is recognized that they have an important role to perform that they have a lot of discretion when performing it and their work has a significant impact on the public. The same is true, in my view, for legislative drafters. Legislative drafters are in a position to influence the content of law and they play a key role in the legislative process.

The importance of this function should not be overlooked. There is a need for quality control and the setting of standards because of the discretion they exercise in their work. These elements are basic to an understanding of the rule of law.

Guidance is not necessary. Legislative drafters may argue that they are capable of exercising their professional judgment and that they do not need additional guidance. Most lawyers could argue this same. However, every professional needs guidance and continuing legal education to ensure they are competent and meet accepted standards.

Codes are impractical. Codes, it is argued, can be impractical and often set goals which are lofty and out of reach, in practice, to any lawyer. Again, this underscores the importance of the use of the code to set ideals for individuals who must carry out very important duties.

No possibility of enforcement. Codes are difficult to enforce or their enforcement is left to the arbitrary whim of the various law societies. While this criticism has some validity, it is important to keep in mind that the potential for enforcement is not the most important implication of a code. The setting of the standard is more important. It helps to instill a sense of collective pride.

Codes are antiquated. A code is antiquated and does not reflect the realities of modern practice. There is no doubt that the legal profession is going through tremendous change, and will continue to do so, well into the next century. But a code of professional conduct is

still used by all of the law societies and there is no movement in the legal profession to abolish them. They still help to instill a sense of collective pride in the legal profession.

(c) Summary

A code does not provide a complete answer to the many ethical issues faced by lawyers but they have stood the test of time. Their remain a useful starting point to set ideals and elaborate general principles, which can be adapted over time. Where there are special needs, as is the case for those whose role is specialized or who have a different role, codes are flexible enough to enable lawyers to respond to their situation.

4. Specific issues for legislative drafters

The role of a legislative drafter is unique in many ways and it raises specific issues that support the need for ethical guidance in the form of general professional standards of conduct. In this section I look at the need for further ethical guidance in the context of conflict of interest, the duty of confidentiality, and solicitor-client privilege.

(a) Conflict of interest

The problem of conflict of interest is not unique to legislative drafters. It is the context in which conflict of issues arise, and the role of the legislative drafter, that are different. The

analysis of conflict of interest, in my view, has to be conducted at three levels: *personal, professional and institutional. Personal* conflict of interest is used to describe the intermingling of private interest and public duty. An example would be the offer of a gift as a reward for completing a job. *Professional* conflict of interest is defined by those rules of professional conduct, which govern the behavior of lawyers in their relationship with clients. An example would be representing two clients whose interests are adverse in nature. Lastly, *institutional* conflict of interest exists because of the environment in which the individual works. In the federal context, this type of conflict arises because of the dual nature of the Minister's role as Minister of Justice and Attorney General of Canada. The Minister is both a member of Cabinet, who participates in the policy-making process, and the independent legal advisor to the government of the day.

One of the problems a legislative drafter faces is the determination of what rules of conduct apply in any specific situation. There is no one source for all of the rules, policies and standards, which may apply. Like all lawyers, the legislative drafter is subject to the professional rules of conduct as a lawyer, but unlike a private sector lawyer, the legislative drafter is also usually a salaried employee and subject to government standards.

An example of one of these rules is conflict of interest. Conflict of interest is a government standard, which is framed as a standard for employees in their role as a public servant. This leaves the legislative drafter with a conundrum - whether the rules that were drafted with professional public servants in mind also apply to legislative drafters in their professional capacity as drafters, separate from their role as public servants. If so, do they

displace the professional rules of conduct applicable to private lawyers? If not, what happens if there is a conflict?

I will begin with an examination of the government standards that apply to the personal and professional interests of public servants. I will then look at the professional rules that apply because legislative drafters are lawyers. I will review briefly the nature of the institutional conflict of interest faced by some drafters.

(i) Public servants - personal and professional

At the federal level of government the conflict of interest rules for all public servants are found in the Treasury Board *Conflict of Interest and Post-Employment Code for Public Servants (the T.B.Code).*[114] It is incorporated as part of the terms and conditions of appointment. As I mentioned earlier, conflict of interest obligations for public servants may exist at three different levels: *personal, institutional* and *professional.* This document is limited to the personal and professional needs of employees as public servants.

On the personal and professional side, the general principle is that public servants should not use their public office for private gain and they should always act in the public interest. Therefore the *T.B. Code*[115] has specific provisions with respect to gifts, disclosure of assets, preferential treatment (e.g. preferential hiring of family members) and post-

[114] (Ottawa: Treasury Board, 1985); online: www.tbs-sct.gc.ca.
[115] *Ibid.*

employment rules. Other activities covered by these standards include teaching, part-time employment and publishing.

The *T.B. Code*[116] refers to, but does not define, or distinguish between, *real, potential* and the *appearance* of conflict of interest but it sets out general principles. These general principles help to give content to the concepts. For example, employees can only use government property for officially approved activities and they cannot take advantage of their public office after they leave their employment.[117] Moreover, employees cannot give preferential treatment to their friends and family in the award of contracts or other benefits.[118]

On the basis of these general principles, it is possible to deduce that the essential ingredients of the concept of conflict of interest are "incompatibility" and "differing interests". In summary, public servants cannot use public office for private gain and this is reflected in the objects, which are set out in section 4:

> 4. The objects of the Code are to enhance public confidence in the integrity of employees and the Public Service:
> (a) while encouraging experienced and competent persons to seek and accept public office;
> (b) while facilitating interchange between the private and the public sector;
> (c) by establishing clear rules of conduct respecting conflict of interest for, and post-employment practices applicable to, all employees; and

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[116] *Ibid.*, sections 5, 6.
[117] *Ibid.*, paragraphs 6(h)(i).
[118] *Ibid.*, sections 30-31.

> (d) by minimizing the possibility of conflicts arising between the private interests and public service duties of employees and providing for the resolution of such conflicts in the public interest should they arise.[119]

The concept of conflict of interest in the context of the *T.B. Code*[120] was explored as part of the *Stevens* inquiry.[121] Mr. Justice Parker, who chaired the commission of inquiry, set out the following criteria for the existence of a *real* conflict of interest:

> 1. the existence of a private interest,
> 2. that is known to the public office holder; and
> 3. that has a sufficient connection or nexus with his or her public duties or responsibilities that is sufficient to influence the exercise of those duties or responsibilities.[122]

Appearance of conflict of interest is more difficult to define. There are few cases on point. It is analogous to the principle that justice must not only be done, it must be seen to be done.[123] Accepting the definition set out by the Supreme Court of Canada in *Valente* v. *The Queen,*[124] Mr. Justice Parker concluded that the *appearance* of conflict of interest "exists when there is a reasonable apprehension, which reasonably well-informed persons could properly have, that a conflict of interest exists.[125]

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[119] *Ibid.*
[120] *Ibid.*
[121] *Commission of Inquiry Into the Facts of Allegations of Conflict of Interest Concerning the Honorable Sinclair M. Stevens* (Ottawa: Minister of Supply and Services, 1987).
[122] *Ibid.*
[123] *Threader and Spinks* v. *The Queen* (1986), 68 N.R. 143 (F.C.A.); see also
[124] (1985) 2 S.C.R. 673.
[125] *Supra*, footnote 122, p. 35.

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

> Where the public office holder finds himself or herself in a situation in which the existence of some private interest could influence the exercise of his or her public duties or responsibilities, the public office holder is in a potential conflict of interest provided that he or she has not yet exercised such duty or responsibility. As soon as the telephone call is placed, or the meeting convened, or the questions answered, or the letter drafted, a duty or responsibility in public office has been exercised and the line between potential and real has been crossed.[126]

There in an obvious cross-over between the *T.B. Code*[127] and the professional rules of conduct for public servants who are lawyers but the *T.B. Code*[128] does not make these links and legislative drafters are left to fashion their own. Some practical examples may help to highlight the types of issues at stake for the legislative drafter.

If a legislative drafter is invited to lunch by a Member of Parliament, who is in Opposition and who supports certain amendments to a Bill which are not favored by the government of the day, those who see the two having lunch could question the drafter's objectivity and impartiality. There is an appearance problem because those who observe the meeting do not know the purpose of the meeting and they may readily surmise that these two individuals are having lunch to discuss the amendments. It is human nature to assume there is a lack of propriety about what is happening even though what is occurring is perfectly innocent. A potential for conflict of interest exists if further drafting is to be done

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[126] *Supra* note 113 at 29.
[127] *Supra* note 110.
[128] *Ibid.*

at some future point and the relationship is ongoing. There would be a real conflict of interest if the drafter were plotting strategy with the Member of Parliament on the very Bill that is before Parliament.

