

# The Duty of Legislative Counsel as Guardians of the Statute Book: *Sui Generis* or a Professional Duty of Lawyers?

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## ABSTRACT

Legislative counsel—those who draft legislation for the executive or for legislative assemblies—are largely overlooked in the Canadian legal literature and case law. One respect in which legislative counsel appear to be unique is their duty as guardians or keepers of the statute book. This article argues that this Guardian duty is best understood as a professional duty of legislative counsel as lawyers. In the same way that all lawyers have professional duties as officers of the court, though these duties are most relevant to litigators, all lawyers have professional duties as officers of the statute book, though these duties are most relevant to legislative counsel. All lawyers, when drafting legislation, have particular component professional duties to encourage, discourage, and even refuse certain instructions. The article also considers law-society jurisdiction over legislative counsel, arguing that such jurisdiction is constrained by parliamentary privilege and federalism.

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## I. INTRODUCTION

Legislative counsel—those who draft legislation for the executive or for legislative assemblies—are largely overlooked in the Canadian legal literature and virtually ignored in the case law. In the broader Commonwealth literature, legislative counsel are often described as “keepers of the statute book” or “guardians of the statute book.” However, it is largely unclear what this Guardian duty entails, to whom it is owed, and by whom it is to be enforced. Existing accounts vary and are often conclusory and vague. At the same time, the modern statute book faces an array of challenges that makes an understanding of this duty particularly relevant.

My goal in this paper is to better bridge the literature on legislative counsel with the literature on legal ethics. Existing Canadian literature on ethics for legislative counsel focuses on key issues for all lawyers, particularly the identity of the client, conflicts of interest, and confidentiality and privilege.<sup>1</sup> It also calls for further research.<sup>2</sup> My focus is not on a general account of ethics for legislative counsel, but instead on the duty as guardian of the statute book and the nature and implications of that duty.

In this paper, I argue that what I term the Guardian duty is best understood not as a *sui generis* duty unique to legislative counsel but as a professional duty applicable to all lawyers. In the same way as the professional duties of lawyers as officers of the court are most apparent in a litigation context but nonetheless do apply to all lawyers, I argue that the

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<sup>1</sup> Deborah MacNair, “Legislative Drafters: A Discussion of Ethical Standards from a Canadian Perspective” (2003) 24:2 *Statute L Rev* 125 at 141–148 (conflicts of interest), 149–50 (confidentiality), 150–154 (privilege) [MacNair, “Legislative Drafters”]; John Mark Keyes, “Professional Responsibilities of Legislative Counsel” (2011) 5 *JPLP* 11 at 18–20 (client), 27–32 (conflicts of interest), 32–43 (confidentiality) [Keyes, “Professional Responsibilities”]. On conflicts of interest, see also e.g. Ian Brown, “Sleeping Better: Ethics for Drafters” (2016) 2016:2 *Loophole* 4 at 11, online (pdf): <[www.calc.ngo/sites/default/files/loophole/Loophole%20-%202016-02%20%282016-05-15%29.pdf](http://www.calc.ngo/sites/default/files/loophole/Loophole%20-%202016-02%20%282016-05-15%29.pdf)> [perma.cc/7CDG-RCK6].

<sup>2</sup> Keyes, “Professional Responsibilities”, *supra* note 1 at 13.

duty as guardians of the statute book is a professional duty of all lawyers that is most apparent in the practice context of legislative counsel.

My analysis is organized into four parts. First, I synthesize and integrate the varied and wide-ranging literature on the seemingly amorphous Guardian duty to identify the key component duties that flow from this role. Second, I articulate the historical basis for, and nature of, the Guardian duty, consider the limitations that flow from that articulation, and propose a different contemporary basis and nature for the duty. Third, I propose additional component duties flowing from the Guardian duty, by combining the literature on best practices for drafting with the literature on legal ethics. Finally, I consider potential constraints on law society jurisdiction over legislative counsel. As a foundation for this work, I start in Part II with background on legislative counsel.

## II. BACKGROUND

In this Part, I outline the necessary background for my analysis. I begin with the issue of whether legislative drafting constitutes the practice of law. I then explain that there are two contexts in which legislative counsel practice, drafting for the government and drafting for legislative assemblies such as the House of Commons or the Senate. I conclude the background by discussing two particularly important aspects of the practice or practice setting of legislative counsel.

### A. Legislative drafting constitutes the practice of law

Any discussion of legal ethics and legislative counsel is misleading and empty unless drafting constitutes the practice of law. While there is some debate in the Canadian literature, legislative counsel are acting as lawyers when drafting. For example, Deborah MacNair notes that “[s]ome have questioned whether legislative drafting constitutes the practice of law” and that “[t]he jurisdiction of any law society over legislative drafters is not clear.”<sup>3</sup> In contrast, John Mark Keyes is emphatic that drafting constitutes the practice of law.<sup>4</sup> In particular, non-lawyer drafters cannot “provide the

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<sup>3</sup> MacNair, “Legislative Drafters”, *supra* note 1 at 131, 134. See also “the application of this set of rules to legislative drafters is ambiguous” (*ibid* at 140). Nonetheless, she later refers to “the importance of legal ethics to those who draft legislation” (*ibid* at 155).

<sup>4</sup> Keyes, “Professional Responsibilities”, *supra* note 1 at 13: “[l]egislative drafting is also

legal advice necessary to ensure that the draft text will operate to bring about the legal result that is sought.”<sup>5</sup> That is, draft legislation “is not merely a policy document, but also encapsulates the opinion of legislative counsel that the draft will produce in law the desired legal effect.”<sup>6</sup> Beverley Smith reaches a similar conclusion.<sup>7</sup> In other words, someone could conceivably acquire the skills to become a competent legislative drafter without becoming licensed as a lawyer – but such a person could not legally give the implicit or explicit assurance that the product will have the intended legal effect. In this respect the act of drafting constitutes the practice of law.

This conclusion is reinforced by statutory definitions of the practice of law. For example, the Nova Scotia *Legal Profession Act* defines the practice of law as “the application of legal principles and judgement with regard to the circumstances or objectives of a person that requires the knowledge and skill of a person trained in the law,” including “selecting, drafting or completing legal documents or agreements that affect the legal rights or responsibilities of a person.”<sup>8</sup> For the reasons Keyes gives, drafting legislation requires legal knowledge and skill, and legislation is clearly a legal document affecting legal rights or responsibilities. The Supreme Court of British Columbia has

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unquestionably an activity associated with the practice of law and one that can be provided only by a legal professional in jurisdictions in which the practice of law is restricted to those who are professionally qualified to practice it.”

<sup>5</sup> *Ibid* at 12. See also Robert B Seidman, “Drafting for the Rule of Law: Maintaining Legality in Developing Countries” (1987) 12:1 Yale J Intl L 84 at 92: “Like other lawyers, drafters have a responsibility to assure their clients that their legal product will function as promised.”

<sup>6</sup> Keyes, “Professional Responsibilities”, *supra* note 1 at 33. See also Ronan Cormacain, “Legislation, Legislative Drafting and the Rule of Law” (2017) 5:2 Theory & Practice of Legislation 115 at 132: “[l]egislative counsel don’t simply draft legislation, they advise, in the fullest sense, on legislation.”

<sup>7</sup> Beverley G Smith, “Legal Ethics and the Legislative Drafter” (2004) Canadian Institute for the Administration of Justice, No LD 98 at 2-4, online (pdf): <ciaj-icaj.ca/wp-content/uploads/documents/import/LD/LD2004/LD98.pdf?id=947&1566762559> [perma.cc/2ZEL-PQW7]. With respect, her reasoning is unconvincing and so I do not recount it here. For an unconvincing argument that drafters need not be lawyers, essentially arguing that non-lawyers can acquire the necessary knowledge and skills, see Norismizan Haji Ismail, “Legislative Drafters: Lawyers or Not?” (2013) 39:3 Commonwealth L Bull 455.

<sup>8</sup> *Legal Profession Act*, SNS 2004, c 28, s 16(1), (1)(b).

held that legislative drafting and the surrounding work of legislative counsel constitutes the practice of law.<sup>9</sup>

## B. Two main practice contexts for legislative counsel

There are two main practice contexts for legislative counsel: the provision of drafting and other legal services to the executive branch of government and the provision of drafting and other legal services to the legislative branch.

Legislative counsel who provide legal services to the executive branch of government are a special subset of government lawyers. As government lawyers, under Elizabeth Sanderson's model, they have three "layers" of duties: professional duties as lawyers, "public law" duties as delegates of the Attorney General, and "public servant" duties as members of the public service.<sup>10</sup> While the organizational client is the Crown, these legislative counsel take instructions from government officials and ultimately from the politicians who comprise the Cabinet. John Mark Keyes is emphatic that these legislative counsel have no professional relationship with, or duties to, the legislative assembly and its members.<sup>11</sup>

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<sup>9</sup> *British Columbia Teachers' Federation v British Columbia*, 2010 BCSC 961 at paras 37–42, citing *New South Wales v Betfair Pty Ltd*, [2009] FCAFC 160 at paras 15–16, which was cited e.g. in John Mark Keyes, "Professional Responsibilities of Legislative Counsel" (Paper presented at the 2010 Legislative Drafting Conference of the Canadian Institute for the Administration of Justice, Ottawa, 13 September 2010), online (pdf): <ciaj-icaj.ca/wp-content/uploads/documents/import/LD/LD2010/LD149A.pdf?id=711&1600837880> [perma.cc/VX6K-58QP].

<sup>10</sup> Elizabeth Sanderson, *Government Lawyering: Duties and Ethical Challenges of Government Lawyers* (Toronto: LexisNexis Canada, 2018) at xxviii. As I will return to below, she identifies the "Keeper of the Statute Book" duty as being within the second layer, duties as delegates of the Attorney General (*ibid* at 40–41).

<sup>11</sup> Keyes, "Professional Responsibilities", *supra* note 1 at 24:

legislative counsel for a government do not have a professional relationship with assembly members. This may seem self-evident, but members of these assemblies do not necessarily appreciate the differences between counsel who work for the assembly and those who work for the government. They occasionally lump them together as public sector counsel who all serve assembly members. Thus, it is critical that when government counsel appear before legislative committees they make it clear that they are not there to provide legal advice, but rather to answer questions on behalf of the government about legislation it is sponsoring. While they may be able to express a legal position on behalf of the government, they

Like legislative counsel who practice for the executive branch of government, legislative counsel for the legislative branch practice law and so have the professional duties of lawyers. The client may be an organizational one, i.e., a legislative assembly such as the House of Commons or Senate or individual member legislators. However, unlike legislative counsel for the executive branch, it is unclear whether these legislative counsel for the legislative branch are properly considered delegates of the Attorney General. This lack of clarity comes from vigorous disagreement about whether the Attorney General is a legal advisor to the legislature.<sup>12</sup> Unlike legislative counsel for the executive, these legislative counsel are employees of the legislative assembly, not employees of the executive, and so are not public servants – although they may likely have duties that appear similar, such as a duty of loyalty and a duty of political neutrality.

