Loyalty, Conscience, and Withdrawal: Are Government Lawyers Different?

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ABSTRACT

There is a growing recognition that the core concepts and specific rules of legal ethics can have unusual and even unique implications for government lawyers. In this short essay, I examine how loyalty, conscience, and withdrawal apply to government lawyers. I argue that while government lawyers should be slower than lawyers in private practice to exercise their professional discretions to withdraw from a matter, they must be particularly ready to withdraw when unavoidably required – despite any selfless dedication to the ideal of a non-partisan public service.

Keywords: *Government Lawyers; Loyalty; Conscience; Withdrawal; Legal Ethics*

I. INTRODUCTION

For the archetypical independent lawyer in solo practice, the role of personal conscience in accepting client matters and withdrawing from them is fairly clear. But many lawyers work in practice arrangements that constrain those choices. Chief among these are lawyers for federal or provincial governments. In this short essay, I examine how loyalty, conscience, and withdrawal apply to these government lawyers.

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Government lawyers are special because they have what Elizabeth Sanderson calls three "layers" of duties, each of which comes with its own set of obligations.[1] They certainly are lawyers, but they are at the same time public servants and delegates of the Attorney General.[2] As Lorne Sossin puts it,

> Civil servants reconcile a variety of competing obligations - to the legislature; to the public; to applicants and their families; to professional duty and personal moral belief; to the rule of law; to the minister, the government of the day, and the honour of the Crown; and to self-interest and the self-preservation of the office and ministry. How these obligations are balanced in particular cases reflects institutional structures and individual preferences.[3]

Note in particular the interplay of both "institutional structures" and "individual preferences".[4] These matters – in particular the role of "personal moral belief" (or conscience) and the content of "professional duty", my focus here – become more complex for public servants who are lawyers. Although the rules of professional conduct treat government lawyers like any other lawyer for an organizational client,[5] there are nonetheless critical differences in application that require careful examination.

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1 Elizabeth Sanderson, *Government Lawyering: Duties and Ethical Challenges of Government Lawyers* (Toronto: LexisNexis, 2018) at xxiv, 2. Sanderson's "three layers" model recalls Adam Dodek's earlier "rule of law triangle" model: Adam M Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law" (2010) 33:1 Dal LJ 1 at 20-21.

2 Sanderson, *supra* note 1 at xxiv, 2.

3 Lorne Sossin, "From Neutrality to Compassion: The Place of Civil Service Values and Legal Norms in the Exercise of Administrative Discretion" (2005) 55:3 UTLJ 427 at 428. (Now Justice Sossin of the Court of Appeal for Ontario.)

4 *Ibid* at 428.

5 See e.g. Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2009, last amended 2022), online: *Federation of Law Societies of Canada* <www.flsc.ca>. See esp rr 1.1-1 ("In this Code, unless the context indicates otherwise,... "law firm" includes one or more lawyers practising: ...(d) in a government, a Crown corporation or any other public body"), 3.4-19 ("Rules 3.4-20 to 3.4-22 do not apply to a lawyer employed by the federal, a provincial or a territorial government who, after transferring from one department, ministry or agency to another, continues to be employed by that government."). But see also r 3.4-17 [emphasis added] (" "matter" means a case, a transaction, or other client representation, but within such representation does not include offering general "know-how" *and, in the case of a government lawyer, providing policy advice unless the advice relates to a particular client representation.*").

While it will be rare circumstances that prompt a government lawyer to resign, or to even seriously consider resignation, I argue that any government lawyer should always be ready to do so. That is, a government lawyer should determine in advance what circumstances would trigger a resignation and always remain alive and aware to the development of such circumstances. I intend my analysis to assist in that advance calculus.

My analysis is organized in four parts. I begin in Part 1 by canvassing the requirements of legal ethics on conscience, loyalty, and withdrawal as they apply to lawyers generally. I then move to Part 2, where I argue that the requirements have special implications for government lawyers. In Part 3 I consider the special case of the Attorney General as chief law officer of the Crown. Then in Part 4 I consider the appropriate threshold for withdrawal for government lawyers. I then conclude by reflecting on the implications of my analysis. Before that, however, I begin with four important points about my analysis.

First, I acknowledge at the outset that any discussion of conscience of lawyers or government employees can invoke section 2(a) of the *Canadian Charter of Rights and Freedoms*.[6] Freedom of conscience under the *Charter* applies to law societies as much as to governments – and for government lawyers specifically, it applies to law societies as regulators and to governments as clients and employers.[7] However, given the anemic state of the case law on freedom of conscience, the *Charter* right will not be the starting point for my analysis. Moreover, at least for the purposes of freedom of expression under section 2(b) of the *Charter*, lawyers accept restrictions that would not be viable for the general public.[8] Similar considerations around the enforcement of professional conduct might well apply to conscience, although purporting to discipline a lawyer for the circumstances of their resignation seems more extreme than regulating the civility and content of their public or private communications. More fundamentally, as I will discuss below, conscience may be the wrong frame of reference or lens by which to characterize and evaluate these decisions.[9]

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6 *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 [*Charter*].

7 See e.g. *Histed v Law Society of Manitoba*, 2007 MBCA 150 at para 43, leave to appeal to SCC refused, 32478 (24 April 2008).