A second example is part-time employment. If the legislative drafter moonlights as a drafter for a private client there is potential for conflict of interest, and possibly a real conflict, if there is any link between what the counsel is working on now and what is reasonably foreseeable in the future. A legislative drafter cannot serve two masters - the Crown and the private client – since their interests are self-evidently incompatible. Appearance is also an issue here. All legislation ultimately goes to Cabinet and Parliament for approval and passage. The private client could have the impression that by using public sector counsel there is preferred access, or preferential treatment, by using this counsel. Moreover, the likelihood of success with the proposal could be heightened, at least in the mind of the private client, by using someone with the skill and knowledge of government drafting and the legislative process.

A third example is when gifts are offered or received. This is one of the most difficult areas for public sector counsel because there are criminal sanctions in addition to possible civil liability. It is a common business practice in the private sector to provide gifts as a gesture of good will and courtesy. It can also become a reward for a job well done. It may be the case that a group who has lobbied the government is happy with the content of a Bill tabled before Parliament and they send a gift to the drafter. The source of the gift, the lobbying group, is a potential conflict. The acceptance of the gift would arguably produce

a real conflict. Legislative drafters are likely to be salaried employees paid out of the public purse. There is no expectation of a monetary reward, in addition to salary theoretically, other than the reward of having served the public. Finally, there is sure to be an appearance of conflict of interest. The actual value of the gift would not be important if a reasonable member of the public would perceive that there is a problem.

The *T.B. Code* has a section on gifts, hospitality and other benefits and it contains the following provisions:

> 27. Gifts, hospitality or other benefits that could influence employees in their judgment and performance of official duties and responsibilities must be declined. Employees must not accept, directly or indirectly, any gifts, hospitality or other benefits that are offered by persons, groups or organizations having dealings with the government.
>
> 28. Notwithstanding, acceptance of offers of incidental gifts, hospitality or other benefits arising out of activities associated with the performance of their official duties and responsibilities is not prohibited if such gifts, hospitality or other benefits:
> (a) are within the bounds of propriety, a normal expression of courtesy or within the normal standards of hospitality;
> (b) are not such as to bring suspicion on the employee's objectivity and impartiality; and
> (c) would not compromise the integrity of the government.
>
> 29. Where it is impossible to decline unauthorized gifts, hospitality or other benefits, employees must immediately report the matter to the designated official. The designated official may require that a gift of this nature be retained by the department or be disposed of for charitable purposes.[129]

[129] *Supra* note 108.

Paragraphs 121(1)(b) and (c) of the *Criminal Code,*[130] which are part of a broader section entitled "frauds against government" (e.g. influence peddling, bribery), are relevant in any discussion about gifts.

> 121. (1) Every one commits an offence who
> ...
> (b) having dealings of any kind with the government, pays a commission or reward to or confers an advantage or benefit of any kind on an employee or official of the government with which he deals, or to any member of his family, or to any one for the benefit of the employee or official, with respect to those dealings, unless he has the consent in writing of the head of the branch of government with which he deals, the proof of which lies on him;
> (c) being an official or employee of the government, demands, accepts or offers or agrees to accept from a person who has dealings with the government a commission, reward, advantage or benefit of any kind directly or indirectly, by himself or through a member of his family or through any one for his benefit, unless he has the consent in writing of the head of the branch of government that employs him or of which he is an official, the proof of which lies on him;[131]

The breadth of both the civil and criminal provisions is striking. It underscores the difficulty of dealing appropriately with the broad range of behavior that occurs with the "give and take" of daily working life. Both sets of provisions are based on the need to preserve the independence and integrity of public officials. However, the potential for a broader application of the principles, one which captures perfectly innocent behaviour, is always there because of the difficulty of isolating and defining what is *prohibited* behavior.

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[130] *Supra* note 45.
[131] *Supra* note 45. vi, 25 C.R. (2d) 188n. The Court of Appeal concluded that these words offended the presumption of innocence in paragraph 11(d) of the *Charter*

If a legislative drafter receives a plaque from a Minister for a job well done this is acceptable under the *T.B. Code*[132] and outside of the application of section 121. It has been offered to an employee in the context of the employer-employee relationship and it is extended as a memento of the occasion. In terms of the application of section 121, the plaque has not been offered by someone who has dealings with the government. If the same legislative drafter receives a box of chocolates from a group who has lobbied the government and the Minister with respect to this particular Bill, the application of the provisions becomes a little more difficult. When section 121 applies, the courts have indicated[133] that it is not necessary for something to be offered, with corrupt intention (in this case, to secure future business or to influence a position in the future) and it is not necessary, for the purposes of paragraph 121(1)(c), for the gift to be offered in consideration for something else.

While legislative drafters do not often receive chocolates, there are other ample occasions for conflict of interest to arise. The legislative drafter occupies a position of importance in terms of knowledge of the government's policy and legislative agenda. Their work is normally part of the core activity of government. The government's work is complex and far-reaching and often involves many diverse activities.

Legislative drafters carry on many activities both inside and outside of work that bring them into contact with the private sector. Teaching is one of these. In their professional

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[132] *Supra* note 108.
[133] *Supra* note 10

capacity the drafter could be approached to teach at a University which receives funding from the government. Teaching at bar admission courses and universities is also common because it encourages public officials to remain part of the academic community and to maintain their professional credentials. Mr. Justice Cory offered the following guidance in *Hinchey*:

> The section (section 121 of the Criminal Code) makes it an offence for an employee to accept or agree to accept from a person who has dealings with the government, a commission, reward, advantage or benefit of any kind directly or indirectly, by himself or through a member of his family, unless he has the consent in writing of the government that employs him. Thus if a government employee accepts, on a rainy day, a ride downtown from a friend who does business with the government he has received a benefit. That could hold true as well for the cup of coffee or occasional lunch bought by the friend for the government employee. Obviously the section was never designed to include in its prohibition these very minor benefits. Nor should it apply to the exchange of those lunches and dinners that has long been a pattern of behavior between old friends. However, benefits on a larger scale might well warrant close scrutiny and require the obtaining of permission from the government employing the official. A reasonable balance must be struck that recognizes both the great dangers involved in paying benefits to government employees and the normal exchange of minor favors between friends.[134]

In other words, public servants have an onerous responsibility when they interact with the private sector. While a *de minimus* principle applies to trivia such as sharing a cup of coffee, public servants are subject to a different level of scrutiny and any public official, including legislative drafters will be expected to maintain high standards of probity.

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[134] *Supra* note 10 at 125.

(ii) Public servants - Institutional conflict of interest

There are professional rules of conduct established by each law society that set out the lawyer's professional obligations concerning conflict of interest. In the public sector at the federal level these are intimately linked to the concept of institutional conflict of interest because the legislative drafter must decide whether and how these rules apply in an institutional setting.

As a public sector lawyer, a legislative drafter is required to maintain a practicing status with a provincial or territorial law society as a condition of employment. The most common definition of conflict of interest, which one finds in the professional context, is that which is in the *CBA Code*[135]:

> A conflicting interest is one that would likely to affect the lawyer's judgment or advice on behalf of, or loyalty to a client or prospective client.

The concept of a professional conflict of interest is similar to that found in the *T.B. Code*[136] except that it applies to the legislative drafter as a professional and licensed member of a law society and not in their capacity as a public sector lawyer.

For those who are part of the federal public sector sections 4 and 5 of the *Department of Justice Act*[137] are relevant. Section 4 sets out the duties and responsibilities of the *Minister*

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[135] *Supra* note 11, Chapter V.
[136] *Supra* note 108.
[137] *Supra* note 53.

of Justice and provides that the Minister of Justice is the official legal advisor of the Governor General and the legal member of Cabinet; section 5 is the parallel provision for the *Attorney General*. Briefly, the role of the Attorney General is to provide legal advice and to conduct litigation on behalf of the Crown. It is the Attorney General who is perceived to be the guardian of the public interest.