There are also some legislative counsel who might be referred to as hybrids: government lawyers who provide legal services both to the executive and to the legislative assembly or its members.<sup>13</sup> If nothing else, these hybrid legislative counsel are evidence, albeit possibly a holdover or anachronism or vestigial remnant, of the Attorney General's role as legal advisor to the legislature.

Thus, legislative counsel for the executive branch and legislative counsel for the legislative branch share only one unchallenged set of duties: the professional duties of lawyers. Unless the guardian duty is a *sui generis* one, it is best understood—by elimination or otherwise—to be a professional duty of lawyers.

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cannot provide legal advice to committee members.

<sup>12</sup> Andrew Flavelle Martin, “The Attorney General’s Forgotten Role as Legal Advisor to the Legislature: A Comment on *Schmidt v Canada (Attorney General)*” (2019) 52:1 UBC L Rev 201; *Schmidt v Canada (Attorney-General)*, 2018 FCA 55 at para 82, leave to appeal to SCC refused, 38179 (4 April 2019) [*Schmidt*]; Steven Chaplin, “The Attorney General Is Not the Legislature’s Legal Advisor” (2020) 14:2 JPPL 189; Andrew Flavelle Martin, “The Attorney General Is the Legislature’s Legal Advisor (Though Not Its Only Legal Advisor), Although That Role Is Admittedly Problematic and Should Probably Be Abolished: A Response to Steven Chaplin” (2020) 14:3 JPPL 625.

<sup>13</sup> See e.g. Brown, *supra* note 1 at 11: “[i]n several Canadian jurisdictions, the drafting office that serves as legislative counsel to government also serves as parliamentary counsel for the legislative assembly.” As Brown notes at 11, this poses a risk of conflicts of interest.

### C. The practice of legislative counsel

Like all government lawyers, legislative counsel for both the executive branch and the legislative branch ultimately take instructions from elected officials, whether indirectly or directly. It is these officials, not legislative counsel as legal advisors, that have democratic legitimacy. As Keyes notes, deference is typically required by legislative counsel on issues of public policy and the public interest;<sup>14</sup> however, “there is undoubtedly a point at which it is not sufficient merely to give advice and stand back.”<sup>15</sup> I will return to this issue, and the tricky question of how that point is identified, below.

What is unusual, perhaps even unique, to legislative counsel is that they “d[o] not control the final product.”<sup>16</sup> As MacNair notes, this is true because the legislative process has many participants and may involve amendments between introduction of a bill and its passage.<sup>17</sup> This is also true because bills are introduced by legislators, not by counsel on their behalf, and indeed legislators may reject the advice of legislative counsel or even forego their services entirely.

## III. GUARDIANS OF THE STATUTE BOOK: A SYNTHESIS

In this Part, I synthesize existing literature on the role of legislative counsel as keepers or guardians of the statute book, as well as literature that demonstrates similar concepts without using the guardian or keeper terminology. I draw on the broader Commonwealth and US literature to supplement the Canadian literature. While the keeper or guardian

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<sup>14</sup> Keyes, “Professional Responsibilities”, *supra* note 1 at 26 [citation omitted]:

One should note the role that the democratic process plays in law-making and the functioning of democratically elected governments. Democracy entails the popular election of officials who are thereby entrusted with the right to exercise public powers. Counsel are employed to advise them and, as Professor Hutchinson says, ‘to defer to such officials on what the public interest demands in deciding on policy and implementing it.’ Thus, it is the responsibility of legislative counsel, on the one hand, to advise of the potential for a finding of unconstitutionality but, on the other, to give effect to the judgment of ministers about whether to proceed with legislation despite that potential. Legislative counsel are not judges and do not exercise power over ministers or elected members.

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

<sup>16</sup> MacNair, “Legislative Drafters”, *supra* note 1 at 131.

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

terminology tends not to be invoked in the US literature, similar substantive concepts are nonetheless identifiable.

Accounts of the guardian or keeper role vary in many respects, both in substance and in language, but there are key recurring elements that can be grouped into four duties: competence, clarity, constitutionality, and values. Of these four, the duty to values is perhaps the thickest and most controversial duty.

First, legislative counsel as keepers or guardians of the statute book have a duty of competence, entailing consistency and coherence both within a statute and with other statutes at large. (This duty is distinct from the duty of competence to the client.<sup>18</sup>) Janet Erasmus, for example, explains that the keeper role means that legislative counsel “are responsible for maintaining the legal and linguistic coherence of the statute book. . . . [t]hey draft to achieve the consistency in language that will support consistency in interpretation and recognize the need for coherence, both in language and substance between its component Acts.”<sup>19</sup> She elaborates that the role of legislative counsel is “to give legal effect to the current government’s intended policy. . . . with a view to making the new law proposed for enactment by the [legislature] operate coherently with other legislated law and with the common law of our jurisdiction.”<sup>20</sup> Teri Cherkewich emphasizes that the guardian role has to do with combatting incoherence: “[t]hrough ensuring the seamless integration of new laws and identifying inconsistencies or incoherence within existing laws, legislative counsel routinely work to shield from harm one of democracy’s vital institutions: its laws.”<sup>21</sup> Similarly, Katharine MacCormick and Keyes emphasize the

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<sup>18</sup> On the duty of competence to the client, see e.g. Brown, *supra* note 1 at 6–9.

<sup>19</sup> Janet Erasmus, “Keepers of the Statute Book: Lessons from the Space-Time Continuum” (2010) 2010:1 Loophole 7 at 7–8, online (pdf): <[www.calc.ngo/sites/default/files/loophole/jan-2010.pdf](http://www.calc.ngo/sites/default/files/loophole/jan-2010.pdf)> [perma.cc/C26G-L3F5]. Erasmus also identifies the “keeper” role as having “echoes of custodian, preserver and protector” and “encompass[ing] the linguistic and juridical state of the statute book” (*ibid* at 7) [citation omitted]. See also *ibid* at 19–20.

<sup>20</sup> *Ibid* at 19–20. See also Teri Cherkewich, “By Sword and Shield: Legislative Counsel’s Role in Advancing and Protecting Democracy One Word (and Client) at a Time” (2015) 36:3 Statute L Rev 253 at 256: “legislative counsel’s duty is to coherently and accurately translate instructions in the form of policy statements into effective new laws that harmonize with existing laws.”

<sup>21</sup> Cherkewich, *supra* note 20 at 261.

coherence of the legal system as a whole, i.e. a responsibility to “the functioning and maintenance of legislation as a system of law. . . to ensure the system’s coherence, intelligibility and efficiency in achieving policy objectives.”<sup>22</sup> Likewise, Robyn Hodge describes one of the “essential tasks” of legislative counsel as keepers as “ensuring the cohesiveness, effectiveness and consistency of legislation.”<sup>23</sup> Here she emphasizes that counsel must “facilitat[e] its [laws’] accurate interpretation by judges and its appropriate implementation by administrators” and that law must be “readable so that the language used and the structure of the legislation yields up its contents easily” and “generally free of systemic or regular errors.”<sup>24</sup> Stephen Laws characterizes the role of guardian of the statute book as “ensur[ing] that there is no debasement of the currency of the means by which Parliament communicates with the courts.”<sup>25</sup>

This duty of competence is also identified by some commentators who do not invoke the keeper or guardian role. VCRAC Crabbe notes that drafting must be “in harmony with the existing legislation as well as with the Common Law or the Customary Law.”<sup>26</sup> By this Crabbe likely means that legislation must be compatible with the common law and explicitly identify any changes it makes to the common law.

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<sup>22</sup> Katharine MacCormick & John Mark Keyes, “Roles of Legislative Drafting Offices and Drafters” (2002) Canadian Institute for the Administration of Justice, No LD 94 at 7, online (pdf): [ciaj-icaj.ca/wp-content/uploads/documents/import/LD/LD2002/LD94-Maccormick.eng.pdf?id=988&1600837880](http://ciaj-icaj.ca/wp-content/uploads/documents/import/LD/LD2002/LD94-Maccormick.eng.pdf?id=988&1600837880) [perma.cc/AS33-2LLC], quoted in Keyes, “Professional Responsibilities”, *supra* note 1 at 18. Outside of the context of the Guardian role, MacCormick & Keyes state that “legislation must be clear and accurate” at 11.

<sup>23</sup> Robyn Hodge, “Maintaining and Adapting the Role of Drafters as Keepers of the Statute Book” (2015) 2015:1 *Loophole* 36 at 37, online (pdf): [www.calc.ngo/sites/default/files/loophole/jul-2015.pdf](http://www.calc.ngo/sites/default/files/loophole/jul-2015.pdf) [perma.cc/LU7A-KM5C].

<sup>24</sup> *Ibid* at 39.

<sup>25</sup> Stephen Laws, “The Role of Legislative Counsel: Wordsmith or Counsel? [2]” (2008) 2008:1 *Loophole* 39 at 43, online (pdf): [www.calc.ngo/sites/default/files/loophole/aug-2008.pdf](http://www.calc.ngo/sites/default/files/loophole/aug-2008.pdf) [perma.cc/SE7C-KEVE]. (He continues: “It is this that makes UK drafters so reluctant to accept unnecessary material in statutes.”) This point is cited at Cormacain, *supra* note 6 at 133.

<sup>26</sup> VCRAC Crabbe, “The Ethics of Legislative Drafting” (2010) 36:1 *Commonwealth L Bull* 11 at 16.

Louis Sormany recognizes responsibilities stemming from what he terms the value of democracy, among them being comprehensibility, coherence, and clarity.<sup>27</sup>

Second, legislative counsel have a duty of clarity, which includes avoiding or at least minimizing vagueness and ambiguity. While the literature does not explicitly connect the duty of clarity to the role of keeper or guardian, this duty seems consistent with the Guardian role. For example, Keyes identifies an obligation “to ensure that the law is clearly stated in accordance with drafting conventions”, including to avoid undue or deliberate “vagueness” or “ambiguity”.<sup>28</sup> Crabbe emphasizes that legislative counsel must see that “any doubt, ambiguity, or vagueness is reduced to a workable minimum through an intelligent application of knowledge and experience. The measure of the draft’s success is the ability to leave little room for doubt and ambiguity, whether semantic, syntactic or contextual.”<sup>29</sup> He asserts that legislative counsel “have the duty to express legislative policy in a language free from ambiguity.”<sup>30</sup> At the same time, he notes that “deliberate ambiguity may have its uses” and is open to the

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<sup>27</sup> Louis Sormany, «L'éthique au service du légiste québécois» (2004), Canadian Institute for the Administration of Justice, No LD99 at 10-11, online (pdf): <ciaj-icaj.ca/wp-content/uploads/documents/import/LD/LD2004/LD99.pdf?id=950&1566762559> [perma.cc/HV7M-HDCC]:

à la clarté et à la compréhensibilité de la loi et de ses objectifs pour le citoyen, à l'univocité des expressions utilisées, aux liens entre la loi, l'intérêt public et les chartes des droits ainsi qu'à la cohérence de la réglementation et de la loi. Il s'agit là d'objectifs généraux, mais fondamentaux, qui, on en convient, doivent guider le légiste dans la rédaction d'un texte de loi.