8 *Ibid* at paras 79, 111.

9 See e.g. Matthew Windsor, "The Special Responsibility of Government Lawyers and the Iraq Inquiry" (2016) 87:1 British YB Int'l L 159 at 175. See below note 76 and accompanying text.

Second, I likewise acknowledge but do not focus on the concept of whistleblowing. Even if whistleblowing statutes could prevail over legislation on the legal profession,[10] they typically exclude information subject to solicitor-client privilege and are typically narrow in scope.[11] My focus is instead on what a government lawyer should and can do in the majority of situations of conscience, where whistleblowing statutes do not apply. Thus my analysis presumes that the rules of professional conduct make no allowance for 'noisy' withdrawal in the public interest.[12]

Third, the calculus for the decisions described below may unavoidably vary because of the answer to a complex question about government lawyers: Are they lawyers first or public servants first? While the answer to this question may sometimes be a matter of black-letter law,[13] there will be situations where it is an inescapable matter of individual judgment. As a result, while it is not analytically helpful to a generalized analysis, it may well affect the decisions made by any individual government lawyer in any particular set of circumstances. Consequently, it underlies my analysis without forming an explicit part of that analysis.

Finally, I readily acknowledge that there may be extreme situations where a lawyer considers it their moral obligation to breach legal ethics. As David Luban puts it, "[w]hen serious moral obligation conflicts with professional obligation, the lawyer must become a civil disobedient to professional rules".[14] My focus is instead on what those rules allow and

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10 See Dodek, *supra* note 1 at 7-8. See also Andrew Flavelle Martin, "Legal Ethics for Government Lawyers: Confronting Doctrinal Gaps" (2022) 60:1 Alta L Rev 169 at 174-191 [Martin, "Doctrinal Gaps"].

11 See e.g. John Mark Keyes, "Loyalty, Legality and Public Sector Lawyers" (2019) 97:1 Can Bar Rev 756.

12 But see, at least for the resigning Attorney General, Andrew Flavelle Martin, "The Attorney General as Lawyer (?): Confidentiality upon Resignation from Cabinet" (2015) 38:1 Dal LJ 147 at 170-171 [Martin, "Resignation"], assessing and proposing a narrow exception where the public interest so requires. It is less than obvious why such an exception should not apply to government lawyers as delegates of the Attorney General.

13 Martin, "Doctrinal Gaps", *supra* note 10 at 172. See also Allan C Hutchinson, "'In the Public Interest': The Responsibilities and Rights of Government Lawyers" (2008) 46:1 Osgoode Hall LJ 105 at 115 [Hutchinson, "Public Interest"]: "it can be argued that all government lawyers, including prosecution lawyers, are government bureaucrats first and lawyers only second."

14 David Luban, *Legal Ethics and Human Dignity* (Cambridge: Cambridge University Press, 2007) at 63.

require – which is necessary to determine what conduct would breach the rule, and when that breach is a moral imperative.

II. THE STANDARD ANSWERS

The clear consensus in the Canadian literature is that absent a court appointment, a lawyer can decline any client or matter for any reason that is not discriminatory under human rights legislation.[15] However, a lawyer should decline a client or matter cautiously – or as MacKenzie puts it, "prudently" – if the client will have trouble finding another lawyer.[16] There are at least four reasons why a lawyer *must* decline a client or matter: conflicts, competence, frivolity, and the likelihood of being a witness in the matter.[17]

In contrast, the clear Canadian consensus is that a lawyer who has accepted a client matter is significantly limited in their ability to withdraw.[18]

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[15] See e.g. *FLSC Model Code*, *supra* note 5, r 6.3-1 ("A lawyer must not directly or indirectly discriminate against a colleague, employee, client or any other person.") and commentary 1 ("A lawyer has a special responsibility to respect and uphold the principles and requirements of human rights and workplace health and safety laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in such laws."); Alice Woolley, *Understanding Lawyers' Ethics in Canada*, 2d ed (Toronto: LexisNexis Canada, 2016) at paras 3.7-3.8 (Now Justice Woolley of the Court of Appeal for Alberta); Mark M Orkin, *Legal Ethics*, 2d ed (Toronto: Thomson Reuters, 2011) at 89; Beverley G Smith, *Professional Conduct for Lawyers and Judges*, 4th ed (loose-leaf, no updates issued) (Fredericton: Maritime Law Book, 2011) at Chapter 2, para 10; Allan C Hutchinson, *Legal Ethics and Professional Responsibility*, 2d ed (Toronto: Irwin Law, 2006) at 75-76 [Hutchinson, *Legal Ethics*]; Gavin MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (loose-leaf, release No 5, December 2022) (Toronto: Thomson Reuters, 2019) at Chapter 2, 42.2. Hutchinson, *Legal Ethics* at 75-76 notes that provincial human rights law would prohibit such discrimination absent a specific rule of professional conduct.

[16] Orkin, *supra* note 15 at 89; Hutchinson, *Legal Ethics*, *supra* note 15 at 77; MacKenzie, *supra* note 15 at Chapter 2, 4.2; Woolley, *supra* note 15 at para 3.9. But see Woolley at para 3.13: "The obligations related to access to justice are generally horatory and do not meaningfully qualify the general discretion given to the lawyer to decline to act in any particular case." See also Hutchinson, *Legal Ethics* at 75: "While the oath taken on call to the bar often contains a commitment to "refuse no man's just cause", this is more of a token gesture of ceremonial window-dressing."