The role of the Minister of Justice and Attorney General poses for many an "institutional" conflict of interest. This has been interpreted to mean that the position, by its very nature, puts the individual who occupies it in an automatic conflict of interest. The conflict arises as a result of the dual role of the Minister. On the one hand, the Minister of Justice develops policy proposals for legislation and provides legal advisory services to the federal Crown; on the other hand, the Attorney General of Canada must exercise their responsibilities in an independent manner and in the public interest.

This is relevant to the work of legislative drafters because they draft government Bills for the House. As drafters, their first duty is to give effect to the instructions they have received. They must serve the interests of their client, the Crown. Yet an equally important part of their job is to ensure that the rule of law is maintained in the legislative process. For example, it is the Minister of Justice who certifies before Parliament that all legislation is in conformity with the *Charter* and it is the drafters who draw any legal problems to the attention of the Minister before the Minister provides the certification.[138] The drafters also explain policies of the Department of Justice on including criminal

[138] *Supra* note 36.

sanctions in legislation, the use of preambles and the use of incorporation by reference as a drafting tool.

A case where the concept of institutional conflict of interest is discussed is *Edziak* v. *Canada (Minister of Justice)*.[139] This was an extradition case. The appellant asked the Minister of Justice to refuse to exercise discretion under section 25 of the *Extradition Act*[140] to surrender the individual to United States authorities. The Minister refused. The Supreme Court of Canada dismissed the appeal. The Court recognized the dual role of the Minister of Justice but did not agree that there was actual bias or a perceived apprehension of bias:

> The appellant contends that a dual role has been allotted to the Minister of Justice by the *Extradition Act*. The Act requires the Minister to conduct the prosecution of the extradition hearing at the judicial phase and then to act as adjudicator in the ministerial phase. These roles are said to be mutually incompatible and to raise an apprehension of bias on their face. This contention fails to recognize either the clear division that lies between the phases of the extradition process, each of which serves a distinct function, or to take into account the separation of personnel involved in the two phases of the extradition process, each of which serves a distinct function, or to take into account the separation of personnel involved in the two phases.[141]

These issues are relevant for the legislative drafter because it is important to know on whose behalf they are acting and in what capacity. The institutional conflict of interest is somewhat different for legislative drafters and is potentially problematic for them.

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[139] (1992) 3 S.C.R. 631.
[140] S.C. 1985, c.E-23.
[141] *Supra* note 123 at 633.

Depending on the situation, there could be an adverse interest, in the professional sense, when the drafter provides legal advice to the Minister. For example, if the drafters provide legal advice to the Minister, during the course of drafting legislation for another Department, and officials from another Department disagree with this advice, the Minister may be faced with balancing the interests of the government and the interests of individual Ministers who have differing interests. As the Minister has a dual role in Cabinet, where the legislation is discussed, the institutional conflict of interest may be difficult to resolve. The drafters who prepared the Bill, and who provided the advice to the Minister, have divided loyalties between the Minister of Justice and the other Ministers.

There is no easy solution to this dilemma and at present the drafter is left in a difficult position.

(iii) Lawyer - professional

Most legislative drafters are lawyers and therefore they are familiar with the professional rules governing conflict of interest that apply to them. The difficulty remains in knowing how and when to apply them in their daily work.

I will mention some examples of existing rules in order to illustrate the number of rules that may apply in any given situation.

Some situations where drafters must consider conflict of interest include interaction with other officials in the legislative process such as parliamentarians and lobbyists, the implications when changing jobs, the necessity of disclosing their own personal bias, how they handle disagreement with what is proposed by the client, and resolving different points of view within the government or legislative entity where they are employed.

A) Contact with other officials and lobbying

Legislative drafters have to keep in mind that there are limitations on disclosure of information, which they become privy to as they draft, and later prepare motions to amend, legislation. For example, lobbyists and parliamentarians are subject to rules in their dealings with government. While it is not the duty of drafters to police or monitor their activities, it is important for them to understand the limitations of those they deal with as well as the rules that apply to their own situation.

The *Parliament of Canada Act*[142] is an example where the legislative drafter must keep in mind another set of rules. It is likely that legislative drafters will have dealings with members of Parliament or their staffs. Members of the Senate and House of Commons are subject to specific rules. Sections 32 to 41 apply to members of the House of Commons. For example, section 38 provides that every contract with the federal government must contain a clause which stipulates that no member of the House of Commons can be a party to a contract or share in, or be part of, the benefits of a contract. Sections 14 to 16 apply to

[142] *Supra* note 64.

Senators. A member of the Senate cannot be a party to a government contract or receive compensation as a result of the contract. Rules regulating the *conduct* of the members of the House of Commons and the Senate can be found in the *Standing Orders of the House of Commons*[143] and the *Rules of the Senate of Canada*[144].

At present the links between all of these rules, and when they apply, are not stated expressly. It may be difficult for the legislative drafter to sort out their ethical obligations or to properly assess their role because of the number of individuals with whom they may come into contact throughout the legislative process. The basic separation between the executive and the legislative branch is also relevant but understated.

The federal *Lobbyists Registration Act*[145] is important to, and must be kept in mind by, legislative drafters because of their role in the legislative process. In addition to this statute, which was first enacted in 1988, and which governs communications by individuals (including lawyers) with federal public office holders in an attempt to influence government decisions, the federal Ethics Counselor, Howard R. Wilson, introduced recently a *Lobbyists Code of Conduct.*[146] There are three categories of lobbyists for the purposes of the Act - consultant lobbyists, in-house lobbyists (corporate) and in house lobbyists (organizations). Disclosure is required for all lobbyists but the degree of disclosure varies. The activities which must be disclosed include the development of

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[143] *Ibid.*, section 21.
[144] *Ibid.*, section 66.
[145] Online: www.//strateis.ic.gc.ca/ethics.
[146] News Release, Howard R. Wilson, February 12, 1997 (http://strategis.ic.gc.ca); *Lobbyists Registration Act Annual Report*, March 1996.

federal legislation and regulations, the award of a contract or arranging a meeting if the activity is for payment and on behalf of a client in the case of consultant lobbyists.[147] Legislative drafters may come into contact with lobbyists in several ways. They may attend parliamentary committees at the request of the Committee investigating a draft Bill in order to provide factual background. Lobbyists may also be present and will be keen to become familiar with those who are responsible for developing the government's position. Government officials may consult lobbyists as part of a formal consultation process. Therefore it is important for the drafter to recognize there is potential for problems in the relationship with a lobbyist and to be familiar with the rules of professional conduct that apply.

B) Changing jobs

The legislative drafter may decide to leave the public service. It is therefore important to know what rules apply and, if there are inconsistencies or conflicts, which rules override the others. This has become more important in recent years because of the growing number of consulting firms who provide advice to government as well as the government's decision to reduce the size of the public service. It may be the case that a legislative drafter would become a consultant or join a private law firm.

There are three sources here: the *T.B. Code,*[148] the *CBA Code*[149] and judge-made law.

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[147] See Guide to Registration, Strategis, Industry Canada (http://strategis.ic.gc.ca).
[148] *Supra* note 122.
[149] *Supra* note 11.

The *CBA Code* indicates as follows:

> 14. The lawyer who has information known to be confidential government information about a person, acquired when the lawyer was a public officer or employee, shall not represent a client (other than the agency of which the lawyer was a public officer or employee) whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person.[150]

This rule is in addition to existing rules in the public sector context with respect to the confidentiality of information and post-employment which appear in Part III of the *T.B.Code.*[151] For example, section 41 provides as follows:

> 41. At no time shall a former employee act for or on behalf of any person, commercial entity, association, or union in connection with any specific ongoing proceeding, transaction, negotiation or case to which the government is a party:
> (a) in respect of which the former employee acted for or advised a department; and:
> (b) which would result in the conferring of a benefit not for general application or of a purely commercial or private nature.

As mentioned earlier,[152] the case of *Martin v. Gray*[153] has been of considerable interest to private practitioners in recent years. It held that when changing jobs from one law firm to another lawyers cannot make use of confidential information they received from a client, to the detriment of the client, in the new job. Public sector lawyers should be aware of the rules that have been developed as a result of this case because they may change jobs within

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[150] *Supra* note 11, Chapter IV, Commentary 14.
[151] *Supra* note 108.
[152] *Supra* at 29.
[153] *MacDonald Estate v. Martin*, (1990) 3 S.C.R. 1235, (1991) 77 D.L.R. (4th) 249.

government, they may enter the government from private practice or they may leave the public service. The Federation of Law Societies, the umbrella organization for all provincial and territorial law societies, produced a *Rule* in March 1994, which was agreed to in principle by all law societies, and the Department of Justice. The *Rule* sets out the circumstances in which lawyers must take certain measures, including the preparation of affidavits and obtaining written consent from clients to continue to act in a matter, when they have obtained confidential and relevant information in the course of their work at the first firm. Guidelines for screening mechanisms, which help to ensure confidential information is not disclosed, form part of the rule. The issue is the extent to which legislative drafters are subject to the rule.