<sup>28</sup> Keyes, “Professional Responsibilities”, *supra* note 1 at 26-27: “Another facet of their role that informs its ethical dimension is to ensure that the law is clearly stated in accordance with drafting conventions. This is not always easy, particularly when instructing officials may have an interest in preserving vagueness or ambiguity.” See also John Mark Keyes & Dale Dewhurst, “Shifting Boundaries between Policy and Technical Matters in Legislative Drafting” (2016) 2016:1 *Loophole* 23 at 28, online (pdf): <www.calc.ngo/sites/default/files/loophole/jan-2016.pdf> [perma.cc/5ZNQ-CGFN]: “There may also be occasions when political considerations prevail, notably in terms of language that will elicit political compromise despite its vagueness or ambiguity.”

<sup>29</sup> Crabbe, *supra* note 26 at 13. See also “a very serious obligation on Parliamentary Counsel to use proper words and arrange the words in a manner that makes the legislative sentence clear, precise, and unambiguous” (*ibid* at 14).

<sup>30</sup> *Ibid* at 16.

legislature.<sup>31</sup> In the US context, David Marcello recognizes the need for “accuracy, clarity, and precision.”<sup>32</sup> He argues that where a client desires “passages so vague that they rise to the level of a constitutional problem,” legislative counsel may face a clash between the interests of the client and duties “to the fair administration of the justice system.”<sup>33</sup> He bases this on the idea that “lawyers are continuously obliged to support the fair administration of our legal system.”<sup>34</sup> Roger Purdy goes further, recognizing that legislative counsel “should seek clarity in expression and should refrain from drafting in a way that is misleading or deceptive”<sup>35</sup> and have a duty “to draft clear, unambiguous, and efficient bills.”<sup>36</sup> Thus, clarity may not be in the client’s interest. Indeed, MacNair recognizes that in the face of instructions to draft something “misleading,” legislative counsel should discourage the desired language and may appropriately withdraw.<sup>37</sup> Likewise, Purdy states that counsel may withdraw where the desired language is “outright, perhaps intentionally, misleading”.<sup>38</sup> At the same time, I recognize the implicit acceptance in this literature that clarity of language can never be absolute, and that vagueness leaves a legitimate and essential role for interpretation by the courts.

Third, legislative counsel have a Guardian duty to constitutionality, i.e. to discourage or even refuse to draft legislation that is contrary to the Constitution. Laws, for example, describes a responsibility to identify

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<sup>31</sup> *Ibid* at 15.

<sup>32</sup> David A Marcello, “The Ethics and Politics of Legislative Drafting” (1996) 70:6 Tul L Rev 2437 at 2453.

<sup>33</sup> *Ibid*.

<sup>34</sup> *Ibid* at 2458.

<sup>35</sup> Roger Purdy, “Professional Responsibility for Legislative Drafters: Suggested Guidelines and Discussion of Ethics and Role Problems” (1987) 11:1 Seton Hall Legis J 67 at 83. See also *ibid* at 78:

Where a legislator, however, intends to act, acts, or seeks to have the drafter act in a way that is clearly violative of the rules of the legislature, in violation of law, substantially deceptive to the legislature, or substantially subverts or is prejudicial to the legislative process, the drafter should take reasonable steps to protect the interests of the legislature and the legislative process.

<sup>36</sup> *Ibid* at 83.

<sup>37</sup> MacNair, “Legislative Drafters”, *supra* note 1 at 148.

<sup>38</sup> Purdy, *supra* note 35 at 89, 94. See also *ibid* at 93; Brown, *supra* note 1 at 13; Sanderson, *supra* note 10 at 40-41.

“anything in a Bill that offends constitutional principle.”<sup>39</sup> Keyes, while not invoking the guardian or keeper role here, suggests that “legislative counsel have an obligation to support conformity with constitutional limits when drafting laws.”<sup>40</sup> However, this merely means that legislative counsel should inform a client of potential unconstitutionality, and should not usurp the decision-making role of the client unless the “client is intent on pursuing a course of action that is manifestly illegal and no credible argument exists to support the constitutionality of what legislative counsel are being instructed to draft,” in which case counsel may withdraw.<sup>41</sup> Similarly, Purdy writes that legislative counsel should discourage legislation that is “clearly unconstitutional” and should potentially withdraw.<sup>42</sup> Crabbe further notes that legislative counsel must ask themselves whether a proposal has “constitutional legitimacy” and “[w]hat are the implications in the proposals for personal rights and vested interests?”<sup>43</sup>

I note that in the Canadian context, a duty to constitutionality must implicitly take into account the availability of the section 33 override in the *Canadian Charter of Rights and Freedoms* to allow otherwise unjustified infringements of sections 2 and 7 through 15.<sup>44</sup> Presumably, legislative counsel should ensure that the client understands that the override may be necessary and understands how it works – particularly that it must be renewed every five years.<sup>45</sup>

Finally, legislative counsel have a duty to values, i.e. to discourage, or at least ensure conscious and deliberate use of, provisions that are contrary to

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<sup>39</sup> Laws, *supra* note 25 at 43.

<sup>40</sup> Keyes, “Professional Responsibilities”, *supra* note 1 at 25.

<sup>41</sup> *Ibid* at 26. See also Sormany, *supra* note 27 at 5, though without specific reference to constitutionality: «Sur le plan juridique, le légiste doit également éviter d'utiliser son statut d'expert en droit pour imposer sa solution ou en refuser d'autres, bref pour se poser comme le seul détenteur de la vérité dont la position doit nécessairement faire autorité.» See more recently Donald L Revell, “Unconstitutional: Who Says? A Comment on the Reference re Non-Discrimination Act” (2020) 2020:3 *Loophole* 126 at 126, 129.

<sup>42</sup> Purdy, *supra* note 35 at 84, 85. See also *ibid* at 118.

<sup>43</sup> Crabbe, *supra* note 26 at 17.

<sup>44</sup> *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 2(b).

<sup>45</sup> *Ibid*, ss 33(3)–(5).

legal values, including fairness and equality and the rule of law. This duty is particularly clear in the Canadian literature. MacCormick and Keyes explain that the guardian role brings responsibilities which “may . . . include the protection of values associated with the entire legal system, such as fairness and equality.”<sup>46</sup> Likewise, Keyes identifies that “the role of legislative counsel . . . entails responsibilities as guardians of the statute book in maintaining the legislative system and respect for legal values.”<sup>47</sup> MacCormick and Keyes, separate from their invocation of the guardian role, argue that legislative counsel should promote legal values such as “procedural fairness and natural justice,” “access to the courts,” “prospective application of the law,” “property rights,” and “parliamentary sovereignty.”<sup>48</sup> However, instead of arguing that legislative counsel should refuse to draft laws contrary to these values, they merely argue that they “have a role to play in ensuring that incursions on these values are fully considered . . . and . . . clearly authorized,” and “should look for solutions that achieve the underlying policy objectives without infringing these values.”<sup>49</sup> MacNair similarly identifies an “expectation that part of the role of the drafter will be to act in the public interest. . . . to ensure that the development and elaboration of the law includes respect for the rule of law and adherence to it.”<sup>50</sup>

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<sup>46</sup> MacCormick & Keyes, *supra* note 22 at 7, quoted in Keyes, *supra* note 1 at 18.

<sup>47</sup> Keyes, “Professional Responsibilities”, *supra* note 1 at 42–43.

<sup>48</sup> MacCormick & Keyes, *supra* note 22 at 16. See also e.g. David C Elliott, “How to Prepare Drafting Instructions for Legislation – Canadian Style” (1999) 1999:1 *Loophole* 1 at 5, online (pdf): <[www.calc.ngo/sites/default/files/loophole/jun-1999.pdf](http://www.calc.ngo/sites/default/files/loophole/jun-1999.pdf)> [perma.cc/J6AE-6TE3], describing a responsibility:

to raise questions of principle. From time to time legislative proposals offend fundamental principles of fairness – for example, proposals to make the law retroactive, certain powers of entry, search, and seizure, interference with individual rights, expropriation without compensation, and so on. Quite apart from Charter of Rights issues, legislative counsel may have a duty to raise fundamental fairness issues at a political or other level if they cannot be satisfactorily resolved with the department concerned.

<sup>49</sup> MacCormick & Keyes, *supra* note 22 at 16.

<sup>50</sup> MacNair, “Legislative Drafters”, *supra* note 1 at 133. See also *ibid* at 148, raising withdrawal where a bill “does not meet acceptable drafting standards or rule of law concerns.”

Turning back to section 33 of the *Charter*, under this duty to values counsel should presumably ensure that the client understands the gravity of its invocation and the impact on otherwise guaranteed fundamental rights and freedoms.

Several other commentators cite a similar duty to values. Laws explains that “[o]ne way in which legislative drafters seek to strike the balance [between law and politics] is by testing their drafts against certain identifiable values in the law.”<sup>51</sup> In other words, legislative counsel “avoid producing legislation that cuts across the grain of the values of the law.”<sup>52</sup> As Terence Daintith and Alan Page put it, legislative counsel “act as the internal guardians of values customarily regarded as integral to the legal order”, giving as examples “non-retrospection, proper use of delegation, and respect for the liberties of the subject. . . . compliance with international law, clarity, and proportionality in the sense of the avoidance of excessive interference with personal or property rights.”<sup>53</sup> (At the same time, they recognize that “[t]he legal values of which Counsel act as the internal guardians are impossible to state with precision.”<sup>54</sup>) In this respect, Ronan Cormacain argues that the Guardian role includes a duty to the rule of law: “legislative drafters are under an obligation, as guardians of the statute book, to prepare legislation that is in accordance with the rule of law.”<sup>55</sup> While he invokes a standard conception of the rule of law, i.e. “the rule of law means that we are all subject to law,”<sup>56</sup> he also notes that “the rule of law is the ideal of the values that a legal system ought to possess.”<sup>57</sup> Here he invokes the rule-of-law criteria of Lon Fuller (including that “[l]aws should generally not be retroactive,” “[l]aws should be clear,” “[l]aws should not contradict

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<sup>51</sup> Stephen Laws, “Legislation and Politics” in David Feldman, ed, *Law in Politics, Politics in Law* (Oxford, UK: Hart Publishing Ltd, 2015) 87 at 95 [Laws].

<sup>52</sup> *Ibid* at 96, quoted in Cormacain, *supra* note 6 at 134. Laws at 96 invokes Lon Fuller.

<sup>53</sup> Terence Daintith & Alan Page, *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (Oxford, UK: Oxford University Press, 1999) at 254.

<sup>54</sup> *Ibid*.

<sup>55</sup> Cormacain, *supra* note 6 at 116. (I note here the connection to Adam Dodek’s work on government lawyers as guardians of the rule of law: Adam M Dodek, “Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law” (2010) 33:1 Dal LJ 1).

<sup>56</sup> Cormacain, *supra* note 6 at 115.