[17] Woolley, *supra* note 15 at paras 3.11-3.12.

[18] Orkin, *supra* note 15 at 91; Smith, *supra* note 15 at Chapter 2, para 85; Brent Olthuis, "Professional Conduct", in Adam M Dodek, ed, *Canadian Legal Practice: A Guide for the 21st Century* (loose-leaf, Release 92, December 2022) (Toronto: LexisNexis Canada, 2009), vol 1

The basic requirement is good cause and reasonable notice.[19] Withdrawal is mandatory under FLSC rule 3.7-7 if "a) discharged by a client; b) a client persists in instructing the lawyer to act contrary to professional ethics; or c) the lawyer is not competent to continue to handle a matter."[20] As Woolley points out, withdrawal is also required by other rules where a conflict of interest arises,[21] and where a corporate client persists in acting "dishonestly, fraudulently, criminally, or illegally".[22] Withdrawal is discretionary where "there has been a serious loss of confidence between the lawyer and the client" or where the client fails to make payment.[23] The commentary to the rule provides examples of circumstances that might produce a loss of confidence: "if a lawyer is deceived by his client, the client refuses to accept and act upon the lawyer's advice on a significant point, a client is persistently unreasonable or uncooperative in a material respect, or the lawyer is facing difficulty in obtaining adequate instructions from the client."[24]

However, the rules of professional conduct do not explicitly address the role of the lawyer's conscience or beliefs in accepting clients or withdrawing, and the literature is likewise less than clear on this point. Woolley argues that a lawyer may decline a client or matter where it "would… require her to compromise [her] beliefs in some way" or "where that representation would run against her own moral commitments" or where she "deeply object[s] to the position she is being asked to take."[25] Woolley applies here three concepts. The first is the human rights concept of a *bona fide* occupational requirement.[26] The second concept is the professional regulatory concept of conflicts of interest, with Woolley arguing that there is a conflict between the interests of the lawyer and the client where "the lawyer's personal beliefs might consciously or unconsciously impair the

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at Chapter 3, para 3.193; Hutchinson, *Legal Ethics*, *supra* note 15 at 84-85; MacKenzie, *supra* note 15 at Chapter 4, 4.11; Woolley, *supra* note 15 at para 3.132.

19 *FLSC Model Code*, *supra* note 5, r 3.7-1.

20 *Ibid*, r 3.7-7.

21 Woolley, *supra* note 15 at para 3.134; *FLSC Model Code*, *supra* note 5, r 3.4-1.

22 Woolley, *supra* note 15 at para 3.136; *FLSC Model Code*, *supra* note 5, r 3.2-8. See also r 3.2-7.

23 *Ibid*, r 3.7-2, 3.7-3. See also rr 3.7-4, 3.7-5 on withdrawal for non-payment in a criminal matter.

24 *Ibid*, r 3.7-2, commentary 1.

25 Woolley, *supra* note 15 at paras 3.14 to 3.24 (quotations are from paras 3.17 and 3.18).

26 *Ibid* at para 3.17.

effectiveness of her representation."[27] (I assume here that such a conflict would preclude the possibility that "the lawyer reasonably believes that he or she is able to represent the client without having a material adverse effect upon the representation of or loyalty to the client", and thus client consent cannot vitiate the conflict.[28]) The third concept is the professional regulatory concept of competence, which standard Woolley argues the lawyer cannot meet "if [her] personal feelings or moral evaluation of the client undermine her advocacy".[29] To the extent that these concepts require lawyers to refrain from conduct short of illegality, they surely constrain the client. Nonetheless, as a matter of legal ethics if not of human rights law, they are unavoidable.

What about mandatory and discretionary withdrawal from a matter after the client has been accepted? While Woolley does not apply her arguments about declining a matter to the context of withdrawal, their roots in the rules on conflicts and competence mean they must require withdrawal from a retainer just as much they require declining a retainer in the first place. The rules of professional conduct explicitly identify shortcomings in competence as a trigger for mandatory withdrawal.[30] Likewise, a lawyer may only act or continue to act where there is a conflict if the client consents "and the lawyer reasonably believes that he or she is able to represent the client without having a material adverse effect upon the representation of or loyalty to the client or another."[31] Thus, if during the course of the retainer the lawyer determines that they can no longer provide competent service or that there may be a "material adverse effect" on the representation,[32] the lawyer would have to withdraw. As for discretionary withdrawal, it is arguable that a "serious loss of confidence" may encompass personal revulsion to a client, cause, or course of action.

A useful contrast can be drawn to the law in the US, as demonstrated in the *Model Rules* of the American Bar Association.[33] The ABA rules contemplate reasons to refuse a court appointment, one being the extreme

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27 *Ibid* at para 3.19.

28 *FLSC Model Code*, *supra* note 5, r 3.4-2.

29 Woolley, *supra* note 15 at para 3.20.

30 *FLSC Model Code*, *supra* note 5, r 3.7-7(b): "A lawyer must withdraw if: … the lawyer is not competent to continue to handle a matter."

