

Lawyers Serving the State: Ethical Issues When Administrative Directions Conflict with the Client-State's Interests

E D G A R S C H M I D T *

I. FOREWORD

The Queen's servant seeks an audience with the Queen

This story took place back in the days when the state was the sole proprietorship of the monarch. The Queen of the realm, Wilma I, needed some help in administering it. One aspect of her realm was the production of fudgegummins for the subjects. She began a practice of appointing a manager of fudgegummins (MOF), a sub-manager of fudgegummins (SMOF) and also some staff to work under the leadership of that manager. The MOF, SMOF, and other staff were paid out of the Queen's purse.

The Queen issued three edicts (her most serious orders, applicable to the entire realm) and in them directed her MOF to inspect all fudgegummins before they went to market

- in the first edict: “to ensure/satisfy himself that the fudgegummins have been made according to the recipe and are not unsafe to consume”;

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- in the second edict: “to research/ascertain whether any of them are not safe to consume”;
- in the third edict: “to verify/ascertain whether any of them are not safe to consume”.

If, on inspection, any of the fudgegummins in a package were considered not to have been made according to the recipe or to be not safe and that package was to be put on the market, the MOF was to ensure that it had a broad stroke of red paint on it. Also, the MOF was to cause a label to be placed on each box of fudgegummins indicating that they had been inspected as required. In fact, the MOF could not inspect all fudgegummins personally, so he relied on the SMOF and really on the staff working under the SMOF to do the inspections.

The MOF thought that it was likely not good for Queen Wilma’s fudgegummin business for red-flagged packages to appear on the market. As a result, a practice developed of not even putting any packages for which red flagging would otherwise be required on the market. They never made it to the shipping dock and therefore did not need to be red-flagged.

For years, the production of fudgegummins proceeded and successive MOFs always claimed that they were being inspected to ensure that they were safe to consume. However sometimes, the MOF got a little annoyed with the SMOF if he reported that packages were found to be not according to recipe or unsafe and would have to be marked with red paint (or set aside and not go to market at all). “Really,” he would ask, “Another instance of inspection failure?”

Shortly thereafter, the SMOF decided to modify the inspection process for fudgegummins. “From now on,” he said to the staff, “I want you to ask yourself only whether there is any possibility at all that a fudgegummin was made according to the recipe and any possibility at all that it will not poison the consumer of it. If there is any such possibility – even if you think it is likely not according to recipe or likely unsafe, and even if you think it is almost certainly so – I don’t want you to treat the package containing it as needing to be red-flagged.” It would make his life with the MOF a great deal easier, he thought.

So that became the standard to which fudgegummins were inspected. The process of setting aside packages containing fudgegummins determined to be red-flaggable continued (so no red-flagged packages ever made it to market), but to the delight of the SMOF, the number of packages that were set aside went down drastically. Now, with red-flagging

reserved for fudgegummins with not even the faintest hope of being according to recipe or safe, pretty much every fudgegummin produced could be sent to market, and this was WITHOUT the red-flag. “Super!” thought the SMOF.

One day, a new staff member joined the fudgegummin inspection team. “You there,” said the staff member’s supervisor, “Please inspect the fudgegummins from this production line.” “And what are the relevant instructions for this inspection?” asked the staff member. “Well, Queen Wilma’s instructions are set out in her edicts. You can read them for yourself.”

The staff member did so and the staff member said to his supervisor, “So, under one of the edicts I have to be satisfied that every fudgegummin in the package is made according to recipe and that no fudgegummin in the package is unsafe to consume, and under the others I have to ask myself which of the following two possibilities is true: 1. that I think every fudgegummin in a package is safe to consume or 2. that I think one or more fudgegummins in a package are not safe to consume.” “Oh no,” said the supervisor, “the SMOF has decided we are only to ask ‘Is there any possibility that a fudgegummin in question might be made according to recipe or be safe?’ Even if you think it is likely not according to recipe or likely unsafe, and even if you think it is almost certainly so — that is not a red-flaggable fudgegummin.”

The staff member was troubled. He said to the supervisor, “We are servants of Wilma I, She pays us. It is Her edicts we are carrying out. I don’t think that is what Her edicts require of us.” His supervisor may have been a little uneasy about the situation (or maybe he had even suggested the revised standard of inspection to the SMOF?). In any case, the supervisor said that this decision came from the SMOF and therefore the staff member should simply carry it out.

The member of Wilma I’s staff continued to be uneasy. One day, he explained his unease in a memorandum and took it to the SMOF. “I don’t believe that the current instructions for us in the fudgegummin unit for how we are to inspect fudgegummins are what Queen Wilma ordered in her edicts. She wants all not-according-to-recipe and all unsafe fudgegummins to be red-flagged (or not go on the market at all). If you believe a fudgegummin is likely or almost certainly not according to recipe or unsafe, do her instructions not require that package to be red-flagged if it goes on the market?”

The SMOF turned to the staff member's supervisor for advice. He confirmed that, in his opinion, an inspection for the faintest possibility of recipe-conformity and safety was exactly what Wilma I wanted because she twice used the word "ascertain." The SMOF told the staff member, "Do as you have been directed."

Accordingly, one day, the staff member sought an audience with Queen Wilma I. He said to Her Majesty, "Your Majesty, I am one of your staff and one of my assignments is to inspect fudgegummins under your edicts. Your instructions in the edicts are to ensure or satisfy myself that every fudgegummin is made according to the recipe and that no fudgegummin is unsafe and in other edicts, to research/verify/ascertain whether any fudgegummin is unsafe. But I have been instructed by your SMOF to ask only if a fudgegummin has any possibility of having been made according to recipe or of being safe. Under his instruction, we consider a fudgegummin red-flaggable only if there is not even the faintest hope of it being according to recipe or safe. I am troubled that my instructions from the SMOF are not what you intended with your edict. I am inclined to think that your intention was to protect the safety of your subjects and that a not-even-the-faintest-hope-of-being-safe red-flaggable standard won't achieve your intended goal. Could you clarify for me what you intend with your edicts?"

Then the staff member's supervisor wrote an article in a journal for the product inspection community arguing that the staff member was disloyal to his employer in asking Her to clarify the meaning of Her edicts and what is more, the Queen should never have allowed any staff member to seek an audience with Her to ask Her such questions if the staff member's supervisors did not agree to the audience. A professor of the product inspection community wrote a second article in which he did not once question the premise of disloyalty and instead spent his time asking whether there might sometimes be justifications for such disloyalty.

It seems that not all members of the product inspection community laughed and laughed and laughed. For those who did not laugh, can anyone explain what exactly happened to their sense of the ludicrous?

II. WHY THIS ARTICLE?

John Mark Keyes¹ and Andrew Flavelle Martin² have written articles in which they opine on the ethical appropriateness of a public employee (the author of this article) asking the Federal Court³ to declare the meaning of three statutory provisions enacted by Parliament to support the lawfulness of the state's legislative activity.

I believe an additional perspective on this question would be useful to the legal profession and the public for their thinking about the particular conduct and more generally about the duties of public employees in relation to their employer's decisions and directions.

III. OUTLINE

A. Part IV: The state's directions

For the convenience of readers, in Part IV I will set out the essentials of the provisions, the meaning of which, were at issue in *Schmidt v Canada (Attorney General)*⁴ (for brevity, I will refer to the case as the "LegExam action").