<sup>57</sup> *Ibid* at 116.

themselves, and “[l]aws should not require the impossible”<sup>58</sup> and of Joseph Raz (including that “[l]aws should be prospective, open and clear”).<sup>59</sup> Hodge also identifies, within the keeper role, a duty to “ensur[e] that the law reflects changes in community views”, giving the examples of writing in multiple languages and of gender neutralization.<sup>60</sup>

#### IV. THE CHARACTER OF THE GUARDIAN DUTY AND ITS IMPLICATIONS FOR LEGISLATIVE COUNSEL

In this Part, I consider the doctrinal character of the Guardian duty and the component duties it imposes. To whom are these duties owed and by whom are they enforced? Recall from above that legislative counsel for the executive have, as government lawyers, Sanderson’s three “layers” of duties: professional duties as lawyers, public law duties as delegates of the Attorney General, and public service duties as public servants. Legislative counsel for the legislative assembly or its members share at least one of these layers—professional duties as lawyers—and at most two, depending on whether they are properly considered delegates of the Attorney General. While the Guardian role and its accompanying duties were traditionally considered delegated roles and duties of the Attorney General, I argue that they are better understood as professional obligations of lawyers.

While few commentators squarely identify the origin or nature of the Guardian role, those commentators that do so agree that it was a role of the Attorney General and of legislative counsel as her delegates. Elizabeth Sanderson identifies legislative drafting, and the keeper role itself, as one of the “residual” duties of the Minister of Justice.<sup>61</sup> MacNair notes that

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<sup>58</sup> *Ibid* at 121, quoting Lon Fuller, *The Morality of Law*, revised ed (Yale: Yale University Press, 1969).

<sup>59</sup> Cormacain, *supra* note 6 at 121, quoting Joseph Raz, “The Rule of Law and its Virtue” in *The Authority of Law: Essays on Law and Morality* (Oxford, UK: Oxford University Press, 1979). He likewise invokes Tom Bingham’s list of values, of which for my purposes the most important are that “[l]aw should be accessible, intelligible, clear and predictable” and that “[l]aw should apply equally to all”: Cormacain, *supra* note 6 at 116, quoting Tom Bingham, *The Rule of Law* (London, UK: Penguin, 2011) at 8.

<sup>60</sup> Hodge, *supra* note 23 at 43. Contrast here Marcello, *supra* note 32 at 2449, characterizing the use of “gender-neutral language” as a policy or political decision and not as a drafting imperative.

<sup>61</sup> Sanderson, *supra* note 10 at 40–41.

legislative counsel provide their services “on behalf of the Minister of Justice and Attorney General of Canada.”<sup>62</sup> Similarly, while not invoking the Guardian role, John Edwards identifies legislative drafting as historically a role of the UK Attorney General.<sup>63</sup> Peter Archer explicitly associates the Guardian role, as he sees it, with the Attorney General.<sup>64</sup>

Nonetheless, while that may be the historically correct understanding, I argue that the Guardian duty of legislative counsel is now better understood as being rooted in the professional duties of lawyers. A major reason for this reconceptualization is the disagreement over whether the Attorney General is a legal advisor to the legislature, from which it follows that the Guardian duty may not apply to legislative counsel for legislative assemblies or their members. This would mean that legislative counsel have fundamentally different ethical obligations to the statute book depending on the person for whom they are drafting, which on its face appears problematic. While I focus in this article on legislative counsel for governments and legislative assemblies (or legislators), a major implication of my analysis is that the Guardian duty, insofar as it is a professional duty of lawyers, applies to lawyers drafting proposed legislation for any client.

Another reason for this reconceptualization is that the Guardian duties in the existing literature, as I have synthesized them in the previous part, resemble in kind the professional duties of lawyers to encourage, discourage,

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<sup>62</sup> MacNair, “Legislative Drafters”, *supra* note 1 at 130. But contrast Keyes, “Professional Responsibilities”, *supra* note 1 at 13–18, who while situating the Guardian role in a third category of duties, separate from duties as lawyers and general duties as public servants, does not identify that third category as duties as delegates of the Attorney General.

<sup>63</sup> John LJ Edwards, *The Law Officers of the Crown: A Study of the Offices of Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (London, UK: Sweet & Maxwell, 1964) at 4: “In this capacity the Attorney-General found himself acting as the principal liaison between the two Houses of Parliament, drafting and amending legislative measures.” See also *ibid* at 34–35, 49 n 79, 50, 51. Surprisingly, Edwards does not mention the guardian or keeper role in *The Law Officers of the Crown* or his other foundational work, John L J Edwards, *The Attorney General, Politics, and the Public Interest* (London, UK: Sweet & Maxwell, 1984).

<sup>64</sup> Peter Archer, *The Role of the Law Officers*, Fabian Research Series 339 (London, UK: Fabian Society 1978) at 19, cited by Cormacain, *supra* note 6 at 133 and quoted by Daintith & Page, *supra* note 53 at 253: “[i]t has come to be recognized that someone within Government should protect the Statute Book from purely cosmetic exercises and this task has fallen to the Law Officers.”

and even refuse certain instructions. In the same way as all lawyers have professional duties as officers of the court, though these duties are most relevant to litigators, all lawyers have professional duties as officers of the statute book, though these duties are most relevant to legislative counsel. All lawyers have professional duties to encourage, discourage, and even refuse particular client considerations and actions. All lawyers, when acting as legislative counsel, likewise have particular professional duties to encourage, discourage, and even refuse.

The rules of professional conduct identify many things a lawyer must encourage, discourage, or refuse, although they might not correspond with the interests or wishes of the client. A lawyer must not “encourage any dishonesty, fraud, crime, or illegal conduct.”<sup>65</sup> A lawyer must not mislead the court.<sup>66</sup> A lawyer must “encourage[e] compromise or settlement . . . and must discourage the client from commencing or continuing useless legal proceedings.”<sup>67</sup> “A lawyer must encourage public respect for . . . the administration of justice.”<sup>68</sup> A lawyer must encourage the client to consider the best interests of the child.<sup>69</sup> And a lawyer must refuse to “institut[e] or prosecut[e] proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party.”<sup>70</sup> Keyes makes similar points about professionalism and duties beyond those to the client, particularly duties regarding the legal system as a whole, illegality, and abusive proceedings.<sup>71</sup>

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<sup>65</sup> *Model Code of Professional Conduct* (Ottawa: FLSC, 2009, as amended October 19, 2019), r 3.2-7, online (pdf): *Federation of Law Societies of Canada* <flsc.ca/wp-content/uploads/2019/11/Model-Code-October-2019.pdf> [perma.cc/6F69-W974] [FLSC Model Code].

<sup>66</sup> *Ibid*, r 5.1-2(e), (k), (l).

<sup>67</sup> *Ibid*, r 3.2-4.

<sup>68</sup> *Ibid*, r 5.6-1.

<sup>69</sup> *Ibid*, r 5.1-4, commentary 4 of r 5.1-1: “In adversarial proceedings that will likely affect the health, welfare or security of a child, a lawyer should advise the client to take into account the best interests of the child, if this can be done without prejudicing the legitimate interests of the client.”

<sup>70</sup> *Ibid*, r 5.1-2(a).

<sup>71</sup> Keyes, “Professional Responsibilities”, *supra* note 1 at 14:

Professionalism in this context also entails obligations that go beyond the particular interests of the client and involve broader, societal interests that may take precedence over those of an individual client. Courts and codes of

Likewise, Ian Brown argues that “[b]eyond the government as a whole, the drafter as lawyer has a duty of loyalty to the legal system and to the public” – which he supports by reference to the duty to encourage respect for the administration of justice.<sup>72</sup>

Likewise, Roger Purdy draws an analogy for drafters “to a lawyer’s duty to avoid filing frivolous or harassing claims;” “if the bill is not supportable by a good faith argument, and is clearly illegal or unconstitutional, the drafter ought to help prevent its passage, or at least should maintain professional integrity by not participating.”<sup>73</sup> Purdy also notes, similarly to some commentators on the lawyer as adviser, that in the drafting context a zealous advocacy model is problematic because legislative counsel are not balanced by opposing counsel.<sup>74</sup>

I thus argue that the Guardian duties are likewise professional duties of lawyers, whether duties to the statute book specifically or to the administration of justice itself more generally. Regardless of clients’ interests and wishes, legislative counsel have countervailing duties to the administration of justice via the statute book, which require them to encourage, discourage, and even refuse some instructions. These duties are connected to the lawyer’s duty of candour – that is, a duty to warn the client that they are contributing to making bad law.

Drawing on my synthesis from Part III, these Guardian duties would include at a minimum several component duties: a duty to discourage and

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professional conduct often describe these interests in terms of maintaining a legal system that functions for the benefit of society as a whole. Legal professionals must accordingly comply with the law itself in rendering their services and must not help their clients engage in illegal activities. They also have a duty not to abuse the legal system by bringing frivolous proceedings or unduly lengthening proceedings.

See also *ibid* at 27, where he argues that there is:

a unique characteristic of the services that legislative counsel provide. They do not merely give advice, which their clients may or may not choose to follow. . . . The connection that legislative counsel have with their draft text arguably results in a greater sense of responsibility than if they had simply given their clients advice.

<sup>72</sup> Brown, *supra* note 1 at 11–12 (quotation is from 11). See also *ibid* at 12: “As one of the key actors in shaping legislation, the drafter has an opportunity to see that it is consistent with the rule of law, that it promotes transparency and that it incorporates principles of natural justice.”

<sup>73</sup> Purdy, *supra* note 35 at 118.

<sup>74</sup> *Ibid* at 80.

refuse clear illegality, including clear unconstitutionality; a duty to discourage or even refuse some level of avoidable and colourable ambiguity or vagueness; a general duty of competence, including a duty to encourage or even require coherence, consistency, and clarity; and a duty to discourage, or at least ensure conscious and deliberate use of, provisions that are contrary to legal values, including fairness and equality and the rule of law. All of these requirements promote and protect the administration of justice, parallel to lawyers' more general duties.

Another advantage to this conception of the Guardian duty as a professional duty of lawyers is that it also applies to lawyers in private practice who are drafting for private clients or for a government. Thus, governments cannot avoid the implications of this Guardian duty by contracting out its drafting service. Likewise, these Guardian duties apply any time a lawyer is drafting proposed legislative amendments on behalf of a client.

In contrast, any characterization of the Guardian duty as simply *sui generis* is analytically weak and doctrinally problematic. In particular, there would appear to be no mechanism or authority to oversee and enforce such a duty.

I acknowledge that these professional duties to the statute book are not explicitly enumerated in the rules of professional conduct. However, the rules note that they are not exhaustive.<sup>75</sup> Given the relatively small number of legislative drafters, it is not surprising that the rules do not address them specifically.<sup>76</sup> (Neither do I suggest that the rules must be amended to include these duties.<sup>77</sup>)

While legislative counsel as lawyers have duties to the Crown as client (or to the legislative assembly or its members as client), this Guardian role may sometimes run contrary to the client's wishes or interests – indeed, the

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<sup>75</sup> FLSC Model Code, *supra* note 65 at 6.