31 *Ibid*, r 3.4-2.

32 *Ibid*, rr 3.7-7(b), 3.4-2.

33 American Bar Association, *Model Rules of Professional Conduct* (Chicago: American Bar Association, 2020) [*ABA Rules*].

repugnancy of the client or cause: "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client."[34] If this reason is sufficient to refuse a court appointment, it all the more so should allow refusal of a repugnant client or matter absent a court appointment. The ABA rules on withdrawal are similar to the Canadian rules, except that they again incorporate repugnancy – but here not the repugnancy of the client or cause, but the repugnancy of the client's *actions*. That is, a lawyer *may* withdraw if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement".[35] Thus the concept of repugnancy shifts focus, with repugnancy of the client or cause being a valid reason to decline a client or matter, but repugnancy of actions instead being a valid reason to withdraw once the retainer has been accepted – assuming the repugnancy of actions can meaningfully be disentangled from the repugnancy of the client or cause.

The ABA rules on repugnancy make explicit what the Canadian rules leave at most implicit, be it through the lens of conflict of interest, competence, or loss of confidence: there may be a level of fundamental disagreement or revulsion at which the lawyer should not, and possibly even cannot, provide or continue to provide professional services.

Implicit in Woolley's analysis, but worth emphasizing, is that even if it were possible to define and develop an objective test for repugnance, it is unavoidably the subjective reaction of the individual and particular lawyer that matters. A potential conflict arises, or the lawyer's ability to provide competent service comes into question, or both, when the particular lawyer finds the particular client or client's actions repugnant – not where a hypothetical reasonable lawyer would find the particular client or client's actions repugnant.

While this element of subjectivity may appear to preclude anything resembling a standard, I note here that such an element is already explicitly contained within the rules of professional conduct: "[w]hen acting as an advocate, a lawyer must not ... knowingly assist or permit a client to do anything *that the lawyer considers to be* dishonest or dishonourable".[36] Moreover, subjectivity presumes sincerity, which can be established or displaced.

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34 *Ibid*, r 6.2(c).

35 *Ibid*, r 1.16(b)(4).

36 *FLSC Model Code*, *supra* note 5, r 5.1-2(b) [emphasis added].

An additional level of subjectivity arises when freedom of conscience under the *Charter* is superimposed over this analysis. I note here that freedom of conscience is underdeveloped partly because the beliefs at issue in litigation often have a religious character that makes religion, not conscience, the relevant freedom.[37] Indeed, the first reported successful claim under freedom of conscience concerned an inmate who had previously been granted a vegetarian diet for religious reasons, but had renounced that religion and claimed the same diet for reasons of conscience.[38] Nonetheless, as recently re-affirmed by the Ontario Court of Appeal, "[t]he scope of freedom of conscience may be broader than freedom of religion, extending to the protection of strongly held moral and ethical beliefs that are not necessarily founded in religion".[39] Assuming the doctrinal test for an infringement of freedom of conscience parallels that for freedom of religion, the sincerity of the belief – not its accuracy – would be a key component.[40] I have argued elsewhere that freedom of conscience can protect professional beliefs that are internal to the profession itself – a conception, for example, of what is right or wrong for a lawyer to do that is anchored in legal ethics itself, as opposed to an external religious belief, but one that goes beyond the accepted consensus and law on the requirements of the rules of professional conduct.[41] Again, sincerity narrows subjectivity to some degree. Given the state of the law on freedom of conscience, however, it is unclear that it would provide any greater protection to a lawyer than the concepts Woolley applies.

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[37] See e.g. *Christian Medical and Dental Society of Canada*, 2019 ONCA 393 at para 85 [*Christian Medical and Dental Society*]. Thanks to a reviewer for bringing this case to my attention.

[38] *Maurice v Canada (Attorney General)*, 2002 FCT 69 [*Maurice*]. According to one commentator, "*Maurice* represents the apogee of jurisprudence in Canada on conscience-based freedoms": Richard A Haigh, *A Burl on the Living Tree: Freedom of Conscience in Section 2(a) of the Canadian Charter of Rights and Freedoms* (University of Toronto Faculty of Law, SJD Thesis, 2012) [unpublished] at 136 [Haigh].

[39] *Christian Medical and Dental Society*, *supra* note 37 at para 82 [citations omitted].

[40] See e.g. Haigh, *supra* note 38 at 260, citing *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 56.

[41] Andrew Flavelle Martin, *The Future of Mandatory Reporting Laws: Developing a Legal and Policy Framework for Determining What Reporting Obligations to Impose on Professionals* (University of Toronto Faculty of Law, SJD Thesis, 2017) [unpublished] at 286-291.

III. THE ANSWERS FOR GOVERNMENT LAWYERS

Government lawyers are different from other lawyers in two relevant ways. The first way, which is common to all in-house counsel, is because they represent a single client as an employee. The second way is because of the unique character and parameters of government lawyering.