B. Parts V to VIII: Factual issues (some with legal aspects)

In assessing the ethical appropriateness or otherwise of asking Her Majesty's Federal Court to declare the meaning of these statutory provisions, it is important to deal with the factual context for that conduct. In Parts V to VIII, I will consider in turn the following questions:

¹ John Mark Keyes, "Loyalty, Legality and Public Sector Lawyers" (2019) 97:1 Can Bar Rev 129 [Keyes].

² Andrew Flavelle Martin, "Folk Hero or Legal Pariah? A Comment on the Legal Ethics of Edgar Schmidt and *Schmidt v Canada (Attorney General)*" (2020) 43:2 Man LJ 199.

³ *Schmidt v Canada (Attorney General)*, 2016 FC 269 [*Schmidt FC*]. In the Federal Court of Appeal: *Schmidt v Canada (Attorney General)*, 2018 FCA 55 [*Schmidt FCA*]. Leave to appeal to the Supreme Court of Canada refused. Supreme Court of Canada, "Docket: 38179: Edgar Smith v Attorney General of Canada" (4 May 2018), online: Supreme Court of Canada <<https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=38179>> [<https://perma.cc/H6JE-S3XW>].

⁴ *Ibid.*

1. Part V: What was actually being done in the conduct of the examinations and related reporting?
2. Part VI: What information was provided to Parliament and the public as to the conduct of the examinations and related reporting?
3. Part VII: Who is the employer and client of a public service lawyer?
4. Part VIII: What is the appropriate interpretation of the statutory provisions in question?

C. Part IX: An issue of conceptual framework: the state as an organization

This leads us to a central conceptual issue that informs the law and that is important for thinking clearly both about what should be done in the statutorily mandated examinations and reporting, and how one should think about related ethical questions. How do we think about and speak about the state? What are the implications of that for constitutional and statutory conformity by state actors, for the examination and reporting duties under the relevant statutory provisions, and for the assessment of ethical conduct by state employees and legal counsel?

D. Part X: The question of ethics

Finally, I will focus directly on the ethical issues presented by this entire story, not just in relation to my conduct, but to the conduct of others as well.

IV. THE STATE'S DIRECTIONS

At issue in the LegExam action was the correct interpretation of three provisions requiring examinations of proposed or actual legislation: section 3 of the *Statutory Instruments Act*⁵ (“SIAct”), section 3 of the *Canadian Bill of Rights*⁶ (“Bill of Rights”) and section 4.1 of the *Department of Justice Act*⁷ (“DoJAct”). Given that the Bill of Rights and DoJAct provisions are so similar, for economy of space, I will present only the DoJAct provision. Here is the wording of these provisions (the French

⁵ *Statutory Instruments Act*, RSC 1985, c S-22, s 3 [SIA].

⁶ *Canadian Bill of Rights*, SC 1960, c 44, s 3.

⁷ *Department of Justice Act*, RSC 1985, c J-2, s 4.1 [DOJA].

version of the SIAAct provision presented is the version enacted by Parliament after substantive debate and before the statute revision commission altered its wording⁸):

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| Subsections 3(2) of the SIAAct⁹ | |
| <p>Examination</p> <p>[3] (2) On receipt by the Clerk of the Privy Council of copies of a proposed regulation pursuant to subsection (1), the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, <u>shall examine the proposed regulation to ensure that</u></p> <p>(a) <u>it is authorized</u> by the statute pursuant to which it is to be made;</p> <p>...</p> <p>(c) it does not trespass unduly on existing rights and freedoms and <u>is not, in any case, inconsistent with</u> the purposes and provisions of the <i>Canadian Charter of Rights and Freedoms</i> and the <i>Canadian Bill of Rights</i>; ...</p> | <p>Examen</p> <p>[3] (2) Au reçu des copies d'un projet de règlement en application du paragraphe (1), le greffier du Conseil privé <u>doit</u>, en collaboration avec le sous-ministre de la Justice, <u>examiner le projet de règlement afin de s'assurer</u></p> <p>a) <u>qu'il est autorisé</u> par la loi en application de laquelle il doit être établi;</p> <p>...</p> <p>c) qu'il ... <u>n'est, en aucun cas, incompatible avec</u> les fins et les dispositions [de la <i>Charte canadienne des droits et libertés</i> et] de la <i>Déclaration canadienne des droits</i>; ...</p> |
| Section 4.1(1)-(2) of the DoJAct¹⁰ | |
| <p>Examination of Bills and regulations</p> <p>4.1 (1) ... the Minister shall ... examine every regulation transmitted ... for registration ... and every [government]</p> | <p>Examen de projets de loi et de règlements</p> <p>4.1 (1) ... le ministre examine... les règlements transmis ... pour enregistrement... ainsi que les projets ou propositions de loi</p> |

⁸ Refer to my companion article, Edgar Schmidt, “Why the FCA decision in Schmidt v Canada (Attorney General) is clearly erroneous” (2020) 43:2 Man LJ 149 at 162-67 for background on why the wording, as substantively enacted by Parliament, is important.

⁹ SIA, *supra* note 5 s 3(2); *Loi sur les textes réglementaires*, LRC 1985, c S-22 art 3(2).

¹⁰ DOJA, *supra* note 7, s 4.1(1)-(2); *Loi sur le ministère de la Justice*, LRC 1985, c J-2, art 4.1(1)-(2).

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| <p>Bill ... , <u>in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the <i>Canadian Charter of Rights and Freedoms</i> and the Minister shall report any such inconsistency</u> to the House of Commons at the first convenient opportunity.</p> <p>Exception</p> <p>(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 <i>Statutory Instruments Act</i> <u>to ensure that it was not inconsistent</u> with the purposes and provisions of the <i>Canadian Charter of Rights and Freedoms</i>.</p> | <p>[du gouvernement] ..., <u>en vue de vérifier si l'une de leurs dispositions est incompatible avec les fins et dispositions de la <i>Charte canadienne des droits et libertés</i>, et fait rapport de toute incompatibilité</u> à la Chambre des communes dans les meilleurs délais possible.</p> <p>Exception</p> <p>(2) Il n'est pas nécessaire de procéder à l'examen prévu par le paragraphe (1) si le projet de règlement a fait l'objet de l'examen prévu à l'article 3 de la <i>Loi sur les textes réglementaires</i> <u>et destiné à vérifier sa compatibilité</u> avec les fins et les dispositions de la <i>Charte canadienne des droits et libertés</i>.</p> |
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[all underlining in the above texts is added]

V. WHAT WAS ACTUALLY BEING DONE IN THE EXAMINATIONS AND REPORTING?

To understand what was actually being done in carrying out statutory provisions in 2012 when the LegExam action was commenced, see the following excerpt from the guiding document for the Public Law Sector of the Department of Justice (which included the Human Rights Law Section):

In accordance with the recommendations of the working group, the following terminology should be employed by PLS counsel when advising on whether a proposed government measure or action is consistent with law. ...

Risk Levels to be used in Public Law

1. **Very Low** – The likelihood ... of a successful challenge runs from non-existent to insignificant.
2. **Low** – ... The likelihood is beyond the minimal range but, ... the measure is more likely than not to survive the challenge.
3. **Medium** – The likelihood falls into the middle zone where the prospects of a successful vs. unsuccessful challenge are evenly balanced. ...
4. **High** – ... Connotes a condition of probable invalidity or illegality of the measure.
5. **Very High** – The likelihood of a successful challenge is almost certain.