<sup>76</sup> But see Purdy, *supra* note 35 at 68: “Although the number of lawyers acting as legislative drafters is small compared to those engaged in private practice, the impact of their ultimate product may be disproportionate.”

<sup>77</sup> I note that Deborah MacNair has argued for the addition of provisions specific to legislative counsel, relating to conflicts, confidentiality, and privilege: Deborah M MacNair, *The Case for Introducing Specific Ethical Standards for Legislative Drafters* (LLM Thesis, University of Ottawa, 2000), online (pdf): <[ruor.uottawa.ca/bitstream/10393/9238/1/MQ57136.PDF](http://ruor.uottawa.ca/bitstream/10393/9238/1/MQ57136.PDF)> [perma.cc/T7AL-4X8P].

Guardian duties will often counterweight duties to the client and prevent legislative counsel from blindly following the instructions of the client. Thus, this Guardian role cannot entail duties owed solely to the client. (While the lawyer undoubtedly has a duty of competence to the client, the duty of competence I have identified as part of the Guardian role is distinct from that duty of competence to the client.) Nonetheless, some of the most important professional duties of lawyers are those other than duties to the client.

### **A. Democratic legitimacy and power: Professionalism or naivete?**

I acknowledge that some of the component duties comprising the Guardian duty, as described in Part III, may seem unrealistic or even naïve or illegitimate. Can legislative counsel really refuse to draft a bill that is unduly vague or clearly unconstitutional, or discourage a client from such instructions – and is it even for them to determine the thresholds of undue vagueness or clear unconstitutionality?<sup>78</sup> Will the client or the person from whom they receive instructions realistically be persuaded by mere encouragements or discouragements? Will these merely encourage the client to retain a more pliable lawyer? And does the law society have a legitimate role in enforcing these obligations? Moreover, as legislators are free to introduce, and legislatures are free to pass, ‘bad’ laws absent constitutional

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<sup>78</sup> On the threshold for constitutionality, see e.g. *Schmidt*, *supra* note 12.

considerations,<sup>79</sup> and to follow ‘unfair’ procedures,<sup>80</sup> who are legislative counsel to impede them in doing so?

My first response is that many of the same criticisms can be made of many of the lawyer’s recognized professional duties to discourage or refuse. If a client consumed in heated divorce proceedings was unwilling to consider the best interests of the children involved, will her lawyer’s encouragement change her approach? If a client in commercial litigation is intent on destroying her opponent, or more mildly intent on depleting her opponent’s resources—or if any client is convinced that she is correct and has been wronged—will the lawyer’s advice that an appeal has no merit affect the client’s calculus? Even though these exhortations seem unlikely to affect the client’s conduct, they are at least nominally professional duties of lawyers – indeed, duties that cannot be easily dismissed as purely aspirational. These duties have an important signaling function to the client, the public, and the profession itself. Granted, any practical effect depends on an adept lawyer who can not only explain why such instructions must be discouraged but, more importantly, provide an alternative route to achieve the client’s intended outcome. If such duties currently recognized in the rules of professional conduct should be abolished, that is a larger discussion that is beyond the scope of my work here.

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<sup>79</sup> See e.g. *Wells v Newfoundland*, [1999] 3 SCR 199 at 223, 177 DLR (4th) 73 [*Wells*], quoted in *Authorson (Litigation Guardian of) v Canada (AG)*, 2003 SCC 39 at para 39 [*Authorson*]: “Legislatures are subject to constitutional requirements for valid law-making, but within their constitutional boundaries, they can do as they see fit. The wisdom and value of legislative decisions are subject only to review by the electorate.” See also e.g. *Bacon v Saskatchewan Crop Insurance Corp*, [1999] 11 WWR 51, 180 Sask R 20 (CA) at para 30, leave to appeal to SCC refused, 27469 (1 June 2000): “Protection is provided by our courts against arbitrary and unlawful actions by officials while protection against arbitrary legislation is provided by the democratic process of calling our legislators into regular periods of accountability through the ballot box.” More recently see e.g. *Toronto (City) v Ontario (Attorney General)*, 2019 ONCA 732 at para 2, leave to appeal to SCC granted, 38921 (26 March 2020): “[T]he question before this court is not whether the legislation is good or bad policy, was fair or unfair; the question is whether it violates the *Charter* or is otherwise unconstitutional.”

<sup>80</sup> See e.g. *Wells*, *supra* note 79 at 223, quoted in *Authorson*, *supra* note 79 at para 39, and quoting from *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 558, 83 DLR (4th) 297: “legislative decision making is not subject to any known duty of fairness . . . ‘the rules governing procedural fairness do not apply to a body exercising purely legislative functions’.”

As for democratic legitimacy, the lawyer, by discouraging and even by refusing instructions, is not making a decision for the client or forbidding a client to carry out a proposed course of action. There are many things a client is free to do that a lawyer cannot participate in. Likewise, the rules of professional conduct have democratic legitimacy insofar as they are mandated and enforced by a body—a body composed of members elected by lawyers and appointed by the provincial government—exercising powers delegated in statute by the provincial legislature. Indeed, government lawyers do not have lesser professional obligations than other lawyers because their clients happen to have democratic legitimacy. While there is a divided literature and case law about whether government lawyers have higher obligations than other lawyers,<sup>81</sup> there has been no compelling argument that they should have lesser obligations than other lawyers.<sup>82</sup>

Legislative counsel should emphasize to clients that these duties are not primarily about the substance of the proposal but rather about how the proposal is executed or transformed into statute. They should also emphasize their duty of political neutrality as public servants or as servants of the legislative assembly or its members.

## V. FURTHER COMPONENT GUARDIAN DUTIES? CONTEMPORARY CHALLENGES FOR THE STATUTE BOOK

In this Part, I go beyond the consensus components of the Guardian duty and consider further candidate component duties on legislative counsel to discourage particular drafting instructions. I do this by combining the literature on best practices for drafting with the literature on legal ethics – that is, by considering that best practices for drafting may constitute professional obligations of legislative counsel as lawyers. Like the

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<sup>81</sup> For a recent synthesis, see Andrew Flavelle Martin & Candice Telfer, “The Impact of the Honour of the Crown on the Ethical Obligations of Government Lawyers: A Duty of Honourable Dealing” (2018) 41:2 Dal LJ 443 at 449–457.

<sup>82</sup> As far as I am aware there has been only one commentator whose work can be interpreted as suggesting that government lawyers should have lesser obligations than other lawyers, with which I respectfully disagree and which is not rooted in democratic legitimacy: Jennifer Leitch, “A Less Private Practice: Government Lawyers and Legal Ethics” (2020) 43:1 Dal LJ 315 at 324–325.

other duties of lawyers to discourage, some of these duties may seem unlikely to impact client conduct – but such discouragement, however ineffective, has value in itself. It may well be that many legislative counsel are already discouraging these practices. I argue here that they may have a professional duty to do so.

### **A. Bad bills (1): Ineffective legislation**

Another such component Guardian duty may be to discourage frivolous or ineffective legislation, parallel to the lawyer's duty to discourage frivolous or pointless litigation.

In recent years, Canadian jurisdictions have seen an increase in legislation that appears, or is intended, to have no legal effect. The bulk of these proclaim commemorative or awareness days, weeks, or months. These share a common format: a descriptive preamble, one substantive section that proclaims a day, week, or month as having a certain designation, and short title and coming-into-force sections. Ontario, for example, now has

more than 50 laws that follow this model.<sup>83</sup> Other similar laws lack a preamble.<sup>84</sup> Some Acts include but go beyond a proclamation.<sup>85</sup>

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<sup>83</sup> *Albanian Heritage Month Act, 2016*, SO 2016, c 29; *Asian Heritage Act, 2005*, SO 2005, c 10; *Bangladeshi Heritage Month Act, 2016*, SO 2016, c 32; *Black History Month Act, 2016*, SO 2016, c 1; *Brain Tumour Awareness Month Act, 2001*, SO 2001, c 19; *British Home Child Day Act, 2011*, SO 2011, c 14; *Celebration of Portuguese Heritage Act, 2001*, SO 2001, c 2; *Christmas Tree Day Act, 2015*, SO 2015, c 12; *Convenience Store Week Act, 2021*, SO 2021, c 17; *DeafBlind Awareness Month Act, 2000*, SO 2000, c 34; *Dutch Heritage Month Act, 2011*, SO 2011, c 4; *Eating Disorders Awareness Week Act, 2020*, SO 2020, c 32; *Emancipation Day Act, 2008*, SO 2008, c 25; *Filipino Heritage Month Act, 2021*, SO 2021, c 15; *Firefighters' Memorial Day Act, 2000*, SO 2000, c 31; *First Responders Day Act, 2013*, SO 2013, c 11; *Franco-Ontarian Day Act, 2010*, SO 2010, c 4; *German Pioneers Day Act, 2000*, SO 2000, c 7; *Hazel McCallion Day Act, 2016*, SO 2016, c 27; *Hindu Heritage Month Act, 2016*, SO 2016, c 35; *Hispanic Heritage Month Act, 2015*, SO 2015, c 4; *Holocaust Memorial Day Act, 1998*, SO 1998, c 25; *Holodomor Memorial Day Act, 2009*, SO 2009, c 7; *Human Trafficking Awareness Day Act, 2017*, SO 2017, c 12, Sched 1; *Intergenerational Day Canada Act, 2015*, SO 2015, c 19; *Irish Heritage Day Act, 2004*, SO 2004, c 10; *Islamic Heritage Month Act, 2016*, SO 2016, c 20; *Italian Heritage Month Act, 2010*, SO 2010, c 17; *Jewish Heritage Month Act, 2012*, SO 2012, c 1; *Katelyn Bedard Bone Marrow Awareness Month Act, 2010*, SO 2010, c 20; *Korean Heritage Month Act, 2017*, SO 2017, c 31; *Lauren Harris Day Act, 2017*, SO 2017, c 32; *Lebanese Heritage Month Act, 2017*, SO 2017, c 27; *Lincoln Alexander Day Act, 2013*, SO 2013, c 18; *Major-General Sir Isaac Brock Day Act, 2012*, SO 2012, c 2; *Nikola Tesla Day Act, 2021*, SO 2021, c 29; *Nurse Practitioner Week Act, 2016*, SO 2016, c 36; *Occupational Safety and Health Day Act, 2021*, SO 2021, c 6; *Ontario Agriculture Week Act, 1998*, SO 1998, c 10; *Ontario Bike Month Act, 2015*, SO 2015, c 16; *Ontario Craft Beer Week Act, 2017*, SO 2017, c 30; *Ontario Day Act, 2021*, SO 2021, c 7; *Ontario Down Syndrome Day Act, 2016*, SO 2016, c 16; *Ontario Flag Day Act, 2015*, SO 2015, c 21; *Ontario Wine Week Act, 2005*, SO 2005, c 22; *PANDAS/PANS Awareness Day Act, 2016*, SO 2016, c 31; *Persian Heritage Month Act, 2021*, SO 2021, c 24; *Pope John Paul II Day Act, 2014*, SO 2014, c 3; *PTSD Awareness Day Act, 2019*, SO 2019, c 7, Sched 52; *Sickle Cell Disease Awareness Day and Thalassemia Awareness Day Act, 2021*, SO 2021, c 22 (proclaiming both Sickle Cell Disease Awareness Day and Thalassemia Awareness Day); *Sikh Heritage Month Act, 2013*, SO 2013, c 12; *Somali Heritage Week Act, 2020*, SO 2020, c 22; *South Asian Heritage Act, 2001*, SO 2001, c 29 (proclaiming both South Asian Arrival Day (s 1) and South Asian Heritage Month (s 2)); *Stop Cyberbullying in Ontario Day Act, 2020*, SO 2020, c 20; *Tamil Heritage Month Act, 2014*, SO 2014, c 4; *Tibetan Heritage Month Act, 2020*, SO 2020, c 19; *Ukrainian Heritage Day Act, 2011*, SO 2011, c 3; *United Empire Loyalists' Day Act, 1997*, SO 1997, c 42.