Why is this relevant to a legislative drafter?

Firstly, the proponents of the *Rule* recognized that the situation of government lawyers is different. Government lawyers have the option to change jobs within a Department or within government. It is therefore impractical to impose the prohibitions in the Rule to transfers within government, especially since there is one client, the Crown. As an employee entering or leaving the public sector, a drafter should be aware that the Department of Justice, and many provincial and territorial governments, signed a Protocol with the Federation of Law Societies, which served as the basis for the development of the *Rule*, and agreed in principle to its implementation. For the purposes of the *Rule* "law firm" is defined to include "one or more members practicing ...(e) in government, a Crown corporation or any other public body". In addition, the *Rule* does not apply to transfers within the provincial or federal Department as long as they remain an employee. In other

words if they work in a legal service in a client department within government, and they transfer to a regional or other client office within the Department, the *Rule* does not apply.

Secondly, there are two cases which indicate that in some circumstances the ruling in *Martin* v. *Gray*[154] does not apply. Although the two cases involved Crown prosecutors, it is clear the courts are prepared to make exceptions to the general rule where the nature of the role of lawyers is different. The case of Crown prosecutors has been distinguished. In *R.* v. *Morales*[155] the Quebec Court of Appeal concluded that only the provincial Crown lawyer who had a prior professional relationship with the accused should be unable to act. The facts of the case were that two individuals were accused of drug offences. During an adjournment a lawyer who represented one of the accused joined the office of the provincial Crown prosecutor. This lawyer now worked in the same office as the two Crown prosecutors who represented the crown in the same case. Defence counsel for the accused argued that the two Crown prosecutors had to remove themselves from the case because of the arrival of the former defence counsel, who had sworn an affidavit indicating she had not disclosed confidential information, in their office. In the Court's view the Attorney General is a quasi-judicial official and the Crown prosecutor does not represent a particular client. As a result, the Crown prosecutors could continue to act. The Court noted that the Crown prosecutor had also advised the defendant's lawyer of the situation and there was no objection until the accused hired a new lawyer. The Court indicated that

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[154] *Supra* note 27.
[155] (1993) R.J.Q. 2940 (Que.C.); for a contrary view see *R.* v *Joyal*, J.E. 90-527 (Que.C.A.), unreported, February, 1990.

the case should be distinguished on the basis that roles and responsibilities of the Crown prosecutors are different.

The *Morales* case is relevant for drafters because they perform their role for one client, the Crown, as is the case for prosecutors. The Court also took into consideration that the *Martin v. Gray* case involved civil litigation, which is also unlikely to be the situation for a legislative drafter.

C) Personal bias

The issue of personal bias, and the obligation to disclose the nature of the bias, should not be overlooked in any discussion on conflict of interest.

The legislative drafter may face pressure to insert clauses in a Bill which the drafter knows, or may have a reasonable suspicion to believe, it could cause problems down the road. The pressure could come in the form of a call from someone in authority in the client Department, a Member of Parliament in Opposition or a member in Parliament from the government of the day. It is then up to the legislative drafter to decide if this is an innocent call for information or an attempt to influence what goes into the Bill. It is also up to the drafter to ascertain if there is a professional conflict of interest, which is an adverse interest within the meaning of the relevant rules of professional conduct. There are several options. The drafter could confer with colleagues to establish whether her reaction to the problem is correct and to discuss possible courses of action to resolve the dilemma. Secondly, the

drafter could go to a superior to confirm whether there is a problem (i.e. the nature of the conflict of interest) and to decide what further, action, if any is required.

A second example occurs in the context of the work of the parliamentary committees. The review of legislation is a complex undertaking. Often members of legislative committees need the assistance of an expert to help with the interpretation of a particular provision. Assume, for example, that a legislative drafter receives a call to appear before the legislative committee examining a Bill to give evidence. This evidence would encompass a detailed explanation of the thinking, which went into the development of the Bill in its current form. Aside from the solicitor-client concerns that revealing such information would raise, the drafter has been placed n a difficult position. If the drafter provides the information is he or she doing so in order to provide background information or to provide advice to the Committee on how they should proceed? Depending on what information the drafter is asked to provide, is the drafter in a professional conflict of interest situation when the drafter is asked to provide information to support a position taken by members who oppose the Bill?

As a third example, let's assume that the legislative drafter is asked to accompany the committee on a tour across Canada while the Committee holds open public hearings to receive comments on the Bill. It could be the case that the Committee is composed of representatives of all members of the House of Commons. However there could be an appearance of conflict of interest because the legislative drafter is normally working in their capacity as an employee of the executive branch, government. It is difficult to

maintain the appearance of impartiality if the drafter is viewed as an integral part of the parliamentary group.

D) Disagreement

There is no guidance at present for the legislative drafter who wants to withdraw either because they disagree with the direction the Crown or Parliament is taking or they are of the view the bill or regulation is misleading and does not meet acceptable drafting standards or rule of law concerns.

Little is known about the incidence of disagreement between the legislative drafter and the client. There is a fine line to draw between what is a technical drafting matter and a disagreement on a substantive legal matter. At present a public servant or parliamentary counsel would have the option of strongly presenting their views and putting forward other options for consideration, withdrawing their services in extreme cases or, in the event of these options not working, resignation.

Whistleblowing, and thereby speaking publicly, is not permitted and the legislative drafter who went public would risk prosecution under a statute and could be the subject of a civil action. While I do not intend to go into detail about the implications of whistleblowing in this paper, it is a subject that has received some attention in recent years has government has been re-organized and it should be kept in mind by any drafter when speaking publicly

on any matter related to work.[156] While it is possible for public servants to express their opinions in public, their ability to do so must be balanced with their duty of loyalty to the Crown. Public servants cannot express views publicly, which are contrary to government policies but the Supreme Court of Canada has indicated that a sustained, public, critical attack by a public servant against government is not acceptable.[157]

(b) The duty of confidentiality

The duty of confidentiality is one of the fundamental principles on which the Solicitor-client relationship is built. It is a rule, which establishes what information should be withheld or disclosed. As mentioned earlier, the confidentiality of information is crucial to the work of the drafter because of the close relationship between the drafter and the legislative assembly, or Parliament, in the case of parliamentary counsel, and Cabinet, in the case of the government drafter. As discussed in Chapter 2, it is important to keep in mind that for public servants there are separate rules with respect to the secrecy and classification of government information.

In the *CBA Code* the general rule respecting confidentiality is set out as follows:

> The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and should not divulge such

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[156] Louis-Paul Cullen and Sophie Perreault, "Environment: The Case of the Whistleblowing Employee (Part One)", September/October 1994, Vol. 4, No.1 Canadian Corporal Counsel 4; "Whistle-blowing police officer vindicated" December 9, 1995 Ottawa Citizen.

[157] *Fraser* v. *Public Service Staff Relations Board* [1985] 2 S.C.R. 455.

> information unless disclosure is expressly or implication authorized by the client, required by law or otherwise permitted or required by this Code.[158]

The duty of confidentiality is treated as an ethical rule because it is based on the premise that there should be full and complete communication between the lawyer and client. As a result, the rule with respect to solicitor-client privilege is often distinguished as an evidentiary rule. The duty of confidentiality applies whether the communication is oral or written, it does not depend on the source of the information and it does not matter if others are aware of, and share, the information. The duty exists in perpetuity, except if a crime has been committed, or if there is express consent to disclose.

Legislative drafters are often working in a government context and therefore, in addition to the rules of professional conduct, they may face other obligations with respect to the duty of confidentiality. For example, in the federal context, legislative drafters, as public servants, must observe the *Access to Information Act,*[159] the *Canada Evidence Act,*[160] the *Official Secrets Act*[161] and the *Privacy Act.*[162] These differing, or conflicting obligations, may be difficult to harmonize. The drafter may be faced with an obligation by statute to disclose information which, under the duty of confidentiality, the drafter would normally withhold.