5(a). **Minister's Statutory Obligation** (for the Human Rights Law Section only) – This is engaged where the level of likelihood is at the far end of the fifth range and is due to manifest inconsistency between proposed legislation or regulations and the *Charter*. In such a case, the measure is manifestly unconstitutional, and no credible (i.e., reasonable and bona fide) argument exists in support of it, such that the Minister's statutory obligation to issue a report to the House of Commons, or the Clerk of the Privy Council's statutory obligation to advise a regulation-making authority, is engaged. Situations of this nature are very unusual¹¹ ... [underlining added]

As it relates to the above document and its companions, which were attachments to the Statement of Agreed Facts in the court proceeding, the Attorney General of Canada and the plaintiff agreed in the Statement of Agreed Facts as follows:

The parties agree that the credible argument standard used by the Minister, Deputy Minister and departmental lawyers is set out in the extracts from the five internal Justice publications appended to this statement of agreed facts. The parties further agree those five appended documents are sufficient to set out what standard is used and that no further evidence on this point is required.¹²

Further, the document quoted above is the guidance document for the group with core responsibilities for public law issues such as questions of conformity with the *Canadian Charter of Rights and Freedoms* (“the *Charter*”) and of the scope or extent of regulation-making authority. Given this, it is the most directly relevant document.

It is therefore clear that what the Department, the Deputy Minister, and the Minister do in the statutory examinations is this: if any argument can be made that reduces the likelihood of a successful challenge even just so slightly that the likelihood is not quite at the “far end” of the Very High (almost certainly illegal or unconstitutional) range, it is treated as not being inconsistent or reportable. Before a measure will be reported as inconsistent or unauthorized, it must be thought to have a 100% or nearly 100% certainty of being unlawful (the “far end” of the almost certainly unlawful range).

¹¹ *Schmidt v Canada (Attorney General)*, 2016 FC 269 (Statement of Agreed Facts-Appendix 2), online: *Charter Defence* <<https://www.charterdefence.ca/uploads/3/4/5/1/34515720/statement-of-agreed-facts.pdf>> [<https://perma.cc/7TPG-SBD7>] at 18.

¹² *Ibid* at para 9.

Note further the description in the quoted text of such an argument as “reasonable”, “*bona fide*” and “credible”. It is important to understand that when such terms were or are used by the Department in connection with their examination standard, those words have virtually no content – they clearly have nothing to do with an increase in the persuasive force of such an argument, since such a “reasonable”, “*bona fide*” and “credible” argument moves the assessment of the probability of illegality to a point just short of the 100% certainty “far end”. The reality is that the examination standard used by the Department can be described accurately in either one of two ways:

- From the point of view of what is not reportable, it is everything for the lawfulness of which even the weakest argument can be made;
- From the point of view of what is reportable, it is only provisions for which not even the weakest argument can be made.

VI. WHAT INFORMATION WAS PROVIDED TO PARLIAMENT AND THE PUBLIC AS TO THE CONDUCT OF THE EXAMINATIONS AND RELATED REPORTING?

Mr. Keyes suggests that the actual standard being employed in the examinations was known and could have been challenged by anyone at any time.¹³ This is factually incorrect. I will consider statements by Ministers of Justice to the public and to Parliament, representations by the Department of Justice itself, and representations by the Privy Council Office in consultation with the Department of Justice.

A. Statements by Ministers of Justice

What was actually said by Ministers of Justice as to these examinations? I have not been able to find a single instance of a Minister of Justice describing the standard of examination as anything less than an examination intended to confirm the consistency of the legislation being examined with the *Charter* until after the commencement of the action in the Federal Court. Let me provide you with six instances of such pre-litigation statements.

¹³ Keyes, *supra* note 1 at 155-56.

1. When the bill that included the future Bill of Rights was at the committee stage in the House of Commons, then-Minister of Justice E. Davey Fulton testified as follows:

It [what is now section 3 of the Bill of Rights] is a specific directive to him [the Minister of Justice], imposing upon him certain obligations with respect to ensuring that all subsequent bills and regulations decided upon shall be, in so far as they lie within the power of the minister to do it, in conformity with the bill of rights. When I say "in so far as they lie within the power of the minister to do it," I mean in so far as it is within his power, preserving still the principle he is not a dictator over parliament, ...¹⁴ [underlining added]

2. When the SIAct was being studied by the Justice and Legal Affairs Committee of the House of Commons in the course of its enactment, then-Minister of Justice John Turner testified to that committee as follows:

It is the Regulations Act which says that any regulation submitted to the Clerk of the Privy Council also has to be certified as being in accord with the Canadian Bill of Rights. The same thing will happen here [under the SIAct]¹⁵. [underlining added]

3. When section 4.1 of the DoJAct was proposed to Parliament, then-Minister of Justice John Crosbie said to the House of Commons with regard to that provision:

The Minister of Justice already has an obligation under the law to examine Bills and regulations to ensure they are consistent with the Bill of Rights. I am referring to the Bill of Rights enacted under the late great John Diefenbaker when his Government was in power. These amendments provide a similar obligation on the Minister of Justice to examine regulations and Government Bills to ensure they are consistent with the Charter.¹⁶ [underlining added]

4. When then-Minister of Justice Irwin Cotler spoke to the Canadian Bar Association in Vancouver at its annual conference in 2005, he said the following:

¹⁴ House of Commons, Special Committee on Human Rights and Fundamental Freedoms, "Canadian Bill of Rights", Minutes of Proceedings and Evidence, (22 July 1960) at 406 (Hon Justice E. Davey Fulton).

¹⁵ House of Commons, Standing Committee on Justice and Legal Affairs, "Statutory Instruments Act", Minutes of Proceedings and Evidence, (16 February 1971) at 7:24 (Hon John Turner).

¹⁶ "Department of Justice Act s 4.1", House of Commons Debates, (27 March 1985) at 3422 (Hon John Crosbie).

Moreover - and this is less known though not less important - this Constitutional Revolution in rights and remedies has had a transformative impact on the roles and responsibilities of the Minister of Justice and Attorney General of Canada as a trustee of the rule of law including:

Certifying that every proposed law and policy comports with the Charter of Rights and Freedoms. [...]

In a word, fidelity to the constitution - to the rule of law - to the Canadian Charter of Rights and Freedoms - must be the canon and commitment by which we stand, and is the canon and commitment which will inform my obligations as Minister of Justice and Attorney General of Canada.¹⁷ [underlining added]

5. Most tellingly, in 2007, after a lawyer from the Department had testified before a Parliamentary committee that their examination did not conclude that any provision of the bill before the committee was manifestly inconsistent with the *Charter*, Member of Parliament Robert Thibault and then-Minister of Justice Rob Nicholson had the following exchange:

Hon. Robert Thibault: ... I have a second question, if he has time. His expert who gave testimony, Mr. Stanley Cohen, said that the legislation in question was "not manifestly unconstitutional ... Not being a graduate of any law school, I am not sure what that means. I would like the minister to explain it. It sounds to me rather weak and is not like a full-fledged endorsement. Could the minister clarify those comments?"