The government lawyer and the in-house counsel, by accepting employment, agree to represent the organizational client in an open-ended way. Woolley notes that the decision to accept a position as a government lawyer "impose[s] meaningful *ex ante* constraints on the choice of clients in particular cases" – although Woolley says the same of the choice to work in a firm.[42] By becoming an employee, the lawyer is presumably foregoing at least some of their discretion to decline files, at least from the perspective of the employer. As I will return to below,[43] a lawyer cannot contract out of their professional obligations, and so the employer cannot require a lawyer to accept files if doing so would violate the rules of professional conduct. If the employer persists in so requiring, the lawyer must withdraw.[44] Outside such circumstances, the government lawyer and the in-house counsel would appear to have no realistic discretion to decline a matter while continuing their employment.

Like all in-house counsel, for government lawyers withdrawal might mean resignation.[45] As John Mark Keyes notes, "withdrawal of services by a public sector lawyer would amount to a refusal to continue working on an assigned file or with a particular government unit, which could have disciplinary consequences up to a termination of employment".[46] Similarly, Elizabeth Sanderson writes that for government lawyers, "withdrawal from client representation is of a whole different order" and "is a very serious decision to make".[47] Sanderson distinguishes between withdrawing from a

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42 Woolley, *supra* note 15 at para 3.22.

43 See below note 62 and accompanying text.

44 See above note 20. *FLSC Model Code*, *supra* note 5, r 3.7-7(b): "A lawyer must withdraw if … a client persists in instructing the lawyer to act contrary to professional ethics".

45 See e.g. Woolley, *supra* note 15 at para 3.136: "effective withdrawal could mean resigning from her employment." See also *FLSC Model Code*, *supra* note 5, r 3.2-8, commentary 5, on "[a] lawyer acting for an organization": "In some but not all cases, withdrawal means resigning from his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter."

46 Keyes, *supra* note 11 at 765.

47 Sanderson, *supra* note 1 at 173, 174.

matter by requesting a transfer to another office, in which case the client remains the Crown, and complete withdrawal by resignation.[48]

Unlike other in-house counsel, however, accepting and continuing employment as a government lawyer means becoming a member of the apolitical public service and accepting both "the constitutional convention of bureaucratic neutrality" and the unique nature of the Crown in a system of responsible government.[49] (Indeed, one would hope lawyers would be particularly sensitive to constitutional conventions.) In doing so, the lawyer must wrestle with the distinction between the Crown as a continuing entity and the government of the day, serving both at the same time.[50] Like all clients, the government may change its legal position and strategy, and like all organizational clients, a change in position will often result from a change in management. Unlike other organizational clients, the real potential for a dramatic change in management occurs regularly through elections; and unlike any other client, the government – and at least indirectly via the government, the government lawyer – serves the public interest.[51]

A commitment to serve the public interest is not the same as a special ability or responsibility to determine the public interest[52] – and neither does it necessarily mean an increased readiness to withdraw. Indeed, by accepting employment with the Crown as a member of the apolitical public service, a lawyer is acknowledging not only that they will serve the current government of the day regardless of its ideology and decisions, but that they will so serve future governments that may well have vastly different ideologies and decisions. This raises the question: is there a meaningful distinction between political ideology and right versus wrong? The apolitical and non-partisan commitment of joining the public service clearly embraces implementation of decisions and instructions one disagrees with politically. I would argue that it also imposes a higher tolerance for what one might consider wrongful, given the democratic legitimacy of responsible government and the fact that it is for the government, and not government

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48 *Ibid* at 174.

49 Sossin, *supra* note 3 at 431. See e.g. Sanderson, *supra* note 1 at 101-103, 106-107, 237-238.

50 See e.g. *ibid* at 106-107.

51 See e.g. *ibid* at 91-98.

52 Sanderson, *supra* note 1 at 98-99. For a thoughtful critique of the public interest as a guiding concept for government lawyers, see Jennifer Leitch, "A Less Private Practice: Government Lawyers and Legal Ethics" (2020) 43:1 Dal LJ 315 at 327-328.

lawyers, to determine what is in the public interest.[53] On the other hand, there are decisions and courses of action that would not be wrongful for a corporate client that would be wrongful for a government client. Consider, for example, a government that fails to meaningfully engage with the duty to consult as an aspect of the honour of the Crown.[54]

Moreover, where a government lawyer is given instructions that approach moral repugnance, it may be even more important that the lawyer decline to withdraw and thus remain to protect the public interest as best they can, whether through dissuading the client or other mitigation strategies. This imperative may be particularly compelling where the lawyer suspects that their successor would follow unethical instructions – and perhaps even be chosen precisely because they were willing to follow such instructions.[55] Erica Newland refers to these conflicting imperatives as "a duty to stay" and "a duty to leave".[56] There is vibrant disagreement over whether it is better to withdraw or continue where a government and its actions are truly morally repugnant to the level of evil.[57] For example, David Luban is explicit that "the only thing that justifies staying in the job is continually trying to accomplish some good or to at least prevent some concrete evil", and warns against "the completely understandable urge to hold your fire until something more important comes along – which may turn out to be holding your fire forever."[58] Likewise, Shannon Prince emphasizes the role of "urgency" in this calculus.[59] Rebecca Roiphe has argued, and I agree, that Luban's analysis applies even in "normal times"

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53 Sanderson, *supra* note 1 at 98-99.