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[158] *Supra* note 11, c. IV.
[159] *Supra* note 90.
[160] R.S., 1985, c. C-5.
[161] R.S., 1985, c.O-5.
[162] R.S., 1985, c. P-21.

The concept of "client" is different in the public sector and parliamentary context. A legislative drafter may have several "clients" among government departments. While the ultimate goal is to produce a draft government bill for a "lead" Minister, the provisions of the Bill may affect different government departments, whose interests vary considerably. The same may be true for the legislature. A private member may wish to bring forward a Bill as a private member, rather than as a member of the government of the day. The drafter may be faced with deciding if they act for the individual member or the parliamentary body as an entity. Even with consultation among departments at the policy stage, it may be the case that issues will be left to the drafter to resolve as the drafting proceeds. This may pose difficulties for the drafter, as the exchange of information proceeds among the various departments throughout the development of the Bill. Should the client departments who are affected by the Bill be entitled to receive all drafts of the Bill? Can the drafter give information to anyone other than the "lead" Department?

It could be the case that the legislative drafter is asked to draft legislation, which affects the employee status of the drafter or their responsibilities under the *Department of Justice Act.*[163] The government of the day could decide to adopt a legislative code for all Department of Justice lawyers. At the same time as the drafters are given their instructions by Cabinet, they are asked not to reveal what they are doing to the Deputy Minister of Justice. Since they are counsel to the Governor in Council, as represented by Cabinet, can the drafters proceed to draft and can they withhold information from their own Deputy

[163] *Supra* note 53.

Minister and Minister? What is their duty to the Crown, to the legal profession and to the public? Should a drafter from outside of government be asked to draft the code?

This last example presents a potential conflict of interest for the drafter as well as a dilemma in complying with the duty of confidentiality. It is a potential conflict of interest because it may be the case that the lawyer may disagree with specific provisions of the proposed Bill. The drafter is an employee of the Crown and the adoption of the Code could change the terms and conditions of employment. The drafter, as a lawyer, also has an interest in the direct outcome of the drafting process. The dilemma in complying with the duty of confidentiality arises because the drafter is an employee of the Department of Justice and it is therefore difficult to argue that the drafter can withhold information from their Deputy Minister or Minister, their Minister being part of the Cabinet that would normally provide instructions. Yet as counsel to the Crown, the drafter owes a duty to keep its instructions confidential.

(c) Solicitor-client privilege

The last of the issues I want to look at is solicitor-client privilege.

Lawyers in government have a unique client, the Crown. Lawyers in Parliament, or a legislative assembly, have the legislature, as a body, as a client. The Crown and Parliament manifest themselves through agents.

Before discussing the rules of solicitor-client privilege for legislative drafters, I will outline briefly the common law rules developed by the courts. The first authoritative statement on the solicitor-client privilege rule is attributed to *Wigmore:*[164]

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to the purpose made in confidence by the client are at his instance permanently protected from disclosures by himself or by the legal adviser, except the protection be waived.

The modern formulation of solicitor-client privilege was developed by the Supreme Court of Canada:

> 1. the communication must be between a solicitor and client;
> 2. it must entail the seeking or giving of legal advice; and
> 3. it must be intended to be confidential by the parties.[165]

In the well known article of Ronald D. Manes on solicitor-client privilege he notes that in-house counsel, which includes government counsel, are entitled to rely on solicitor-client privilege to protect their confidential communications with a client:

> A solicitor, who practices law as an employee of a corporation, or as an officer or director of the corporation, may cloak his or her communications with the corporation with the solicitor-and-client privilege so long as the communications are within the solicitor's capacity as solicitor. This was the holding of Lord Denning in the case of *Alfred Crompton Amusement Machines Ltd. v. Commissioners of Customs and Excise (No. 2),* where he stated, at p.376:
>
> They are regarded by the law as in every respect in the same position as those who practice in their own account. The only difference is that they act for one client only, not for several clients.

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[164] Wigmore, *Evidence* (McNaughton Rev. 1961), para. 2292.
[165] *Solosky* v. *The Queen,* [1980] 1 S.C.R. 821 at 837; se also *Descôteaux et al.* v. *Mierzwinski,* [1982] 1 S.C.R. 860.

> They must uphold the same standards of honor and etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges ... the communications between the legal advisors and their employer (who is their client) are the subject of the legal privilege.[166]

One distinction must be made between the duty of confidentiality and solicitor-client privilege. The ethical obligation of confidentiality is much broader than, and includes, solicitor-client privilege. The duty of confidentiality applies to all information obtained during the solicitor-client relationship and it cannot be disclosed until the lawyer is compelled by law to do so. Information, which is subject to solicitor-client privilege, on the other hand, must meet the three criteria noted above.

This poses a dilemma for the government lawyer that the private practitioner does not have to face. The government lawyer must apply to legislation such as the *Access to Information Act* and the *Privacy Act.*[167] The private practitioner does not have this obligation. As a result, if information must be disclosed under one of these statutes it can be argued that the lawyer is obligated to disclose and cannot claim that the duty of confidentiality prevents disclosure.

A legislative drafter my face the issue of the application of solicitor-client privilege in several ways.

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[166] "Solicitor/Client Privilege" (1988) 20 Advocates' Soc. J. 20 at 25; *see also* Ronald D. Manes and Michael P. Silver, *Solicitor-Client Privilege in Canada* (Toronto: Butterworths, 1993) at 53-55.
[167] *Supra* note 90.

Often it is the legislative drafter who appears before a parliamentary legislative committee to provide factual, background information to members of the Committee as they conduct a detailed examination of the Bill. No parliamentary committee can of its own accord ask for the production of papers or records from a legislative drafter except to the extent the power has been conferred on the Committee by the House. The witness can be invited or summoned[168] formally. The practice is to invite the witness to appear. The papers must be relevant to the work of the Committee. The House of Commons has conferred on several standing committees and the legislative committees the power to send for "persons, papers and records". Usually the Committee will leave it up to a government Department to decide whom it will send as a witness but in the case of a Bill this will usually mean the drafter responsible for drafting the Bill.

The drafter may face a dilemma. The government counsel (or Department) will normally indicate that the documents are of a confidential nature. This may leave the legislative drafter subject to a double-edged sword. On the one hand, the drafter my be required to apply solicitor-client privilege to certain information; on the other hand, Parliament may not recognize the existence of the privilege or feel bound by any rules in this regard. The same holds true for the duty of confidentiality and the confidentiality of information by statute. Parliament will not normally be bound by legislation, which relates to the internal proceedings of Parliament.[169]

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[168] *Standing Orders of the House of Commons*, S.O. 122.
[169] *Williamson v. Norris*, (1899) 1 Q.B. 7; *House of Commons v. CLRB*, (1986) 2 F.C. 372.

The dilemma faced by drafters in Canada has been faced by drafters in the United States. It may be useful to examine briefly how they addressed this situation. The State of Colorado[170] is one of the few jurisdictions in the United States to modify its *Rules of Professional Conduct*. This has not been done formally but the Office of Legislative Services issued a position statement in 1996. The *Rules of Professional Conduct* apply to all lawyers who are licensed to practice.

The approach in the Office of Legislative Services is straightforward. They looked at the relationship between the legislative counsel and the Colorado General Assembly and concluded that they should draw an analogy between the large corporation and the in-house counsel. In other words, they started by looking at the employment setting of its lawyers and concluded that the legislative counsel is not the adviser to the Colorado General Assembly members individually but to the Assembly as an institution. This does not solve all of their problems but it does provide a good starting point for some issues such as attorney-client, or solicitor-client privilege.

A position statement was drafted, based on rule 1.13 of the *Colorado Rules of Professional Conduct*, which states as follows:

> 1) A lawyer employed by an organization represents that organization and owes primary allegiance to the organization itself, and not its individual employees, representatives, or other persons connected with the entity.

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[170] Douglas G. Brown and Dan l. Cartin, "The Attorney-Client Relationship and Legislative Lawyers: The State Legislature as Organizational Client", (Spring 1996) *Journal of American Society of Legislative Clerks and Secretaries* 18-26.