Hon. Rob Nicholson: ... More importantly, he asked whether it does not manifestly comply; whatever the wording was, I think I got the gist of it. I can tell him that I believe this complies with the Charter of Rights and Freedoms and I believe this complies with Mr. Diefenbaker's Canadian Bill of Rights. Certainly I can say that there is no legislation to which I would lend my name and my office as Minister of Justice, nor on behalf of the government would we introduce any piece of legislation, were we not convinced that it complied with the Charter of Rights and Freedoms and the Canadian Bill of Rights. I hope that satisfies the hon. member.¹⁸ [underlining added]

6. The standard of compliance with the *Charter* was again confirmed by then-Minister of Justice Nicholson just a little more than a month before the LegExam action was commenced. On November 6, 2012,

¹⁷ Government of Canada, "Speech for Irwin Cotler to Canadian Bar Association: The Constitutional Revolution, the Courts, and the Pursuit of Justice" (15 August 2005), online: *Government of Canada* <<https://www.canada.ca/en/news/archive/2005/08/constitutional-revolution-courts-pursuit-justice.html>> [https://perma.cc/EF2U-8WB5].

¹⁸ House of Commons Debates, 39-1, (23 November 2007) at 1278 (Hon Robert Thibault and Hon Rob Nicholson).

before the Standing Committee on Justice and Human Rights, this exchange took place:

Hon. Irwin Cotler: ... Minister, as you are aware, section 4.1 of the Department of Justice Act stipulates that bills must be checked for compliance with the Canadian Charter of Rights and Freedoms. My question is, by what standard was this bill vetted for charter compliance?

Hon. Rob Nicholson: All bills that are drafted by the Government of Canada are vetted to ensure they comply with the Constitution of this country. That is as it should be.

Hon. Irwin Cotler: No, I understand the requirement, Minister, that is set forth in the Department of Justice Act, but the reason I raise the question of the standard that is used is that a previous witness from the Department of Justice said the standard is one that is—and I quote—manifestly unconstitutional and could not be defended by credible arguments." Others have said—and I quote—that it's one of whether or not a credible Charter argument can be made." I'm asking your opinion because I don't think that you yourself have shared your views on what the appropriate standard would be in this regard.

Hon. Rob Nicholson: Well. The standard is that we comply with all the constitutional documents, be it the charter or The Canadian Bill of Rights. We satisfy ourselves that all legislation is in compliance. I think that has been the procedure of this government and previous governments, and that will continue.¹⁹ [underlining added]

As we see, every single Minister of Justice who proposed the examination provisions to Parliament stated that they were about conformity with law, not about the existence of some weak argument in that general direction. Furthermore, even when a pointed question about "manifest" inconsistency was put to the Minister of Justice, the Minister repeatedly confirmed that the examination was about conformity with the *Charter*.

B. Representations by the Department

In May 2012, when considering what my ethical obligations were as a public employee and state lawyer, I considered that if the Department's own documents setting out their actual practice (including the document quoted from above) could be provided by me to Members of Parliament, I might have fulfilled (by extension and analogy) my ethical obligation of

¹⁹ House of Commons, Standing Committee on Justice and Human Rights, "Department of Justice Act", Minutes of Proceedings and Evidence, 41-1, (6 November 2012) at 7 (Hon Irwin Cotler and Hon Rob Nicholson).

bringing a matter of unlawfulness to the attention of my organizational client's governing body.²⁰

Given this, I arranged for an *Access to Information Act*²¹ ("ATI") request to be made of the Department of Justice for documents setting out their current practice in carrying out the examination provisions. The request was detailed and specific and included the following:

4. I want particularly the documents that provide guidance in carrying out these statutory responsibilities to any unit of the department that deals especially with human rights and, if applicable, similar documents for the units that write legislation.

²⁰ The Law Society of Manitoba, "Code of Professional Conduct" (2017), online: *The Law Society of Manitoba* <<https://lawsociety.mb.ca/wp-content/uploads/2019/12/ENG-Code-of-Professional-Conduct-2020-02-05.pdf>> [<https://perma.cc/NZ49-GBAC>] at para 3.2-8 at 28 [LSM Code of Professional Conduct] provides as follows:

Dishonesty, Fraud when Client an Organization

3.2-8 A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally or illegally must do the following, in addition to his or her obligations under rule 3.2-7:

(a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer that the proposed conduct is, was or would be dishonest, fraudulent, criminal, or illegal and should be stopped;

(b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed wrongful conduct to be stopped, advise progressively the next highest persons or groups including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the conduct was, is or would be dishonest, fraudulent, criminal, or illegal and should be stopped; ...2

Commentary

[...]

[2] This rule speaks of conduct that is dishonest, fraudulent, criminal or illegal. Such conduct includes acts of omission.

[3] Indeed, often it is the omissions of an organization, such as failing to make required disclosure or to correct inaccurate disclosures that constitute the wrongful conduct to which these rules relate. Conduct likely to result in substantial harm to the organization, as opposed to genuinely trivial misconduct by an organization, invokes these rules. [underlining added]

²¹ *Access to Information Act*, RSC 1985, c A-1.

In June 2012, just months before the LegExam action was commenced, the Department provided 5 documents. One contained no information of substance whatsoever, all of that information having been redacted, while the other four documents were partially redacted copies of two versions of the Regulations Manual, each in French and English. The documents furnished in response to the ATI request repeated several times the essence of the following quote from one of them (and never gave any suggestion of anything different):

From the *Federal Regulations Manual/Manuel de la réglementation fédérale*, 1998, Revised version (Part 2 in 2003, Appendix to Part 2 in 2011, and Part 4 in 2008, 2010, 2011, and 2012):

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| <p>It is the mandate of the Regulations Section to examine, under the <i>Statutory Instruments Act</i>, all draft regulations <u>to ensure that they are legally valid</u>, ... To <u>ensure the legal validity of draft regulations</u>, the Section must <u>determine that the regulations are consistent with the powers delegated by Parliament</u>, ... <u>and are consistent with the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights</u>.²² [underlining added]</p> | <p>La Section de la réglementation a le mandat d'examiner, aux termes de la <i>Loi sur les textes réglementaires</i>, tous les projets de règlement <u>afin de s'assurer notamment qu'ils sont juridiquement valides</u>... Pour <u>garantir la légalité des projets de règlement</u>, la Section <u>doit s'assurer que ces projets sont conformes aux pouvoirs délégués par le Parlement</u>, ... <u>et qu'ils son compatibles avec la Charte canadienne des droits et libertés et la Déclaration canadienne des droits</u>.²³ [underlining added]</p> |
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Not a single word was provided by the Department about the examinations under s. 3 of the Bill of Rights or s. 4.1 of the DoJAct. Not one of the five documents that were later entered into evidence in the

²² Department of Justice Canada Legislative Services Branch, "Federal Regulations Manual: Drafting and Advisory Services Group" (1998), online: *Exhibit C to the Affidavit of Naomi Grey* <<https://www.charterdefence.ca/uploads/3/4/5/1/34515720/affidavit-of-n-grey-exhibitc-p258-310.pdf>> [<https://perma.cc/YM4W-HFBV>] at 002084 (3 of Manual).

²³ Department of Justice Canada Legislative Services Branch, "Manuel de la réglementation fédérale" (Mars 1998), online: *Exhibit C to the Affidavit of Naomi Grey* <<https://www.charterdefence.ca/uploads/3/4/5/1/34515720/affidavit-of-n-grey-exhibitc-p576-633.pdf>> [<https://perma.cc/7WAP-KY9A>] at 002373-002374 (at 3-4 of Manual).

LegExam action was even revealed as existing, let alone provided, in full or in redacted form.