54 See e.g. Leitch, *supra* note 52; 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.

55 See e.g. Andrew Flavelle Martin, "The Legal Ethics Implications of the SNC-Lavalin Affair for the Attorney General of Canada" (2019) 67:3 Crim LQ 161 at 165, 172 [Martin, "SNC"]. Luban refers to this concept as "the typical argument": David Luban, "Complicity and Lesser Evils: A Tale of Two Lawyers" (2021) 34 Geo J Leg Ethics 613 at 656 [Luban, "Lesser Evils].

56 Erica Newland, "Response: A Practitioner's Perspective on *Complicity and Lesser Evils*" (2021) 34 Geo J Leg Ethics 681 at 682, 687.

57 See recently Luban, "Lesser Evils", *supra* note 55; Leora Bilsky & Natalie R Davidson, "Response: Legal Ethics in Authoritarian Legality" (2021) 34 Geo J Leg Ethics 665; Shannon Prince, "Response: A Good and Virtuous Nature May Recoil: On Consorting With Evil To Do Good" (2021) 34 Geo J Leg Ethics 695; Newland, *supra* note 56.

58 Luban, "Lesser Evils", *supra* note 55 at 661. Bilsky & Davidson, *supra* note 57, critique and complexify this analysis.

59 Prince, *supra* note 57 at 698-700.

and in the absence of "evil": "[T]here is always some room around the edges for lawyers to exercise influence.... However, the desire to... be relevant and powerful... should never supplant lawyer's professional judgment and obligation to the rule of law".[60] Nonetheless, the rules of professional conduct make no allowance for a lawyer to decline to withdraw on the basis that the successor lawyer will be less ethical.[61]

In joining the public service, is the government lawyer agreeing to forego their professional discretion as a lawyer to decline a matter, and to withdraw from a matter if there is a serious loss of confidence? Or, if not, is the lawyer agreeing to an implied term that if they exercise that discretion they will resign from their employment, and if they do not resign then they may incur discipline by the government as employer? The lawyer certainly cannot agree to forego their duty to withdraw if, as per Woolley's argument and terminology, representation would compromise their beliefs and thus violate their professional duty of competence and professional duty to avoid conflicts of interest.

It is clear from the decision of the Supreme Court of Canada in *Krieger v Law Society of Alberta* that government lawyers cannot contract out of their professional *obligations* as lawyers: the government's standards may be higher than those of the law society, but cannot be lower.[62] The same would be true of a private employer's standards for in-house counsel. What remains unclear, however, is if a lawyer can contract out of their professional *discretions* – specifically, for my purposes, the discretion to reject a prospective client matter and the discretion to withdraw where "there has been a serious loss of confidence between the lawyer and the client".[63]

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60 Rebecca Roiphe, "Is Obedience Always Support? Government Lawyers in Evil Regimes" (5 August 2002), online (blog): Jotwell <https://legalpro.jotwell.com/is-obedience-always-support-government-lawyers-in-evil-regimes/>.

61 Martin, "SNC", *supra* note 55 at 172.

62 *Krieger v Law Society of Alberta*, 2002 SCC 65 at para 50: "It may be that in some instances the conduct required by the Attorney General to retain employment will exceed the standards of the Law Society but of necessity that conduct will never be lower than that required by the Law Society." See also *Law Society of Upper Canada v Neinstein*, 2015 ONLSTA 5 at para 49: "counsel cannot contract out of their professional obligations"; *Pham (Re)*, 2015 LSBC 14 at para 72: "lawyers must always act fairly and with integrity in respect of all matters relating to their relationship with their clients. A lawyer cannot contract out of his or her obligation to do so." See also *FLSC Model Code*, *supra* note 5, r 6.1-1: "A lawyer has complete professional responsibility for all business entrusted to him or her".

63 *FLSC Model Code*, *supra* note 5, r 3.7-2.

Arguably, the discretion granted to lawyers under the rules of professional conduct is as important to their professionalism as the mandates imposed on them under those rules. That is, the discretion to decline a matter or to withdraw from a matter is necessary to protect their ethics. The lawyer's decision not to decline or withdraw, where they honestly and reasonably believe such action is appropriate, could itself be a breach of professional obligations. To loop back to Woolley, a loss of confidence could be so serious that the lawyer is in a conflict of interest or cannot meet their duty of competence, or both. But even where that threshold is not reached, there may be something important and worthy of protection about a lawyer's discretion to withdraw.

On the other hand, when a government lawyer refuses to follow instructions, they are refusing to fulfill the terms of their employment. While an individual refusal in itself will not compromise the ability of the government to function and may not compromise the ability of the individual government lawyer to provide legal services, there will be a frequency and prevalence of refusals which will do so.[64] Short of reasonable accommodation to the extent of undue hardship under human rights law, an employer has no obligation to continue to employ a lawyer who cannot or will not fulfill their duties. As Ralph Nader and Alan Hirsch recognize, "[t]he government attorney who *frequently* finds assignments morally unpalatable is probably working in the wrong place, and will presumably realize as much" (and thus resign).[65]

If the terms of a government lawyer's employment clash with their professional duties, then the simple answer is that they must decline employment or resign. Under this simple view, the government lawyer has no claim to force the government, as their client or as their employer, to honour their professional obligations short of resignation. Recall that the lawyer "must not … knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable".[66] Jennifer Leitch, for example, has argued that a purely adversarial stance in litigation involving the government and Indigenous peoples, or other vulnerable parties, is problematic.[67]

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64 Sanderson, *supra* note 1 at 173-174.