<sup>84</sup> In Ontario, see e.g. *Special Hockey Day Act, 2018*, SO 2018, c 17, Sched 39 [self-repealing]; *Terry Fox Day Act, 2015*, SO 2015, c 17; *Treaties Recognition Week Act, 2016*, SO 2016, c 18.

<sup>85</sup> In Ontario, see e.g. *Hawkins Gignac Act (Carbon Monoxide Safety), 2013*, SO 2013, c 14;

These kinds of legislation, though unnecessary, do not individually cause any legal problems. But what about when taken as a whole?

In 2005, writing with specific reference to Holocaust Memorial Day legislation, Vaughan Black recognized that such laws, “intended to be wholly symbolic,” appear to be “not deserving of much attention” and that the study of them appears to be pointless: “[p]erhaps all that is worthy of note is that provincial legislatures have started using the statute books for the rhetorical statements that used to be expressed merely as house resolutions.”<sup>86</sup> Black argued, however, that “it is worth pausing to note which symbols the government elects to statutorily rejoice in and which it does not. . . . Symbols count, and government action to take note—statutorily, even if non-justiciably—of one phenomenon but not another counts a fair bit.”<sup>87</sup> More specifically, Black argued that legislation that grants “symbolic” rights “might operate to cheapen those rights that really matter.”<sup>88</sup>

Some commentators go further than Black, arguing that legislation with no legal effect serves to cheapen the statute book itself.<sup>89</sup> Consider Seidman: “Whatever illusions existed in an earlier, perhaps more naive era, today we

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*Ontario Trails Act, 2016, SO 2016, c 8, Sched. 1, s 4; Lupus Awareness Day Act, 2021, SO 2021, c 12, s 1(2): “On Lupus Awareness Day, all Ontarians are encouraged to wear an item of the colour purple.” Pregnancy and Infant Loss Awareness, Research and Care Act, 2015, SO 2015, c 37, s 1; Remembrance Week Act, 2016, SO 2016, c 21, s 1; Rowan’s Law (Concussion Safety), 2018, SO 2018, c 1, s 5; Status of Ontario’s Artists Act, 2007, SO 2007, c 7, Sched 39, s 6 [Minister to designate a weekend]; Tamil Genocide Education Week Act, 2021, SO 2021 c 11, s 1(2): “During that period, all Ontarians are encouraged to educate themselves about, and to maintain their awareness of, the Tamil genocide and other genocides that have occurred in world history.” Trans Day of Remembrance Act, 2017, SO 2017, c 29, s 1; Vimy Ridge Day Act, 2010, SO 2010, c 3, s 1; Workers Day of Mourning Act, 2016, SO 2016, c 14).*

<sup>86</sup> Vaughan Black, “Rights Gone Wild” (2005) 54 UNBLJ 3 at 5–6.

<sup>87</sup> *Ibid* at 7.

<sup>88</sup> *Ibid* at 8.

<sup>89</sup> See Cormacain, *supra* note 6 at 123, summarizing the relevant literature. See also Brian C Jones, “Our Forgotten Constitutional Guardians: Preserving Respect for the Rule of Law” (2021) 42:1 Statute L Rev 1 at 14: “ultimately, statutory law is a legitimate indicator of how states are operating. If statutes contain obvious disorganization, polemical language, pointless provisions, or other types of pathologies (such as log-rolling or pork-barrel legislation), then this is evidence that the state more generally is suffering from other ill effects.”

know that politicians introduce some laws not for instrumental but symbolic purposes. Drafters sometimes cynically go along with their clients.<sup>90</sup> Daniel Greenberg, for example, argues that this “nonsense legislation” or “non-legislation . . . seriously damages the rule of law,”<sup>91</sup> not only by discouraging public respect for the law but also by obliging judges to attempt to apply and interpret meaningless legislation.<sup>92</sup> Consider further his comments about a similar UK law, the *Anti-Slavery Day Act 2010*, albeit perhaps somewhat patronizing to backbenchers and private members’ bills: “[O]ne cannot expect private members to draft sound law: their job is to raise important issues, and to leave to the government to deal with them effectively. Being responsible for the rule of law and the shape of the statute book, the government should have either blocked the Bill or turned it into real law.”<sup>93</sup> In the same way that Greenberg identifies a responsibility on the government to validate the law, arguably legislative counsel have a duty—to the rule of law no less—to discourage or refuse to draft meaningless legislation.

Indeed, Greenberg notes that “[i]t is a fundamental principle of legislative drafting that each legislative proposition must confer a right or impose a duty and be enforceable.”<sup>94</sup> Elsewhere, Greenberg laments the abandonment of this principle: “[i]t always used to be generally accepted within Government that legislation is to be used only to change the law, and not for advertising or other purposes of political propaganda.... This is no longer accepted to anything like the same extent.”<sup>95</sup> I note here that this exhortation does not account for, or allow for, a legitimate role for purpose provisions or preambles.

What can cause serious legal problems is legislation intended to have no legal effect that may inadvertently change the law. Black makes this argument regarding the Ontario *Heritage Hunting and Fishing Act, 2002*,

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<sup>90</sup> Seidman, *supra* note 5 at 92 [emphasis added, citation omitted].

<sup>91</sup> Daniel Greenberg, “Nothing Will Come from Nothing” (2010) 160 New LJ 1084 at 1084.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> Daniel Greenberg, *Laying Down the Law: A Discussion of the People, Processes and Problems That Shape Acts of Parliament* (London, UK: Sweet & Maxwell, 2011) at 154, n 3 [Greenberg, *Laying Down the Law*].

which states that “[a] person has a right to hunt and fish in accordance with the law”:<sup>96</sup> such rights “might turn out to be more than merely symbolic.”<sup>97</sup>

Before moving on, I make a friendly recommendation to legislative counsel: when next updating the statute book via a good-government-style omnibus bill, combine these dozens of meaningless statutes into a handful of comprehensive statutes—the *Heritage Act*, the *Awareness Act*, the *Memorial Day Act*—with each preamble becoming a schedule.

## B. Bad bills (2): Excessive regulation-making authority

Another source of bill badness short of illegality is excessive regulation-making authority.<sup>98</sup> (Greenberg notes that this authority is routinely granted in statute when the bill itself is incomplete when passed.<sup>99</sup>) See for example the *Safeguarding our Communities Act (Patch for Patch Return Policy)*: “The Lieutenant-Governor in Council may make regulations, . . . respecting any matter considered necessary or advisable to carry out effectively the purpose of this Act.”<sup>100</sup> (Ironically, the Act lacks a purpose provision.) Many other Ontario statutes use essentially identical language, including the phrase “necessary or advisable to carry out effectively the purpose of this Act.”

A particularly egregious example of excessive regulation-making authority is section 2 of the *Ontario Affirming Sexual Orientation and Gender Identity Act, 2015*, which adds section 29.1 to the *Regulated Health Professions Act, 1991*.<sup>101</sup> Subsection 1 provides that “[n]o person shall, in the course of

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<sup>96</sup> *Heritage Hunting and Fishing Act, 2002*, SO 2002, c 10, s 1; Black, *supra* note 86 at 4.

<sup>97</sup> Black, *supra* note 86 at 8, 25–28.

<sup>98</sup> Greenberg, *Laying Down the Law*, *supra* note 95 at 158:

Worse still, from the democratic point of view, it has now become routine for Bills of any size to include a power for the Minister to finish the job, in effect, by subordinate legislation: these powers to make ancillary and supplementary provision have largely been accepted without major controversy, although one might think that they were an affront to the entire democratic process.

<sup>99</sup> *Ibid* at 204: “It is only when important matters have still not been decided by Government before the time at which the Bill requires to be introduced that Departments are tempted, and frequently succumb to temptation, to leave to secondary legislation matters that really deserve to be set out on the face of the Bill.”

<sup>100</sup> *Safeguarding our Communities Act (Patch for Patch Return Policy), 2015*, SO 2015, c 33, s 4(1)(g).

<sup>101</sup> *Affirming Sexual Orientation and Gender Identity Act, 2015*, SO 2015, c 18, s 2 [ASOGIA]; *Regulated Health Professions Act, 1991*, SO 1991, c 18. ASOGIA s 1 made parallel

providing health care services, provide any treatment that seeks to change the sexual orientation or gender identity of a person under 18 years of age.” Instead of defining any of these terms, subsection (3) authorizes regulations “clarifying the meaning of ‘sexual orientation’, ‘gender identity’ or ‘seek to change’ for the purposes of subsection (1)”. (Moreover, while subsection 2 identifies some exceptions to the prohibition in subsection 1, subsection 3 also authorizes regulations “exempting any person or treatment from the application of subsection (1).”) That is, instead of even attempting to define or “clarify” its own terms the Act left these functions entirely to regulations. Reinforcing Greenberg’s comments above, ASOGIA was a private member’s bill, to which these provisions were added at committee.<sup>102</sup> In fairness to the legislative counsel who drafted the amendments to ASOGIA, and to the legislative counsel who drafted the original bill, it may well be that both were unable to get better instructions from the client for the drafting process. Nonetheless, I argue that those legislative counsel should have encouraged the client to provide better instructions and seriously considered withdrawing from the matter, i.e., refusing to continue to draft, when such instructions were not forthcoming.

While the case law is clear that such a vast regulation-making authority is not unlawful,<sup>103</sup> it is at best sloppy drafting and, at worst, a degradation of the functions of legislators. As Ben Fraser puts it, “The legislative counsel’s role involves considering the appropriateness of matter for delegated legislation as part of the more general role of being responsible

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amendments to the *Health Insurance Act*, RSO 1990, c H-6, to state that such services were not insured services for the purpose of public health insurance.

<sup>102</sup> Ontario, *An Act to amend the Health Insurance Act and the Regulated Health Professions Act, 1991 regarding efforts to change or direct sexual orientation or gender identity*, Bill 77, 41st Parl, 1st Sess, online: [www.ola.org/en/legislative-business/bills/parliament-41/session-1/bill-77](http://www.ola.org/en/legislative-business/bills/parliament-41/session-1/bill-77) [perma.cc/M2FD-GKKE].