What was provided in relation to the examinations under s. 3 of the SIA Act was completely misleading as to what the Department was actually doing. What was provided in response to the ATI request did confirm that the Department once held a reasonable understanding of that section. It once understood that a direction to examine in order to ensure / *afin de s'assurer* that a proposed regulation was authorized and was NOT inconsistent with the Bill of Rights or the *Charter* required an opinion that the proposed regulation was in accordance with both the enabling statutes and the relevant fundamental human rights.

Therefore, the actual facts as to public knowledge of the Departmental practice are that the public and parliament did not know (and it seems Ministers of Justice did not know!) of the Department's no-hope-of-being-lawful examination standard and that the Department at best was not fully forthright about what it was doing and at worst, actively misled the ministers and the public.

The use by the Department of doublespeak in relation to its is-there-any-even-feeble-argument-that-can-be-made standard for not reporting, including "reasonable", "*bona fide*", and above all "credible" was not forthright. Reasonable people ordinarily understand "credible" to mean worthy of being accepted or believed. However, the Department used "credible argument" in regard to arguments that the Department believed to be almost certain to fail, ones it considered to be far outweighed by other better arguments on the other side.

C. Statements from the centre of the executive branch

The Privy Council Office, the centre from which state action in the executive branch is coordinated, has prepared and published – both to the public service and more broadly to the public – a *Guide to Making Federal*

Acts and Regulations in French and English. Here is what this document²⁴ says about examinations under the Bill of Rights and the DoJAct [underlining added]:

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| <p>Certification of Government Bills The Minister of Justice is required to examine every bill introduced in or presented to the House of Commons by a Minister of the Crown. This requirement arises from section 3 of the <i>Canadian Bill of Rights</i> and section 4.1 of the <i>Department of Justice Act</i>. The purpose of the examination is <u>to determine whether any provision of the bill is inconsistent with the purposes or provisions of the <i>Canadian Bill of Rights</i> or the <i>Canadian Charter of Rights and Freedoms</i></u>. The Minister of Justice is required to report <u>any inconsistency</u> to the House of Commons at the first convenient opportunity.</p> | <p>Attestation de conformité des projets de loi Il incombe au ministre de la Justice, selon l'article 3 de la <i>Déclaration canadienne des droits</i> et l'article 4.1 de la <i>Loi sur le ministère de la Justice</i>, est tenu d'examiner tous les projets de loi déposés à la Chambre des communes par un ministre, <u>en vue de vérifier leur compatibilité avec la <i>Déclaration</i> et la <i>Charte</i></u>. Il signalera <u>toute incompatibilité</u> à la Chambre dans les meilleurs délais.</p> |
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Thus, the Privy Council Office asserts that the examinations are intended to verify the consistency of bills with the Bill of Rights and the *Charter* and reporting any provision that was NOT so consistent. This document also states that it was published in collaboration with the Department of Justice, so that the Department had some input as to the Guide's content. Further, it continues to be published on the Privy Council website.²⁵

From this we can infer that at a minimum, the Privy Council Office and the Department of Justice once held the view that the examinations

Government of Canada Privy Council Office and Department of Justice, "Guide to Making Federal Acts and Regulations 2nd edition" (2001), online: *Government of Canada* <<https://www.canada.ca/content/dam/pco-bcp/documents/pdfs/fed-acts-eng.pdf>> [https://perma.cc/7VKM-G8KE] at 155; Gouvernement du Canada, Bureau du Conseil privé et le ministère de la Justice Canada, «Lois et règlements: l'essentiel, 2e édition» (2001), online: *Gouvernement du Canada* <<https://www.canada.ca/content/dam/pco-bcp/documents/pdfs/fed-acts-fra.pdf>>[https://perma.cc/N5PK-2ZB3]at 160.

²⁵ Office of the Privy Council, "Lois et règlements: l'essentiel" (25 May 2018), online: *Government of Canada* <<https://www.canada.ca/fr/conseil-prive/services/publications/lois-reglements-essentiel.html>> [https://perma.cc/H4ND-ZY4V].

were about consistency with law and all inconsistencies were to be reported, not just ones that had not even the feeblest argument in favour of their lawfulness.

It is interesting that the Privy Council continues to publish this document without amendment to the quoted excerpt.

VII. WHO IS THE EMPLOYER AND CLIENT OF A PUBLIC SERVICE LAWYER?

In considering the ethics of bringing the LegExam action before the Federal Court, it is crucial to identify who my employer and client were. One must always know this so that one knows to whom one owes one's duty of loyalty as an employee and, whose interests one must serve as a lawyer.

Mr. Keyes and Mr. Martin refer to the relevant lawyer-client or employment relationship as being with the "Government" or "government",²⁶ but this is a mistaken statement. In fact, my employer was the Canadian state (perhaps more particularly, the Canadian state in its federal/central aspect), and my client was the same.

Can anyone doubt that the public service's salaries are paid out of monies belonging to the state, not to the ministers who for a time serve the state as its executive officers or "government"? Or that the buildings those public servants occupy, the desks and computers they use, the travel dollars they spend, etc. are all paid for out of state monies? Can anyone doubt that if a public servant causes a compensable harm, that it is the state that will pay the resulting damages? Clearly the employer of the public service is the state.

The distinction between "state" and "government" as employer is a significant one. Just as an employee of a corporation owes her or his duty of loyalty to the corporation, not to its executive officers, so an employee of the organization that is the state owes her or his duty of loyalty to the state, not to its executive officers.

Suggestions are sometimes made that public employees serve "the government of the day." I suggest that is an inexact shortcut. The public service always serves the state. It does so under the leadership and

²⁶ Keyes, *supra* note 1 at 155; Martin, *supra* note 2 at 199.

direction of the government of the day. As part of their service to the state, public employees faithfully help the state's executive leadership perform their responsibilities to the state.

The role of the state's executive officers includes developing policy and legislative proposals that express their understanding of what is in the public interest. As a result, public servants assist those who are the current appointees to the state's executive offices in the development and formulation of their legislative initiatives.

However, none of the above makes a public servant an employee of those executive officers. Nor, when the employee is a lawyer, does it make those executive officers the lawyer's client. The public servant's employer is the state and, if they are working as a lawyer, the public servant's client is the state.

VIII. WHAT IS THE APPROPRIATE INTERPRETATION OF THE STATUTORY PROVISIONS IN QUESTION?

This is an important question in its own right, and much too lengthy to deal with in this paper. Therefore, for our purposes, I will treat it as a fact that the interpretation of the statutory provisions adopted by the Department of Justice around 1992 is manifestly incorrect in law. It is without support in the legislative texts; it is without support in the parliamentary record; it undermines Parliament's purposes; it disregards important legal principles such as the rule of law; it flies in the face of the hierarchy of norms in the Canadian state; and it ignores the fundamental human rights and democratic interests of citizens. In a companion paper, I have more fully set out the reasons to conclude that the Federal Court of Appeal decision in the LegExam action is incorrect in law and not to be relied upon.²⁷

Consideration of the ethical implications of commencing the LegExam action must be assessed without regard to the later FC and FCA decisions, as these were obviously not yet in existence.

²⁷ See Schmidt, *supra* note 8.

IX. THE COURTS AND THE QUEEN

In the Westminster tradition, the state has evolved from a monarchy, in which all functions resided in the monarch, to a democratic state. However, it is sometimes useful to consider the monarchical form of the state because it survives in a metaphoric way (as a palimpsest?) in the democratic state, primarily in matters of form and language. We still refer to “orders in council” (as if the Queen has made them) and federal statutes recite that “Her Majesty, ... enacts as follows...”, and certain courts still refer to themselves as courts of “Queen’s Bench”.