65 Ralph Nader & Alan Hirsch, "A Proposed Right of Conscience for Government Attorneys" (2003) 55:2 Hastings LJ 311 at 317 [emphasis in original].

66 *FLSC Model Code*, *supra* note 5, r 5.1-2(b).

67 Leitch, *supra* note 45 at 352-354.

The more complicated answer is that by imposing such terms, i.e. by precluding the government lawyer from free exercise of their professional discretions, the government is acting contrary to public policy and the more specifically contrary to the independence of the bar. Under this view, the imposition of these terms is problematic. While such terms would be challenging for any in-house counsel, they are especially so for government lawyers, for whom independence of the bar means both independence from the state *qua* state and independence from the state *qua* client.

Thus while a government lawyer should be slower than lawyers in private practice to exercise their professional discretions to withdraw from a matter, they must be particularly ready to withdraw when unavoidably required – despite any selfless dedication to the ideal of a non-partisan public service. Prospective government lawyers should be aware of, and comfortable with, this dual reality before joining the public service.

IV. AN EXTRA-SPECIAL CASE? THE ATTORNEY GENERAL AS CHIEF LAW OFFICER OF THE CROWN

In this Part, I consider the special case of the federal, provincial, or territorial Attorney General in the Canadian context and the implications for government lawyers declining or withdrawing. As chief law officer of the Crown, the Attorney General is a special government lawyer from whom the powers and functions of all government lawyers are delegated.[68]

I would argue that the Attorney General should be more ready to resign than a government lawyer – that is, that there is a wider range of circumstances in which it is appropriate and even necessary for the Attorney General than for a government lawyer to resign. This difference flows in part from the special responsibilities of the Attorney General and in part because of the greater signaling function of the resignation of the Attorney General than the resignation of a typical government lawyer. The literature recognizes an array of situations in which the Attorney General may and must resign:

> The attorney general must resign if Cabinet attempts to interfere in decisions regarding criminal proceedings, and arguably must resign if Cabinet rejects his advice that a proposed action would be unconstitutional or otherwise unlawful. In contrast, the attorney

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[68] See above note 2 and accompanying text.

> general might resign where Cabinet rejects his policy or legal advice (other than unconstitutionality or other unlawfulness), where he loses confidence in the prime minister as leader, or where he wishes to disassociate himself from actions by the prime minister or other ministers.[69]

More recently I have argued that resignation is specifically required by the rules of professional conduct, and not solely because of constitutional convention, when there is interference by Cabinet with the criminal law responsibilities of the Attorney General.[70]

Consider for example the archetypical principled resignation speech of an Attorney General, that of Brian Smith of British Columbia in 1988:

> This is an office of great sensitivity and neutrality in the administration of justice.... [T]he Premier and his office ... do not appreciate the unique independence that is the cornerstone of the Attorney-General's responsibilities in a free parliamentary democracy.... In removing myself from this office now it is my hope that I may protect its unique independence.... Only by stepping down, only by speaking out now, can I hope to prevent a course which will weaken the independence and erode the tradition of the office of the Attorney-General.[71]

It is clear from Smith's remarks that that there had clearly been a serious loss of confidence between him and his client and that resignation was in his view absolutely necessary.

Do these special features of the Attorney General trickle down, or follow with the delegation of functions, from the Attorney General to all government lawyers as their delegates?[72] Given the special role of the Deputy Attorney General,[73] the Deputy's obligations to resign roughly parallel those of the Attorney General themselves. The Deputy should resign where the

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69 Martin, "Resignation", *supra* note 12 at 156.

70 Martin, "SNC", *supra* note 55 at 170-172.

71 British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 34th Parl, 2nd Sess (28 June 1988) at 5498 (Hon BR Smith), online: <https://www.leg.bc.ca/documents-data/debate-transcripts/34th-parliament/2nd-session/34p_02s_880628p>. Thanks to Adam Dodek for this suggestion.

72 In parallel, consider how the positive obligation of the Attorney General, to see that government business is consistent with the rule of law, attaches to government lawyers as their delegates: Dodek, *supra* note 1 at 21-22.

73 See e.g. Sanderson, *supra* note 1 at 216-218.

Attorney General themselves fails to do so and where the Attorney General rejects advice from the Deputy that a course of action would be unconstitutional or otherwise unlawful.[74] Similar considerations might reasonably apply to lawyers in senior management roles. However, it would seem that the rules of professional conduct would not require, and might not even permit, the typical government lawyer outside of management to resign merely because the Attorney General, the Deputy Attorney General, or a senior manager failed to do so. While withdrawal is discretionary where "there has been a serious loss of confidence between the lawyer and the client",[75] the rules do not seem to anticipate or provide for a layered hierarchical practice setting in which a lawyer might have a serious loss of confidence not in the client but in a lawyer to whom they report.