> 2) A lawyer may also represent any members, employees, or other constituents of the organization, but only when such representation will not affect the lawyer's allegiance to the entity itself or result in a conflict of interest.
> 3) When a constituent of an organizational client communicates with the organization's lawyer in the constituent's organizational capacity, the communication is protected by the rules on confidentiality.
> 4) The duty defined in Rule 1.13 applies to governmental organizations.
> 5) Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context.[171]

The position statement states:

> It is the position of the Office of Legislative Legal services with the General Assembly that:
>
> 1. No attorney-client relationship exists between staff attorneys employed by the Office of Legislative Legal Services and individual members of the General Assembly.
> 2. Staff attorneys employed by the Office of Legislative Legal Services maintain the attorney-client relationship with the general Assembly, as an organization, and not with individual members of the General Assembly.
> 3. The conduct of Office staff attorneys within such an attorney-client relationship is governed by Rule 1.13 of the Colorado Rules of Professional Conduct, entitled "Organization as Client"(see attached Addendum "A"). To the extent Rule 1.13 applies:
>
> > (a) A staff attorney represents the General Assembly which acts through its duly authorized constituents, and the attorney owes allegiance to the General Assembly itself, and not its individual members, employees, representatives, or other persons connected with the entity.
> > (b) In dealing with the General Assembly's members, employees and other constituents, a staff attorney shall explain the identity of the client when it is apparent that the General Assembly's interests are adverse to those of the constituents with whom the lawyer is dealing.

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[171] *Ibid.*

> (c) A staff attorney representing the General Assembly may also represent any of its members, employees, or other constituents, but only in those instances in which such representation will not affect the attorney's allegiance to the entity itself, and also subject to the provisions of the conflict of interest provisions of the Rules.
> (d) When one of the constituents of the General Assembly communicates with a staff attorney in that person's organizational capacity, the communication is protected by the confidentiality provisions of Rule 1.6 of the Colorado Rules of Professional Conduct.
>
> 4. Pursuant to section 2-3-505, C.R.S., a statutory duty of confidentiality is owed by an Office staff attorney to a member of the General Assembly in connection with bill preparation for that member. However, this statutory duty is separate and distinct from the attorney-client relationship between an OLLS staff attorney and the General Assembly since the statutory duty is applicable to all Office employees, not just staff attorneys.
>
> 5. The attorney-client relationship maintained between an Office staff attorney and the General Assembly is separate and distinct from any duty owed by such an attorney under the statutory provisions of the Code of Ethics. Those ethical obligations are required of all employees of the General Assembly.[172]

As a result, in Colorado there are several layers of duty: attorney-client privilege, the duty of confidentiality to the General Assembly and the duty that flows from Rule 1.3, another duty of confidentiality, the latter flowing from the attorney-client relationship of the legislative counsel.

The basic premise of the Position Statement is to state expressly what the duties are and then relate them back to the existing *Rules of Professional Conduct.* This makes the process express and clear for the legislative counsel. It does not alleviate all of the possible conflicts nor does it clarify the specific nature of the attorney-client relationship in a day-to-day-practice. It is unclear, for example, if legislative counsel experience any difficulty

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[172] *Ibid.*

in applying the general duty of confidentiality to the General Assembly as well as the duty of confidentiality under these rules.

The approach in Colorado still has some problems. A problem still exists in identifying clearly what are the interests of the institution and, in addition, when these interests should prevail over those of an individual employee or member of the General Assembly:

> The lawyer should explain the identity of the client - the legislative institution-when it is apparent that the legislature's interests are adverse to those of the constituent with whom the lawyer is dealing. General examples of such a situation include a legislator who insists on taking any action violative of rules or statutes that is not in the best interests of the legislature as an institution. A direct example is a legislator who is an adverse party to the state legislature in ongoing litigation who requests advice from a legislative lawyer relative to that litigation. Practically, the instances when it may be necessary for the legislative lawyer to have the matter reviewed by a higher authority in the organization may be rare. Under such circumstances, the lawyer must have a sense of the professional behavior that serves the legislature as an organizational client under Rule 1.13.[173]

In the Colorado situation there still remains a question of accountability. Possibilities for dealing with problems include the hiring of outside counsel, legislation which prohibits employees of the Office of Legal Legislative services from lobbying with respect to proposed legislation, the implementation of legal education programs and adding footnotes to legal opinions indicating for whom the advice was prepared and that it is not an official legal position of the legislature.

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[173] *Ibid.*

What the Colorado experience demonstrates is that one single measure, such as the express designation of the organizational entity as a client, is not enough. Additional measures are necessary because of the multi-faceted nature of the work and the high duty of care required of the lawyer as a professional.

As Doug G. Brown and Dan L. Cartin point out:

> Today, behavior and actions of legislative staff should have a firm and understandable ethical basis. Tomorrow, the credibility and ability of the staff to perform their work may depend on the strength of the connection between staff actions and commonly accepted ethical principles.[174]

It is important, therefore, to ensure that legislative drafters understand who is their client, the nature of their relationship to their client and the professional obligations, which apply. Express standards in a code could help in this respect.

5. Conclusion

Throughout this Chapter I have argued that specific ethical provisions in a code would assist legislative drafters in understanding their role and responsibilities, with the result that the quality of legislation would be improved along with confidence in the legislative process. Another by-product would be the increased awareness by legislative drafters of what they do and an understanding of the importance of their function in the legislative process.

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[174] *Supra* note 171.

Reed Dickerson, a well-known legislative drafter, alludes to the issue of conflict of interest, however briefly, in his text, *The Fundamentals of Legal Drafting*. His text is illustrative of a number of texts, which underscore the importance of legal ethics to those who draft legislation:

> There are ethical problems peculiar to legal drafting. When I was drafting laws for the Pentagon, a high-level lawyer from the National Security Agency asked me to "fuzz up" a draft bill so that, when the particular provision came back to NSA to be administered, they could interpret it to mean what they wanted to have subtly hidden in it. Although such an action would certainly not have been unprecedented, I indicated that I would not participate in any scheme that put blinders on Congress. When we move from public documents to private ones, the professional strictures against lack of candor may be severe, at least where the parties deal on a generally equal footing.
>
> How far may a draftsman give vent to his own social values when shaping deals for his client? The answer is "not very far". If he cannot remain functionally loyal to his client's views, he should withdraw from the relationship.[175]

Mr. Dickerson raises another interesting issue in his discussion on language, the superior knowledge of the legislative drafter and morality. In discussions on the "reasonable expectations" of a client he comments as follows:

> This opens up the broad field of morality in drafting. Aldous Huxley, citing religious authority, asserts that language carries great moral responsibilities. Deceit is an easy case. Uncertainty often causes trouble, and even idle talk has been frowned on, a proscription hard to evaluate. Much of this is supportable, if we define "morality" as embracing all matters that improve or weaken the human condition. Indeed, it is plausible to assert that even the languages of mathematics are founded on a pervasive moral principle, that of noncontradiction.

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[175] *Reed Dickerson, supra,* note 45 at 6.

> In any event, the matter should be clear in the case law. Language is a basic tool of society. If we misuse it, we create trouble for ourselves and ultimately for society as a whole.[176]

These passages indicate the relevance of morality, and therefore legal ethics, in the legislative drafting process.

I want to make some suggestions in the concluding Chapter 4, for amendments to the existing rules.

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[176] *Ibid.*

CONCLUSION: SOME PROPOSALS FOR CHANGE

CHAPTER 4

> Legislative drafting is one particular area, which has been insufficiently examined. Legislation has significant impact on societal growth, and control over legislative expression, exercised to a considerable extent by lawyers, needs to be re-examined.[177]

1. Introduction

There is a need for express provisions, in the form of amendments to the existing *Code of Conduct*[178], which recognize the importance of legislative drafters as members of the legal community with significant, and unique, responsibilities in the system of justice.

I will now set out the text of three proposed amendments, which address some of the issues, unique to the practice of legislative drafters, which I described in Chapter 3. These issues include solicitor-client privilege and the duty of confidentiality. However, since the role of the public sector lawyer is unique I would also propose to have a separate, more general, chapter for the role of the public sector lawyer. This chapter would stand on its own as a general framework for the governance of public sector lawyers. There is a need for a separate definition of public sector lawyers because the *CBA Code,*[179] like most codes of professional conduct, is drafted primarily with the private sector lawyer in mind. Moreover, the public sector practice of law is usually treated as a non-traditional practice

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[177] Roger Purdy, *supra,* note 29 at 45.
[178] *Supra* note 11.
[179] *Supra* note 11.

of law within the legal profession. This also builds, in part, on the role of the legislative drafter, which I described in Chapter 2.

I do not intend to draft comprehensive provisions to address every issue. I would like to introduce some suggestions for amendments in order to stimulate further discussion.