In the transformation from a monarchy with real powers lying with the monarch, to a democratic state where almost all of those powers reside with others, the unity of the state was not abolished. A simple but telling indication of this is that we refer to the legislative, executive, and judicial branches. Branches, of course, are not stand-alone living entities. They live only as they are connected to the tree. So, too, the legislative, executive, and judicial branches are not stand-alone entities; they must be understood to draw their life from and serve the central entity, the state. Essentially, different aspects of the monarchical power were gradually assumed by these branches of the state. As the UK Supreme Court stated in the first of its important Brexit decisions:

41. Originally, sovereignty was concentrated in the Crown, subject to limitations which were ill-defined and which changed with practical exigencies. Accordingly, the Crown largely exercised all the powers of the state ... However, over the centuries, those prerogative powers, collectively known as the Royal prerogative, were progressively reduced as Parliamentary democracy and the rule of law developed. By the end of the 20th century, the great majority of what had previously been prerogative powers, at least in relation to domestic matters, had become vested in the three principal organs of the state, the legislature (the two Houses of Parliament), the executive (ministers and the government more generally) and the judiciary (the judges).²⁸

In the pre-democracy monarchy, to whom would a servant of Her Majesty turn to clarify the meaning of Her edicts if that were necessary? Ultimately, to the Queen herself. Therefore, if a servant of the Queen was being directed by one of Her more senior servants to carry out one of Her edicts in a manner that appeared to be clearly mistaken and that put at

²⁸ *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)*, [2017] UKSC 5 at paras 41-45.

risk the very purposes for which that edict was issued, it would always have been a possibility for the servant to seek an audience with the Queen to have Her direction, Her clarification or confirmation, as to what Her edict required. Additionally, in no way is seeking such an audience with the Queen disloyal to Her. It is never disloyal to one's employer to seek the employer's clarification of the employer's directions. If anything, it expresses loyalty in that the servant wishes to be sure that he or she is carrying out the employer's directions as intended.

After the transition to a democratic state, the courts represent and carry out the function that the Queen Herself would have been carrying out in that sort of request to Her for clarification.

X. THE QUESTION OF ETHICS

I will now briefly summarize the relevant factual context for the act of commencing the LegExam action.

1. I was employed by the state and my client was the state.
2. The highest authority of my client (the state's legislative assemblies acting together) had enacted the Charter as part of the state's supreme law.
3. A state authority in the second highest tier of authority in the state, the federal legislature, had enacted
 - a. the Bill of Rights with a sort of quasi-constitutional role;
 - b. statutes that set out the limits within which delegates of Parliament were authorized to make regulations;
 - c. statutes that required legislative provisions to be examined as to their lawfulness or unlawfulness and required reporting of any unlawful provision.
4. My supervisors in the unit in which I was employed (the Department of Justice) directed me to examine legislative provisions not for their lawfulness, but for the possibility of making any argument, however weak, in favour of lawfulness, and to consider only provisions for which not even a weak argument could be made as being reportable.
5. Under the applicable principles for interpreting legislation, the interpretation of my supervisors was clearly mistaken.

6. This interpretation of my supervisors and the standard of examination it called for put at risk the fundamental human rights protected by my employer's highest norm or supreme law.
7. This standard of examination undermined the hierarchy of authority in my employer (the supremacy of Parliament) by not ensuring that subordinate legislation (made by delegates of Parliament) was within the authority of its enabling statutes (made by Parliament).
8. The most senior legal officers of the state (its Ministers of Justice) had repeatedly stated to Parliament and the public that the examinations were about lawfulness (and never suggested they were about a weak possibility of lawfulness).
9. In fact, when a question was put to one of them as to what an examination for "manifest" inconsistency was about, that Minister expressly negated anything less than an examination for lawfulness.
10. The former understanding of my unit was that the examinations were about lawfulness.
11. Some of the guidance documents of my unit continued to state that the examinations were about lawfulness.
12. The key guidance document of the central authority in the public administration of the state continued to state that the examinations were about lawfulness.
13. I had exhausted all other avenues for having the standard of examination under the examination provisions restored to lawfulness including
 - a. raising the matter at successively higher levels within my unit, including to the manager of the unit, the Deputy Minister;
 - b. a disclosure to the Office of the Public Sector Integrity Commissioner;
 - c. a request, under the Access to Information Act, for the Departmental documents setting out any instructions for, or statements of what was being done in, the conduct of the examinations.
14. In its response to the Access to Information Act request, the Department of Justice effectively misled as to its standard of

examination by providing documents that recited only the Department's former lawfulness standard. The Department failed to disclose even the existence of the documents setting out the remote hope of lawfulness standard actually being employed.

In those circumstances, I turned to the branch of my employer whose role is to interpret statutes and uphold the law and asked it to declare the correct interpretation of the examination provisions so that the Department might correct its erroneous and unlawful practice.

Mr. Keyes argues, and Mr. Martin assumes, that doing so was disloyal to my client.

Imagine if another organization, a corporation say, had its own issue resolution unit and say an employee brought the following question to that issue resolution unit: "What do our corporate by-laws require by way of notice of shareholders' meetings?" How could posing a question to one's own employer be disloyal to that employer? Particularly a question as to the requirements of that employer's own decisions/norms?

Imagine further, that the by-laws stated that 10 days' notice of a shareholder meeting was to be given to shareholders, and the employee's managers had directed the employee to give only 1 day's notice. Why would it, in any reasonable conception of things, be disloyal of the employee to seek to uphold the employer's own by-laws by asking its issue resolution unit to clarify whether the by-law meant 10 days (not 1 day) when it said 10 days?

That analogy is quite apt for the situation I was in. All relevant indications were that the examinations were to be directed to the question of lawfulness. However, the managers in the Department of Justice were directing the state's employees to be satisfied with any feeble argument in the direction of lawfulness, treating as unreportable provisions that they themselves believed to be likely or almost certainly unlawful (and participated in concealing what was being done). Why could an employee ever be faulted for asking the employer's issue resolution unit to clarify what the examination provisions actually require in those circumstances? As in the fable told at the outset, how could it possibly be disloyal for a servant of the Queen to ask Her what She meant with Her edicts?

Or perhaps the thinking of Mr. Keyes or Mr. Martin is that the "disloyalty" reposed in the fact that my request was, of necessity, public, and known to the citizen/members of my employer?

Here, too, I have questions. According to Mr. Keyes, the actual standard being used was well-known publicly. In that case, it could not have been confidential.

However, equally as important, the directions for the examinations were public. My employer had given these instructions by way of public statutes. Further, any report under two of the provisions was to be made to the House of Commons and thus also available to the public. Thus, there was no intention that the duty to examine and any resulting reports were to be confidential.

Given this, how could it be a breach of confidentiality to set out the facts as to how those publicly established duties were being carried out and to request the state's issue resolution body to clarify whether the manner in which they were being carried out was in accordance with the publicly given directions?

While I appreciate Mr. Martin's greater openness as it relates to justifications for my conduct (and perhaps in light of the fuller facts provided in this paper, he may find a stronger basis for those justifications or for others), I fail to see how any such justifications are necessary. My duty of loyalty as an employee and my duty as a lawyer to my client were both owed to the state and nothing I did was in any way disloyal to the state. To the contrary, they were motivated by loyalty to the state and its hierarchy of decisions in the face of the disregard for these very things by the state's managers in the Department of Justice.