<sup>103</sup> See e.g. *In Re George Edwin Gray* (1918), 57 SCR 150, 42 DLR 1. While dated, this remains the leading case on point. But for recent pushback in the literature see Lorne Neudorf, “Reassessing the Constitutional Foundation of Delegated Legislation in Canada” (2018) 41:2 Dal LJ 519. See also Major Ed Cottrill, “When Is Executive Lawmaking Constitutional in Canada?” (2020) 14:2 JPPL 383 at 400; Mark Mancini, “The Non-Abdication Rule in Canadian Constitutional Law” (2020) 83:1 Sask L Rev 45.

for the statute book.”<sup>104</sup> I argue that legislative counsel have a component Guardian duty to discourage such instructions as poor drafting.

### C. Bad bills (3): Politicized or meaningless short titles

A descriptive and accurate short title is important for multiple reasons.<sup>105</sup> The Supreme Court of Canada has recently re-affirmed that both short titles and long titles have a role in statutory interpretation, including for a federalism analysis, as intrinsic evidence.<sup>106</sup> At a more fundamental level, Paul O’Brien argues that “one of the main purposes of the short title is to locate the legislation in the statute book” – a purpose that he argues that electronic access to laws has not rendered obsolete.<sup>107</sup> Thus, another challenge to the statute book is the proliferation of politicized or meaningless short titles. Indeed, Paul O’Brien refers to this as “[t]he most controversial issue with the language of short titles.”<sup>108</sup>

Jones provides the Brexit example of the “European Union (Withdrawal) Bill” and its predecessor title, “the Great Repeal Bill”:

The danger was that the sloganeering and propaganda seen throughout the heated referendum would now be incorporated into statutory form, through the bill’s short title. Such a wantonly symbolic gesture may have poisoned the bill’s parliamentary processes, including its debate in both chambers, and probably even influenced the reporting and understanding of the legislation outside of Parliament.<sup>109</sup>

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<sup>104</sup> Ben Fraser, “Common Law Rights, Human Rights and Delegated Legislation” (2019) 2019:3 *Loophole* 43 at 72, online (pdf): <[www.calc.ngo/sites/default/files/loophole/Loophole%20-%202019-03%20%282019-10-07%29-1.pdf](http://www.calc.ngo/sites/default/files/loophole/Loophole%20-%202019-03%20%282019-10-07%29-1.pdf)> [perma.cc/L2DG-M9ZB] [citation omitted].

<sup>105</sup> See e.g. Paul O’Brien, “Legislative Titles: What’s in a Name?” (2012) 2012:3 *Loophole* 17 at 21, online (pdf): <[www.calc.ngo/sites/default/files/loophole/nov-2012.pdf](http://www.calc.ngo/sites/default/files/loophole/nov-2012.pdf)> [perma.cc/7GLZ-PSCT]: “For a short title to be accurate and helpful, you would assume that it should be descriptive of the subject matter of the legislation.”

<sup>106</sup> *Reference Re: Genetic Non-Discrimination Act*, 2020 SCC 17 at paras 35, 49 (Karakatsanis J), 122 (Moldaver J), 170, 173–77 (Kasirer J, dissenting).

<sup>107</sup> O’Brien, *supra* note 105 at 20.

<sup>108</sup> *Ibid* at 23. See also Edward C Page, “Their Word is Law: Parliamentary Counsel and Creative Policy Analysis” (2009) 4 *Public Law* 790 at 804: “Counsel will, however, seek to stop departments bringing unnecessary ‘spin’ into the wording of legislation and also in the explanatory material.”

<sup>109</sup> Jones, *supra* note 89 at 1–2.

As for sloganeering in Canadian short titles, consider for example *An Act To Make Alberta Open For Business*, *Making Ontario Open for Business Act, 2018*, *Open for Business Act, 2010*, and as a champion budget bill short title, *Protecting What Matters Most Act (Budget Measures), 2019*.<sup>110</sup> Indeed, O'Brien notes that "Canada has recently turned the use of political slogans in legislative titles into an art form."<sup>111</sup>

Other commentators note that short titles often give little indication of their content, sometimes on purpose.<sup>112</sup> Daintith and Page observe that "[i]t is for [legislative] Counsel to give a Bill its short and long titles, . . . the convention or working rule in relation to short titles being that they should be short and not misleading. . . . Faced with ministers who want to make a political impact, however, the draftsman may find himself forced to give ground."<sup>113</sup>

Similarly, Black notes two Ontario statutes "which on inspection are substantively elusive (and arguably empty), but which have evocative titles": the *Environmental Bill of Rights* and *Victims' Bill of Rights*.<sup>114</sup>

On the other hand, Keyes and Dale Dewhurst argue that the impact of politicized short titles is usually transient: "Happily, in Canada, the politicization of bill titles manifests itself principally in amending legislation. Once an amending Act is enacted, the amendments become

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<sup>110</sup> *An Act To Make Alberta Open For Business*, SA 2019, c 8; *Making Ontario Open for Business Act, 2018*, SO 2018, c 14; *Open for Business Act, 2010*, SO 2010, c 16; *Protecting What Matters Most Act (Budget Measures), 2019*, SO 2019, c 7.

<sup>111</sup> O'Brien, *supra* note 105 at 24.

<sup>112</sup> Purdy, *supra* note 35 at 89-90, quoting Duncan Kennedy, "Legislative Bill Drafting" (1946) 31:1 Minn L Rev 103 at 110: "a harmless-looking title may cover a vicious bill, it may be made the sheep's clothing for a legislative wolf." See also *ibid* at 89: "intentionally unclear titling or language, or misleading organization may help obscure a bill's intended meaning from potentially hostile legislators or interest groups."

<sup>113</sup> Daintith & Page, *supra* note 53 at 253.

<sup>114</sup> Black, *supra* note 86 at 7; *Environmental Bill of Rights, 1993*, SO 1993, c 28; and *Victims' Bill of Rights, 1995*, SO 1995, c 6. Ontario is far from alone. For a more recent application of the *Environmental Bill of Rights*, see *Greenpeace Canada v Minister of the Environment (Ontario)*, 2019 ONSC 5629 (Div Ct), Corbett J dissenting, Mew J concurring in part with the dissent but not in the result. Thanks to an anonymous reviewer for bringing this case to my attention.

integrated into the principal Acts it amends. The amending Act ceases to have a great deal of significance, except in terms of legislative history.”<sup>115</sup>

As for eponymous laws, most jurisdictions have some, but the short titles tend to include some parenthetical indication of their content. Contrast, for example, *Sabrina’s Law, 2005* with *Christopher’s Law (Sex Offender Registry), 2000*, *Rowan’s Law (Concussion Safety), 2018*, and *Ryan’s Law (Ensuring Asthma Friendly Schools), 2015*.<sup>116</sup> Indeed, recent federal legislation has made the eponym parenthetical: *Protecting Canadians from Unsafe Drugs Act (Vanessa’s Law)*, and *Justice for Animals in Service Act (Quanto’s Law)*.<sup>117</sup>

Eponymous laws may also be problematic when the short title contains information that is not present in the remainder of the statute. Consider here the *Poet Laureate of Ontario Act (In Memory of Gord Downie), 2018*, which beyond the short title and long title contains no mention of Gord Downie, not even in a preamble.<sup>118</sup>

As Guardians of the statute book, legislative counsel arguably have a component duty to discourage short titles that are politicized sloganeering or give little indication of the bill’s content, or both,<sup>119</sup> on the basis that such titles harm the statute book by making it less accessible and increasing the risk of misinterpretation. For example, Duncan Berry argues that “politicians have been known to use the short title of a Bill to make a political grandstanding statement. . . . [L]egislative counsel should do everything within their power to discourage this kind of abuse of the statute book.”<sup>120</sup>

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<sup>115</sup> Keyes & Dewhurst, *supra* note 28 at 30.

<sup>116</sup> *Sabrina’s Law, 2005*, SO 2005, c 7; *Christopher’s Law (Sex Offender Registry), 2000*, SO 2000, c 1, *Rowan’s Law (Concussion Safety), 2018*, SO 2018, c 1, and *Ryan’s Law (Ensuring Asthma Friendly Schools), 2015*, SO 2015, c 3. See also in Ontario e.g. *Hawkins Gignac Act (Carbon Monoxide Safety), 2013*, *supra* note 85; *Arthur Wishart Act (Franchise Disclosure), 2000*, SO 2000, c 3; *Chase McEachern Act (Heart Defibrillator Civil Liability), 2007*, SO 2007, c 10, Sched N.

<sup>117</sup> *Protecting Canadians from Unsafe Drugs Act (Vanessa’s Law)*, SC 2014, c 24; *Justice for Animals in Service Act (Quanto’s Law)*, SC 2015, c 34.

<sup>118</sup> *Poet Laureate of Ontario Act (In Memory of Gord Downie), 2018*, SO 2019, c 16. See likewise *Magna Carta Day Act (In Memory of Julia Munro, MPP), 2020*, SO 2020, c 27.

<sup>119</sup> Indeed, this is Jones’ strong implication: see generally Jones, *supra* note 89. However, Jones does not explicitly relate this duty to the keeper or Guardian role.

<sup>120</sup> Duncan Berry, “Professor Helen Xanthaki’s Drafting Legislation: A Practitioner’s

#### **D. Caution: Purpose clauses and preambles**

What about preambles and purpose clauses? In the Canadian context, Kent Roach argues that preambles can have several different purposes and audiences, with some benefits and some harms.<sup>121</sup> Among other things, preambles “may have degenerated into a form of a political advertising for statutes that promise much more than they deliver. . . . mak[ing] extravagant claims about what legislation achieves or hopes to achieve that are not supported by the text of the law.”<sup>122</sup> Likewise, preambles can be a political tool of misdirection. As Roach puts it, preambles can “provide a symbolic concession to values that are not really advanced by the legislation and thus provide an attempt to assuage those who may be concerned about the act.”<sup>123</sup> That is, preambles “can recognize competing rights and policy aspirations.”<sup>124</sup> Roach warns however that, in doing so, preambles can muddy or delay a necessary policy choice.<sup>125</sup>

As an example of misleading or misrepresentative short titles, consider the *Commitment to the Future of Medicare Act, 2004*, the preamble of which states, *inter alia*, that “The people of Ontario and their Government: . . . [r]ecognize that pharmacare for catastrophic drug costs is important to the future of the health system,” and casts “home care” and “community mental health care” as “cornerstones,” even though the Act makes no further mention of pharamacare or catastrophic drug costs or home care or mental health.<sup>126</sup>

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Perspective” (2017) 2017:2 Loophole 2 at 37.

<sup>121</sup> Kent Roach, “The Uses and Audiences of Preambles in Legislation” (2001) 47 McGill LJ 129.

<sup>122</sup> *Ibid* at 132.

<sup>123</sup> *Ibid* at 149.

<sup>124</sup> *Ibid* at 151–152.

<sup>125</sup> *Ibid* at 152.