As a starting point, I would propose to add the following three changes:

1. insert a general Rule, Commentary and Notes to address the needs of public sector lawyers generally.
2. amend the Commentary and Notes for the existing Chapter IV, Confidential Information.
4. insert a general Rule, Commentary and Notes to address the issues related to solicitor-client privilege for the public sector lawyer.

2. Proposed amendments

(a) Amendment # 1 : Add new chapter for role of public sector lawyers

Discussion

As a starting point, I suggest the insertion of a specific chapter to recognize the unique role of legislative drafters as public sector lawyers. This chapter is pivotal because it

recognizes the differences between private sector practitioners and public sector practitioners. It does not cover all of the issues relating to solicitor-client privilege, the duty of confidentiality and conflict of interest but it sets out the basic framework. Lastly, for the purposes of this thesis I would define "public sector lawyer" as a legislative drafter. Over time, and as the need arose, other public sector lawyers could be added to the definition.

In addition, I propose that amendments should be made to other chapters to introduce a specific ethical standard that applies to lawyers in the public sector. The extent of the amendments varies. Amendments #1 and 3 are a completely new chapter; amendment #2 adds clarification as to when the Rule applies and additional annotations in the Notes, including case law and relevant texts. The amendments are highlighted in bold text.

Using the format of the *CBA Code,*[180] a suggested amendment would be as follows:

CHAPTER xxx

THE PUBLIC SECTOR LAWYER

Rule

A public sector lawyer who is employed by the government or other public entity shall act in the best interests of the government or entity, and shall observe the

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[180] *Ibid.*

standards of this Code, as expressly adopted by the employer or public entity, subject to any other ethical standards implemented by the employer, and the law. 1

Commentary

Guiding principles

1. The government, and not its individual employees, is the client of a public sector lawyer employed by the government.

2. The public entity, and not its employees or individual members, is the client of the public sector lawyer employed by that entity.

3. In the event of any inconsistency between the provisions of this Code and the standards of the government or a public entity, this Code prevails with respect to standards of professional conduct, where the government or the public entity have expressly adopted the application of this Code and have indicated in their adopting document that the Code, or parts of the Code, supersede any other authority.

4. A public sector lawyer includes, without limitation, legislative drafters, notaries, solicitors and barristers employed by government. 2

5. Public sector lawyers do not have a higher professional obligation than others to follow the codes of professional conduct.3

NOTES

1. **See generally, The Lawyer in Corporate and Government Service, The Law Society of Alberta, Code of Professional Conduct, Chapter 12, January, 1995, as updated; The Lawyer in Public Office, Nova Scotia Barristers' Society, Legal Ethics and Professional Conduct, A Handbook for Lawyers in Nova Scotia, Chapter 17. For further information on the nature of the work of the legislative drafter see generally the Guide to the Making of Statutes and Regulations (Ottawa: Department of Justice, 1995).**

2. **Legislative drafters include those lawyers whose main employment is the drafting of regulations and legislation.**

3. **Everingham, Goguen, LePage, Vaughan, Johnson, Spakow, Kergan, Jones, McCullough, McCaul, Rabinovitch, Ghetti, Allen and Magee v. The Queen in right of Ontario and Administrator of the Mental Health Centre, Penetanguishene, (1992), 8 O.R. (3d) 121 (Ontario Court) (General Division)); Kenneth Kernaghan, "The ethical conduct of Canadian public servants" (1973) 4, No.1 Optimum 5.**

(b) Amendment #2: Duty of confidentiality

Discussion

To deal with confidentiality I would keep the existing Rule and amend the Commentary and Notes (changes are highlighted in bold italics). The purpose of these amendments is to adopt the main part of the Rule for public sector lawyers, to highlight the exceptions applicable to them and to add further guidance on the case law and texts.

CHAPTER IV

CONFIDENTIAL INFORMATION

Rule

The lawyer, **including the public sector lawyer referred to in Chapter xxx**, has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and should not divulge such information unless disclosure is expressly or impliedly authorized by the client, required by law1 or otherwise permitted or required by this Code.

Commentary

Guiding Principles

1. The lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time the client must feel completely secure and entitled to proceed on the basis that without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held secret and confidential.

The public sector lawyer, as appropriate, must understand and observe the principles of disclosure of information under existing rules of parliamentary procedure as well as the applicable law and policy of the government or public entity that employs them.2

2. This ethical rule must be distinguished from the evidentiary rule of lawyer and client privilege with respect to oral or written communications passing between the client and lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or to the fact that others may share the knowledge.**3**

3. As a general rule, the lawyer should not disclose having been consulted or retained by a person unless the nature of the matter requires such disclosure. **This rule does not apply to the public sector lawyer referred to in Chapter xxx because the nature of the**

employment situation is such that it is public information if the lawyer is employed by the government or public entity.

4. The lawyer owes a duty of secrecy to every client without exception, regardless of whether it be a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.**4**

Confidential Information Not to be Used

5. The fiduciary relationship between lawyer and client forbids the lawyer to use any confidential information covered by the ethical rule for the benefit of the lawyer or a third person, or to the disadvantage of the client. The lawyer who engages in literary works, such as an autobiography, memoirs and the like, should avoid disclosure of confidential information.**5**

6. The lawyer should take care to avoid disclosure to one client of confidential information concerning or received from another client and should decline employment that might require such disclosure.**6**

7. The lawyer should avoid indiscreet conversations, even with the lawyer's spouse or family, about a client's affairs and should shun any gossip about such things even though the client is not named or otherwise identified. Likewise the lawyer should not repeat any

gossip or information about the client's business or affairs that may be overheard by or recounted to the lawyer. Apart altogether from ethical considerations or questions of good taste, indiscreet shoptalk between lawyers, if overheard by third parties able to identify the matter being discussed, could result in prejudice to the client. Moreover, the respect of the listener for the lawyers concerned and the legal profession generally will probably be lessened.7

8. Although the Rule may not apply to facts that are public knowledge, the lawyer should guard against participating in or commenting upon speculation concerning the client's affairs or business. **In the case of the public sector lawyer referred to in Chapter x the lawyer should refer to the government's or public entity's policy on communications for assistance.**

Disclosure Authorized by Client

9. Confidential information may be divulged with the express authority of the client concerned and, in some situations, the authority of the client concerned and, in some situations, the authority of the client to divulge may be implied. **However, the authority to disclose may vary depending on whether the lawyer is a public sector lawyer or a lawyer in private practice.**

For example, some disclosure may be necessary in a pleading or other document delivered in litigation being conducted for the client. Again, the lawyer may (unless the client directs

otherwise), **in the case of a lawyer in private practice**, disclose the client's affairs to partners and associates in the firm and, to the extent necessary, to non-legal staff such as secretaries and filing clerks. **In the case of the public sector lawyer referred to in Chapter xxx, the lawyer may make such disclosure within the government or the public entity as is permitted by law or policy.**

The implied authority to disclose places the lawyer under a duty to impress upon associates, students and employees the importance of non-disclosure (both during their employment and afterwards) and requires the lawyer to take reasonable care to prevent their disclosing or using any information that the lawyer is bound to keep in confidence. **In the case of the public sector lawyer referred to in Chapter x, the lawyer should refer to the government's or public entity's communications policy for assistance in determining who is authorized to speak on behalf of the client.**

Disclosure Where Lawyer's Conduct in Issue

10. Disclosure may also be justified in order to establish or collect a fee, or to defend the lawyer or the lawyer's associates or employees against any allegation of malpractice or misconduct, but only to the extent necessary for such purposes. (As to potential claims for negligence, see Commentary 10 of the Rule relating to Advising Clients).9 **This Guiding Principle does not apply to the public sector lawyer referred to in Chapter xxx.**

Disclosure to Prevent a Crime

11. Disclosure of information necessary to prevent a crime will be justified if the lawyer has reasonable grounds for believing that a crime is likely to be committed and will be mandatory when the anticipated crime is one involving violence.**10**

The lawyer who has reasonable grounds for believing that a dangerous situation is likely to develop at a court facility shall inform the person having responsibility for security at the facility and give particulars. Where possible the lawyer should suggest solutions to the anticipated problem such as:

(a) the need for further security;

(b) that judgement be reserved;

(c) such other measures as may seem advisable.

Disclosure Required by Law

13. When disclosure is required by law or by order of a court of competent jurisdiction, the lawyer should always be careful not to divulge more information than is required.**11**

14. The lawyer who has information known to be confidential government information about a person, acquired when the lawyer was a public officer or employee, shall not represent a client (other than the agency of which the lawyer was a public officer or

employee) whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person.