I think our consideration of ethical obligations of lawyers and employees should now turn elsewhere.

A. An underlying fundamental issue: state actors' duties in relation to the state

There is an underlying issue on which the federal Department of Justice has gone astray and with respect to which the legal community's thinking is inadequate. What the Department and the legal community have failed to grasp fully is that ministers and public employees alike act in a state capacity and because of that, they have duties to act in accordance with the state's decisions and norms.

The law has long understood that persons acting in any capacity on behalf of an organization have a duty to that organization that outsiders, or even just ordinary members or shareholders of the organization, do not.

The law has sometimes characterized these duties as “fiduciary”, basing this characterization, I submit, on the fact that persons such as directors and officers acting on behalf of the organization hold powers and have custody of resources that derive from the organization. These powers and resources are not the property of the persons acting on behalf of the organization and they have in a real sense, been “entrusted” to them by the organization. As a result, these persons have a duty to act in the interests of the organization, and therefore an obligation to conduct themselves in accordance with the organization’s constituting documents and by-laws.²⁹

The Department has mistakenly come to conceptualize the relationship between ministers or other state actors and the state’s own decisions (its constitution and its statutes) as solely a matter of risk management and these individuals’ own risk tolerance. Risk management, applied as the Department applies it (considering that ministers are free to act in ways that they believe to be likely or even almost certainly unlawful if they have the “risk tolerance” for such action), mistakenly assumes that these persons are operating in a duty-free zone. However, because they are acting on behalf of the state, in an official capacity and in its name, they owe duties to the state to act in accordance with its constitution and laws. Any advice Departmental lawyers give to other officers of the state must include recognition of the duties of such officers to comply with law and must not suggest that they have the freedom to do anything for which they have a “risk tolerance”.

²⁹ For an illustration of this duty, consider subsections 122(1) and (2) of the *Canada Business Corporations Act*, RSC 1985, c C-44, s 122(1)-(2):

Duty of care of directors and officers

122 (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall

(a) act honestly and in good faith with a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Duty to comply

(2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement.

Some legal scholars, for example Professor Adam Dodek, assert that state counsel have a duty toward the laws of the state that their colleagues, who are not state counsel, do not. Therefore, as the argument goes, they are subject to higher duties.³⁰

Others, including some courts, have been reluctant to see state counsel as located on some elevated platform (or perhaps reluctant to see other lawyers as some “lesser” beings) and have insisted that all legal counsel are subject to the same standards of ethical conduct.³¹

However, it is my argument that both are true: state lawyers do have higher duties with regard to compliance with the law than other lawyers, but it is not because the ethical rules or standards are different, it is because state lawyers stand in a different relationship to the state than other lawyers. The same general rules and standards apply, but the difference in relationships means that the same rules have a different outcome with regard to the state’s decisions/governing rules expressed in its constitution and statutes.

If we were to understand that state actors stand in a different relationship to the state than ordinary citizens or other lawyers, and that it is this relationship that grounds a duty to act in accordance with the state’s constitution and by-laws, we would have the foundation for thinking more clearly about the ethical duties of legal counsel in the state’s service.

³⁰ Adam Dodek, “Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law” (2010) 33:1 Dal LJ 1 at 20.

Professor Dodek purports to consider the argument that state lawyers work for an organization, but in my view, dismisses it before having understood its full implications. He correctly asserts that public lawyers have a duty to uphold the law, but does not understand, as I read his paper, that this duty arises out of the relationship of public lawyers to the state. It is because they are state actors that the state’s constitution and statutes represent duties for them. The fact that not all lawyers have such duties is not because they have different or lower duties, but because other lawyers do not stand in the same relationship to the state. By analogy: every parent owes a duty to supply necessities to their dependent children. So all parents are subject to the same duties. But other parents do not owe that duty to my children. The application of a general duty may depend on the existence of a particular relationship.

³¹ See for example: *Everingham v Ontario* (1992), 8 OR (3d) 121 (Div Ct).

B. Acting in the client's interests

Next, we will consider the duty of a lawyer to act in the client's interests (and the duty of an employee to loyally serve their employer).

The codes of professional conduct in Canadian law societies have for some years now clarified that a lawyer who acts for an organization must not confuse the interests of the executive officers or managers or any other person or group within the organization with the interests of the organization itself. In the Law Society of Manitoba Code of Professional Conduct, one finds the following guidance:

When the Client is an Organization

3.2-3 Although a lawyer may receive instructions from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, the lawyer must act for the organization in exercising his or her duties and in providing professional services.

| Commentary |
|---|
| [1] A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors and employees. While the organization or corporation acts and gives instructions through its officers, directors, employees, members, agents or representatives, the lawyer should ensure that it is the interests of the organization that are served and protected. ... ³² |

When the organization has adopted a constitution that commits them to respecting certain fundamental rights and freedoms of its members, and when the organization has a hierarchy of norms, (constitution > statute > regulation > administrative direction), surely acting in the client's interests (as opposed to the interests of managers or organizational officers) would require the lawyer to act in ways that were consistent with respect for these norms in accordance with their hierarchy.

This is particularly an issue when persons within the organization urge the lawyer to take actions that benefit them individually, but are outside the organization's interests. In the case of a state employee, the political interests of a minister, or the career aspirations or convenience of a deputy minister, are not interests that a state lawyer may ethically prefer to the interests of the state itself.

³² LSM Code of Professional Conduct, *supra* note 20 at para 3.2-3 at 25.

Even when forming their administrative interpretation of the examination provisions (i.e. what do these provisions direct us to do), the managers in the Department of Justice, as lawyers, have a duty to act in the interests of their client, the state. Surely acting in good faith in relation to their client and in their client's best interests requires the lawyers of the Department to adopt not just any interpretation of the client's directions that the lawyers find convenient, but the one that is likely the best interpretation of those directions!

To abandon the former understanding of the examination provisions – an understanding that was fully supported by the words of the provisions and by statements of every minister of justice who proposed the enactment of the examination provisions to Parliament and one that had endured for some 30 years – in favour of an interpretation for which there was no support in the text, context, purpose, or other relevant interpretive factors reveals a failure to act in the interests of the client. Whose interests does it serve to move from examinations aligned with the law and supporting conformity with law to examinations that produce virtually nothing of utility? Not the state's interests. The only interests that might be served by such a change are

- the convenience of deputy ministers (because a not-even-a-feeble-argument standard for reporting means virtually no occasions in which it is necessary to give what may be unwelcome news to regulation-makers or ministers that what they are proposing is not, in the view of the Department, consistent with law);
- the convenience of executive officers of the state (because a not-even-a-feeble-argument standard for reporting means virtually no occasions in which it is necessary to give what may be politically awkward information to the people's elected representatives about what the executive officers of the state are proposing to them).

However, is there any doubt that those interests are not the state's interests? Or that a lawyer, whose client is the state, ought not to prefer those interests to the interests of the state?

Mr. Keyes argues that "anything less" than the Departmental standard (which he again, in the habitual doublespeak of the Department, calls the "credible argument" standard) risks eroding the influence public sector lawyers have with the ministers and officials they serve...³³

³³ Keyes, *supra* note 1 at 129.

First of all, there can hardly be anything less than the current Departmental standard. The current Departmental standard is already at the extreme end of “lessness”. The issue is whether to have something more.