<sup>126</sup> *Commitment to the Future of Medicare Act, 2004*, SO 2004, c 5. See also Keyes & Dewhurst, *supra* note 28 at 31:

This demand in turn moves preambles from being technical legal devices for ensuring legality into the domain policy as tools for gaining support for it and demonstrating effective legislative action for political purposes. In fact, this additional self-serving political purpose may help explain why courts have demonstrated caution in using preambles for interpretive purposes.

Consider also the preamble to the act which added “sexual orientation” as a prohibited ground of discrimination under the *Canadian Human Rights Act*: “the Government recognizes and affirms the importance of family as the foundation of Canadian society and that nothing in this Act alters its fundamental role in society.”<sup>127</sup> Arguably, by recognizing or pandering to the “pro-family” lobby, this preamble undercuts the educational and transformative message and mission of human rights legislation.

What about the legal role of preambles? Roach argues that as an interpretive tool, preambles have limited weight, primarily as an explanation of the legislature’s purpose.<sup>128</sup> I acknowledge here that in the UK context Greenberg mourns the decline of preambles:

The great advantage of the preamble was that its placing showed that it contained material that was different in kind from the material forming part of the legislative provisions themselves, and that it was intended to flavour them, and provide background to their construction, rather than to take parity with them (which always creates a risk of inconsistency). . . . Their abandonment has, however, been regretted by the courts.<sup>129</sup>

It is fair to ask whether courts would prefer politicized or misleading preambles to no preambles at all.

What about purpose provisions? Greenberg argues that these should be used carefully: “it is therefore the clear duty of each drafter not to determine not to use them on theological grounds, but to study their use and abuse with a view to becoming able to use them as effectively and harmlessly as possible.”<sup>130</sup> Similarly, Duncan Berry recognizes both their utility and their susceptibility to abuse: purpose provisions “not only offer the reader an insight into the reasoning of the policy formulators, thus enhancing comprehension, but most importantly also state what the relevant statute intends to achieve. . . . [T]he value of purpose/objects provisions has become sullied due to the propensity of some politicians to hi-jack them in order make emotive political statements that should have no place in statutes.”<sup>131</sup>

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<sup>127</sup> *An Act to amend the Canadian Human Rights Act*, SC 1996, c 14, preamble; *Canadian Human Rights Act*, RSC 1985, c H-6.

<sup>128</sup> Roach, *supra* note 121 at 153.

<sup>129</sup> Greenberg, *Laying Down the Law*, *supra* note 95 at 258.

<sup>130</sup> *Ibid* at 260.

<sup>131</sup> Berry, *supra* note 120 at 37 [citations omitted]. See also Keyes & Dewhurst, *supra* note

Misleading or overly aspirational preambles can misrepresent the text of an Act, both to the public and to courts, and damage the utility and clarity of the statute book as a whole. Preambles and purpose provisions can both be politicized. Thus, legislative counsel arguably have a component duty, as part of their overarching Guardian duty, to encourage the proper use, and discourage the improper use, of preambles and purpose provisions.

### **E. A counterpoint: Omnibus bills**

In contrast, I would argue that there is no component Guardian duty to discourage or refuse to draft omnibus bills—controversial as they may be—unless and until there is an indication from courts that they raise constitutional issues.

Adam Dodek argues that the modern omnibus bill, and particularly the “omnibudget” bill,<sup>132</sup> is “a threat to parliamentary democracy in Canada.”<sup>133</sup> While noting that “omnibus bills are neither intrinsically good nor bad,”<sup>134</sup> in their contemporary usage “they compromise the House of Commons’ ability to hold the government accountable.”<sup>135</sup> In a nuanced analysis, Dodek demonstrates that the traditional criterion for the legitimacy of an omnibus bill, a unifying single purpose, has been “stretch[ed]” so far as to be abandoned.<sup>136</sup> Indeed, he goes so far as to argue that omnibus bills may be unconstitutional insofar as they infringe not only the unwritten principle of democracy but also a purposive interpretation of the democratic rights in section 3 of the *Charter*.<sup>137</sup> Dodek considers the dangers of omnibus bills to

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28 at 32: “purpose clauses . . . are arguably subject to the same political frailties as preambles.”

<sup>132</sup> Adam M Dodek, “Omnibus Bills: Constitutional Constraints and Legislative Liberations” (2017) 48:1 *Ottawa L Rev* 1 at 6 [Dodek, “Omnibus Bills”].

<sup>133</sup> *Ibid* at 10. For a similar argument, see Keyes & Dewhurst, *supra* note 28 at 35.

<sup>134</sup> Dodek, “Omnibus Bills”, *supra* note 132 at 8.

<sup>135</sup> *Ibid* at 13–14.

<sup>136</sup> *Ibid* at 9 (“stretch[ed]”), 13 (single purpose).

<sup>137</sup> *Ibid* at 39 (principle), 39–41 (section 3). See also *ibid* at 10: “When parliamentarians relinquish this role and simply defer to the executive, which prepares government bills, they fail in their representative function and risk making a mockery out of the constitutional right to vote by emptying it of any substance.”

be constrained by many different actors: the House of Commons, the Senate, the Governor General, and the courts.<sup>138</sup>

With great respect to Dodek, however, the use of omnibus legislation short of a constitutional violation (which is contestable) would seem to be protected by the legislatures' freedom to follow unfair or inadequate procedures. While omnibus bills may well make for bad lawmaking, they do not make for badly drafted laws. An omnibus bill is a tool or mechanism to add provisions to the statute book, albeit disparate provisions when misused. It is the text of these provisions, as I have outlined above in this Part, that is a legitimate concern for legislative counsel fulfilling their Guardian duty. Thus, I argue that legislative counsel do not have a component Guardian duty to discourage omnibus legislation.

## VI. REGULATORY AND DISCIPLINARY JURISDICTION OVER LEGISLATIVE COUNSEL

Insofar as the Guardian duty is a professional duty of legislative counsel as lawyers, it is a legitimate basis for law society regulation and potentially for law society discipline. In this Part I examine some of the regulatory implications of my analysis. I draw largely on the work of Deborah MacNair. First, I consider whether legislative counsel for legislative assemblies are outside law society regulatory and disciplinary jurisdiction because of parliamentary privilege. Second, I consider whether federalism precludes law society authority over legislative counsel for the House of Commons, the Senate, and the federal government. Third, I consider but ultimately reject the more intriguing possibility that legislative counsel are at least partly outside law society regulatory and disciplinary jurisdiction because of a parallel to prosecutorial independence.

Recall that law society jurisdiction over legislative drafters assumes that they are lawyers practising law, as discussed in the introduction. Thus, MacNair argues that “the application of this set of [law society] rules to legislative drafters is ambiguous.”<sup>139</sup> For the reasons given above, I maintain that drafting constitutes the practice of law.

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<sup>138</sup> *Ibid* at 21-41.

<sup>139</sup> MacNair, “Legislative Drafters”, *supra* note 1 at 140.

Any law society regulatory and disciplinary jurisdiction over legislative counsel for legislative assemblies would compromise the separation of powers and infringe parliamentary privilege, following the reasoning of the Supreme Court of Canada in *House of Commons v Vaid*:

In order to sustain a claim of parliamentary privilege, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency.<sup>140</sup>

The ability of the legislative assembly and its member legislators to fulfill their deliberative and lawmaking functions would be compromised if the law society could constrain the selection of legislative counsel—by prohibiting the choice of drafters who are not licensed as lawyers—and regulate their conduct. Indeed, the freedom of the legislative assembly to choose and supervise its counsel of choice would mean that legislation on the legal profession cannot require legislative counsel for legislative assemblies to be members of the law society. MacNair, while not invoking parliamentary privilege, gestures in this direction.<sup>141</sup>

As MacNair argues, law society regulatory and disciplinary jurisdiction over legislative counsel for the House of Commons, the Senate, or the federal government would be constrained by federalism.<sup>142</sup> That is, federal legislation on the qualifications and selection of these counsel would prevail over provincial legislation on the legal profession via paramouncy or interjurisdictional immunity.<sup>143</sup> The House of Commons, the Senate, and the federal government are thus nonetheless free to choose non-lawyer drafters, who cannot be prosecuted for the unlicensed practice of law.

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<sup>140</sup> *Canada (House of Commons) v Vaid*, 2005 SCC 30 at para 46.

<sup>141</sup> MacNair, “Legislative Drafters”, *supra* note 1 at 135: “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.”

<sup>142</sup> *Ibid* at 134–35 (quotation is from 135): “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.”

<sup>143</sup> For a detailed account, see Andrew Flavelle Martin, “The Implications of Federalism for the Regulation of Federal Government Lawyers” (2020) 43:1 Dal LJ 363.

Legislative counsel for the House of Commons or the Senate would be doubly protected against law society discipline by federalism and by parliamentary privilege.

A more intriguing possibility is that legislative counsel enjoy a parallel to prosecutorial independence that constrains law society jurisdiction. MacNair writes that “[t]he legislative drafter is often perceived as having a distinct, independent role similar to Crown prosecutors and ‘judicial-like’ in nature . . . given the special part they play within government, Parliament and the Legislative Assembly.”<sup>144</sup> In her view, questions of law society jurisdiction are “relevant to the extent that traditionally legislative drafters, like prosecutors, have had an independent, quasi-judicial role within the public sector.”<sup>145</sup> However, with the greatest respect to MacNair, the basis for this assertion remains unclear to me and, in the absence of a compelling argument and a delineated and justified scope, the unique role of prosecutors and the unique considerations that protect prosecutorial discretion are simply too dissimilar to those of legislative counsel.

## VII. SUMMARY AND CONCLUSIONS

In this article, I have argued that the duty of legislative counsel as Guardians of the statute book is best understood not as a *sui generis* duty unique to such counsel but instead as a professional duty of lawyers enforceable by the law societies. Based on the existing literature, I argued that the standard account of the Guardian duty is best understood as having four component duties: competence, clarity, constitutionality, and values. I argued that while these Guardian duties were traditionally considered to be delegated duties of the Attorney General, they are now better understood as professional duties of lawyers. In the same way that all lawyers have duties to the administration of justice that are clearest in the context of litigation, I argue that lawyers have additional duties to the administration of justice, via the statute book, that are clearest in the context of legislative counsel. Put simply, there are some instructions that legislative counsel cannot follow and some client decisions that they must discourage.

I added to the existing account by considering whether legislative counsel should discourage clients from proposing legislation with no legal

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<sup>144</sup> MacNair, “Legislative Drafters”, *supra* note 1 at 131.

<sup>145</sup> *Ibid* at 135.

effect, legislation with excessive regulation-making authority, short titles that are vague or politicized, or omnibus legislation lacking a unifying single theme. Finally, I argued that parliamentary privilege and federalism limit law society regulatory and disciplinary jurisdiction over legislative counsel.

Much of what I have covered may appear to simply amount to best practices for legislative counsel. My argument, however, gives those best practices normative force and makes them enforceable professional duties as lawyers, subject to the constraints identified on law society jurisdiction over legislative counsel. Moreover, my characterization of Guardian duties as professional duties means they apply to all lawyers regardless of their client, even if they are not legislative counsel to governments or legislatures.