NOTES

1. Cf.CBA-COD4; CBA3(7);Que. 3.05.01,.02,.03:Ont.4;Alta. 15;N.B. C-3;IBA B-8;ABA-MR 1.6;ABA Canon 4, DRs4-101(A),(B),(C). **In the case of the public sector lawyer referred to in Chapter xxx, disclosure may be governed by statute, including the Canada Evidence Act S.C. 1985, c. C-5 and the Access to Information Act S.C. 1985, c.A-1. Similarly a public sector lawyer may have a duty by statute not to disclose because of the Official Secrets Act, S.C. 1985 c.O-5 and the Oath or Solemn Affirmation of Office and Secrecy which is sworn or declared by each public sector employee upon appointment to office.**

2. "...(I)t is absolutely necessary that a man, in order to prosecute his rights or defend himself...should have recourse to lawyers, and ... equally necessary ... that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege and not the privilege of the confidential agent)...", per Jessell, M.R. in *Anderson* v. *Bank of British Columbia* (1876), L.R. 2 Ch.D. 644 at 649(C.A.).

See generally Beauchesne's Rules & Forms of the House of Commons of Canada, (6th) (Carswell: 1989); Erskine May's Treatise on The Law, Privileges, Proceedings and Usages of Parliament (21st ed.) (London: Butterworths, 1989).

3. Cf. Orkin, pp. 83-86, and Tollefson, "Privileged Communications in Canada" in Proceedings of 4th Int. Comp. Law Symp. (1967) (Univ. of Ottawa Press) 32 at 36-41. **In the case of public sector lawyers referred to in Chapter xxx see generally Sopinka and Lederman on Evidence (Carswell: Toronto, 1996), c. 3.**

4. "... (A) fundamental rule, namely the duty of a solicitor to refrain from disclosing confidential information unless his client waives the privilege...Because the solicitor owes to his former client a duty to claim the privilege when applicable, it is improper for him not to claim it without showing that it has been properly waived," per Spence, J. must know of his rights and show a clear intention to forgo them: Kulchar v. March & Benkert (1950), 1 W.W.R. 272 (Sask. K.B.).

For a discussion on the issue of waiver in the public sector context see Cooper, Crown Privilege (1990); Manes & Silver, Solicitor-Client Privilege in Canadian Law (1993); Manes & Silver, The Law of Confidential Communications in Canada (1996); Professional Institute of the Public Institute of Canada v. Canadian Museum of Nature (1995), 63 C.P.R. (3d) 449 (Fed. T.D.); Puddister Trading Co. v. Canada (1996), 195 N.R. (Fed. C.A.); Best Cleaners and Contractors Ltd. v. Canada,

(1985), 2 F.C. 293 (C.A.); Canada (Auditor General) v. Canada (Min. of Energy, Mines & Resources), (1989) 2 S.C.R. 49.

5. Misuse by a lawyer for his own benefit of his client's confidential information may render the lawyer liable to account: *McMaster* v. *Byrne* (1952), 3 D.L.R. 337 (P.C.); *Bailey* v. *Ornheim* (1962), 40 W.W.R. (N.S.) 129 (B.C.S.C.).

6. "Joint retainer. When two parties employ the same solicitor, the rule is that communications passing between either of them and the solicitor, in his joint capacity, must be disclosed in favor of the other, or instructions given to the solicitor in the presence of the other; though in Bell et al. v. Smith et al. (1968), S.C.R. 644 at 671. To waive, the client it is otherwise as to communications made to the solicitor in his exclusive capacity." (quotation from *Phipson on Evidence* cited and approved by Atkins, J. in *Chersinoff* v. *Allstate Insurance* (1968), 69 D.L.R. (2d) 653 at 661 (B.C.S.C.).

As to the duties of lawyers instructed by insurers in the defence of the insured in motor accident cases, see *Groom* v. *Crocker et al.* (1938), 2 All E.R. 394 (C.A.).
This Note does not apply to public sector lawyers referred to in Chapter xxx.

7. See Eaton, "Practising Ethics" (1967), 10 Can. B.J. 528.

8. "When a solicitor files an affidavit on behalf of his client ... it should be assumed, until the contrary is proved, or at least until the solicitor's authority to do so is disputed by

the client, that the solicitor has the authority to make the disclosure", per Lebel, J. in *Kennedy* v. *Diversified* (1949), 1 D.L.R. 59 at 61 (Ont. H.C.).

9. There is no duty or privilege where a client conspires with or deceives his lawyer: *The Queen* v. *Cox* (1885), L.R. 14 Q.B.D. 153 (C.C.R.). Cf. *Orkin* at p.86 as to the exceptions of crime, fraud and national emergency.

10. To oust privilege the communication must have been made to execute or further a crime or fraud- it must be prospective as distinguished from retrospective: *R.* v. *Bennett* (1964), 41 C.R. 227 (B.C.S.C.) and cases there cited.

11. Cf. Freedman, "Solicitor-Client Privilege Under the Income Tax Act" (1969),

12. Can. B.J. 93.

The public sector lawyer cannot as a rule disclose personal information: See generally, Privacy Act S.C. 1985, c. P-21.

(c) Amendment #3: The public sector lawyer and solicitor-client privilege

Discussion

At present the Canadian Bar Association does not have a specific Chapter on solicitor-client privilege. The references are scattered throughout the various Rules. The purpose of

this chapter would be to include, for the benefit of public sector lawyers, a separate chapter for the rules that apply to their circumstances.

CHAPTER yyy

PUBLIC SECTOR LAWYERS AND SOLICITOR-CLIENT PRIVILEGE

Rule

The public sector lawyer shall ensure that the relationship with the Crown or public entity is protected by solicitor-client privilege.

Commentary

Guiding Principles

1. The public sector lawyer employed by government must treat the Crown as their client.1

2. The public sector lawyer employed by government must treat the public entity as their client.

3. The public sector lawyer who provides legal advice shall ensure that the client understands the nature of the lawyer's role and the rules with respect to solicitor-client privilege.

4. The obligation of observing solicitor-client privilege is separate from the duty of confidentiality or any other obligation imposed by law or policy, and it must be considered in the context of the employment setting of the public sector lawyer's relationship with the Crown.2

5. The public sector lawyer may act for employees of the client as agents of the client, and solicitor-client privilege may apply, but the public sector lawyer must ensure that the representation of the employee will not affect the lawyer's duty to the client and that it is subject to the rules with respect to conflict of interest as set out in Chapters V and VI.

NOTES

1. Alfred Crompton Amusement Machines Ltd. v. Customs & Excise Commissions (No2) (1972) 2 Q.B. 102; Re Director of Research and Investigation and Shell (1975) 22 C.C.C. (2d) 71 (F.C.A.).

2. For examples of legislation see generally Access to Information Act S.C. 1985, c.A-1, which provides for an exemption from disclosure for documents covered by solicitor-client privilege.

4. Conclusion

It is difficult to measure the impact of a code on the behavior of lawyers. However, it does provide a framework and a starting point by establishing the ethical core of the profession. Amending a professional code of conduct has the additional benefit of asking lawyers to reflect on their responsibilities. Embodying ethical standards in such a code would provide a distinct professional ethic for legislative drafters. It would help to set minimum standards that would be a benchmark for competency within the profession, service to the client and professional values. And it would stimulate much needed reflection and discussion.

Amendments, which address specific ethical standards, are needed to draw attention to the specific needs of legislative drafters. Legislative drafters are important to the administration of the system of justice and, in particular, to the efficient working of the legislative process through the drafting of well-crafted, cohesive statutes and regulations.

Legislative drafters face unique issues in their practice, including conflict of interest, the duty of confidentiality and the identification of the client with respect to solicitor-client

privilege. While not unique to lawyers generally, the issues require difficult and careful decision-making in practice.

The legislative drafter is involved throughout the legislative process as it evolves from beginning to end - submissions to Cabinet, interpretation of Cabinet decisions, drafting of the bill or regulation, consultation with respect to content, legal advice on substantive issues, amendments, interpretation of the law and appearances before parliamentary committees and other bodies. At present, despite this important role in the development of law, which runs parallel to the development of case law by the courts, the existing professional codes of conduct are silent with respect to any ethical guidance or standards. It is time to recognize the special role these public sector lawyers play within the legal profession.

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