Further, his identification of whose confidence public sector lawyers are to consider is telling: not the confidence of the organization as a whole, not the confidence of the organization’s highest governing body, its Parliament, not the confidence of the citizens whose fundamental rights and liberties and democratic interests are at stake, but the confidence of the government officials they serve.³⁴ Although, of course, it is NOT ministers or officials that public employees ultimately serve; they serve the state.

It may be useful to look at this issue from another angle: for what kind of minister or deputy minister would receiving the Department’s view as to inconsistency with the Charter or illegality of a regulation (rather than a virtually irrelevant opinion as to whether the faintest of hope of legality exists) present a problem? Not for a minister or deputy who wished to respect the limits of the law. For such a minister or deputy, the information is helpful and useful to achieving their objectives.

As a result, the only kind of person for whom receiving an honest opinion as to legality is problematic, is one who does not wish to comply with law, for whom human rights and the democratic supremacy of parliament are problems and obstacles. Where the choice is between:

- the confidence and trust of the enduring organization that has put in place the constitution, that has limited regulation-making powers in its statutes, that employs the lawyers, pays their salaries, provides their supports; and
- the confidence and trust of those who would like to make regulations that they believe to be unlawful and to propose to Parliament the enactment of statutes they believe to be unconstitutional without information as to such illegality being made known to that Parliament,

it seems clear to me whose confidence is truly the public lawyer’s duty to merit and maintain.

³⁴ *Ibid.*

It might also be instructive to consider the perspective of persons who were sentenced under unconstitutional minimum sentence statutes to determine how they feel about Mr. Keyes' priorities as to whose confidence lawyers in the public service ought to prefer.

In sum, it is not my conduct in bringing this issue to the state's attention that should give rise to a loss of the state's confidence, but rather the conduct of the Departmental officials responsible for this deplorable twisting of the state's directions and their failure to support the state's constitution and statutes.

C. Avoiding conflict of interest

There is a further aspect of this situation that is troubling to me. The LegExam action raised questions as to the lawfulness of the conduct of the Deputy Minister of Justice (directly involved in the SIAct examinations) and the Minister of Justice (the state officer charged with the examinations under Bill of Rights and DoJAct).

The lawyers who acted (purported to act?) on behalf of the state in the litigation reported to the Deputy Minister and Minister. How could their actions on behalf of the state be free from at least the appearance of a conflict of interest?

There is also reason to believe there was not only the appearance of a conflict, but the reality of it. Clearly if the Minister and Deputy Minister were acting unlawfully, their interests and the interests of the state are not the same. Surely an assessment of the interests of the state must include the interests of its Parliament in receiving the advice or information it has required as to the lawfulness of what is being proposed to it? In circumstances where the state has committed itself to respecting certain fundamental citizens' rights (through the enactment of the *Charter* as part of the state's constitution), does an assessment of where the state's interests lie not require a consideration of whether the position taken is consistent with its undertaking to citizens with regard to such rights? In circumstances where the state has a hierarchy of norms in which statutes rank above regulations, do the state's interests not also require support for a regime under which regulations are to be authorized by their relevant statutes?

As we already recognize, the interests of particular officers or managers in the state are not automatically the interests of the state. Therefore, the interests of the Deputy Minister and Minister (in not being found to have

failed to carry out the examination provisions in accordance with law) were potentially (and actually, I submit) in conflict with the interests of the state.

Some good practices have begun to emerge in criminal proceedings to address such conflicts of interest. In British Columbia, for example, the Province has a policy of appointing special prosecutors (persons who are outside the public service chain of command)

... where there is a significant potential for a perceived or real improper influence in prosecutorial decision-making in a given case. The paramount consideration is the need to maintain public confidence in the administration of criminal justice. The independent role of the special prosecutor in British Columbia's justice system ... is intended to strengthen the independence and impartiality of the exercise of prosecutorial discretion. Historically, special prosecutors have been appointed in cases involving cabinet ministers, senior public or ministry officials, senior police officers, or persons in close proximity to these individuals.³⁵ [underlining added]

As a result, the state has devised techniques to ensure its interests are represented with independence in criminal matters. Is there any reason to believe that it is any less important to ensure representation of the state's true interests and the avoidance of perceived or real conflicts of interest in cases of civil litigation involving the state?

Further, does a lawyer involved in a context with the potential for such conflicts of interest have any ethical duty to bring it to the attention of the client, to recommend the appointment of independent counsel, or to take any other steps to ensure the client's interests are independently represented?

D. Honesty and candour

The Manitoba Code of Professional Conduct sets out the following ethical duty:

Honesty and Candour

3.2.2 When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.³⁶

³⁵ BC Prosecution Service, "About Special Prosecutors", online: *Government of British Columbia* <<https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bc-prosecution-service/about/special-prosecutors>> [<https://perma.cc/G4KY-QQH9>].

³⁶ LSM Code of Professional Conduct, *supra* note 20 at para 3.2.2 at 22.

When the Minister of Justice³⁷ and the Parliamentary Secretary for the Minister of Justice³⁸ advised parliamentary bodies that the examinations were being conducted to ensure conformity of bills with the *Charter* (and this was long after the Department had adopted the absence-of-even-a-weak-argument reporting standard), did the lawyers in the managerial ranks of the Department of Justice, who would be aware of what these individuals had said to Parliamentarians, have a duty of honesty and candour to their client, the state, to see that the true state of affairs was made known to the state's highest governing body, its legislature?

After the LegExam action was commenced in the Federal Court, when a member of Parliament raised a question of privilege as to the failure of the Minister of Justice to report provisions of bills the Minister believed to be inconsistent with the *Charter*, did the duty of candour of the lawyers in the Department who then advised the Minister require them to remind the Minister of his earlier statements (in 2007 and November 2012) to the effect that the examinations were to ensure conformity with the *Charter* or the statements by every other Minister of Justice to the same effect?

If they had presented this information to the Minister, is it possible that the Minister may have decided that he still believed what he (and every other Minister of Justice) had said about what the examinations required? Perhaps he may have preferred to disavow the Departmental standard and correct the Departmental practice, instead of defending it?

There is also the matter of the provision of misleading information under the *Access to Information Act*. Since the state chose to enact the Act, it seems clear that the state's interests lie in the provision of whatever information or documents the Act mandates to be provided. Did the lawyers in the Department of Justice who failed to disclose even the

³⁷ See earlier in this article, *supra* at 126-27.

³⁸ On 15 November 2007, Rob Moore – then Parliamentary Secretary to the Minister of Justice – testified as follows in committee:

The minister has to certify in each case that he believes the bills to be constitutional, based on advice he receives. ...

... I would refer everybody to the testimony that the minister has already given, where he has stated that it's his duty as a minister to certify that legislation coming forward is, in his opinion, compliant with the Charter of Rights." [underlining added]

House of Commons, Legislative Committee on Bill C-2, Minutes of Proceedings and Evidence, 39-2 (15 November 2007) at 1-2 (Hon Rob Moore).

existence of the most relevant documents fulfil their duty of honesty and candour to the state?

Consider also the Departmental use of doublespeak. When your actual standard for reporting, the tipping point between reporting and not-reporting, is the existence of any feeble argument, how is it honest and candid with one's client to refer to this as a "credible argument" standard?

My suggestion, therefore, is that the most useful ethical explorations arising out of the LegExam action, and the facts it revealed about the Department of Justice, are ones that would assist lawyers in the service of the state (including managers in the Department of Justice) to understand more fully who employs them and is their client, to serve the interests of that organization, to avoid conflicts of interest, and to act with honesty and candour in their work.