V. A THRESHOLD?

If there is a threshold beyond which governments are no longer entitled to loyalty from their lawyers and government lawyers can or should withdraw, what is that threshold and can it be meaningfully articulated in terms of conscience? Matthew Windsor has argued in the UK context that the very concept of a government lawyer's conscience is problematic as a basis for resignation, because that characterization makes the choice an "individualist" one and thus "purports to oust further scrutiny."[76] Similarly, in the US context Marica E Mulkey argues that "the true crisis of conscience for the government attorney likely will be a rare and intensely personal phenomenon",[77] which suggests that there is little if any objective characterization of the threshold.

Mere disagreement is clearly not the threshold. There will likely be many issues on which any government lawyer, like any public servant and any lawyer, disagrees with the client-government's choices and their advice is not followed. Withdrawal, with or without resignation, will typically be as Windsor puts it "a wholly disproportionate response".[78]

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74 See e.g. *ibid* at 221-226.

75 *FLSC Model Code*, *supra* note 5, r 3.7-2.

76 Windsor, *supra* note 9 at 165 (further scrutiny), 166 (individualist).

77 Marcia E Mulkey, "A Crisis of Conscience and the Government Lawyer" (2005) 14:2 Temple Political & Civil Rights L Rev 649 at 661.

78 Windsor, *supra* note 9 at 167.

Likewise, the threshold for mere withdrawal, my focus in this article, should be lower than the threshold for whistleblowing or noisy withdrawal – if such actions are indeed ever appropriate for government lawyers. John Mark Keyes has argued that the threshold for speaking out, both as a civil servant and as a lawyer, is what he calls "clear illegality".[79] Unfortunately there is wide latitude for wrongness short of illegality, especially "clear" illegality.

Between these points of mere disagreement and clear illegality lies a spectrum. One viable approach, though it might seem tautological, is that declining or withdrawing from a matter is warranted and ethically permissible whenever a government lawyer is willing to resign from employment as a result. By ending their career, as Sanderson suggests resignation would, a government lawyer is applying a standard, albeit a subjective one, and transmitting a signal, albeit one that only lawyers may recognize.[80] In other words, a resignation is warranted and permissible whenever a government lawyer is willing to resign. Such a standard is nonetheless problematic for the government as client, as individual lawyers' willingness to resign is a subjective and thus unpredictable function of many variables. This standard is reminiscent of what I have elsewhere termed a "career gamble" test, based on the work of Allan Hutchinson, for a government lawyer to breach confidentiality.[81]

How then should the individual government lawyer determine when resignation is warranted? There are at least some objective indicia that trigger an obligation or discretion to resign. Following Keyes' analysis, these indicia include clear illegality. Other indicia are unavoidably subjective. From Woolley's analysis, a government lawyer must decline or withdraw when their disagreement is so great that there is a conflict of interest (that poses a material risk of impairment of the representation) or impaired competence. Once that threshold has been met, however, there is no alternative to withdrawal – even if the lawyer honestly believes that they can mitigate the conduct of the government as client by remaining in the role. Short of these levels, there is only the individual lawyer's conscience or

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79 Keyes, *supra* note 11 at 776, 783.

80 On signalling, see generally Windsor, *supra* note 9.

81 Andrew Flavelle Martin, "Folk Hero or Legal Pariah? A Comment on the Legal Ethics of Edgar Schmidt and *Schmidt v Canada (Attorney General)*" (2021) 43:2 Man LJ 198 at 208-209, applying Hutchinson, "Public Interest", *supra* note 13 at 127-128.

conception of right and wrong, when that conscience or conception causes "a serious loss of confidence between the lawyer and the client".[82]

Arguably this reality is the same as for any in-house counsel, not just government lawyers. The difference is that there are arguably many things that are objectively wrongful for government – or that a government lawyer might reasonably consider subjectively wrongful for government – that would not be wrongful for a corporation or another non-governmental organizational client. A lawyer will presumably take those differences into account when deciding to resign. However, a lawyer should also take those differences into account when accepting employment in the first place. Again, the government lawyer in joining the apolitical civil service is arguably, or at least ideally, foregoing the ability to judge the government's choices in a way that other in-house counsel perhaps do not.

VI. Reflections and Conclusion

For any lawyer, the repugnance of the client or the client's proposed conduct is not only an appropriate reason to decline to accept a matter but also, by virtue of the rules on competence and conflicts, may not only allow but indeed require a lawyer to decline a matter or withdraw from the matter once underway. The government lawyer as part of the apolitical civil service should expect potentially more frequent disagreement with the client's decisions and should thus be slower to withdraw than a lawyer in private practice. While the government lawyer cannot contract out of their professional obligations, they should thus be slower to exercise their professional discretions. Nonetheless, when the repugnance is such that competence or conflicts come into question, the government lawyer must withdraw despite any selfless dedication to the ideal of a non-partisan public service.

Ultimately, the inherent subjectivity of conscience does not change the fact that it is the only appropriate frame of reference for a government lawyer who cannot in good faith continue in their role. There will be circumstances well short of illegality where even the government lawyer who is fully committed to the ideal of the respective roles of the elected government and the civil service cannot effectively continue to provide adequate professional services – and forcing any government lawyer to

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82 *FLSC Model Code*, *supra* note 5, r 3.7-2.

continue would harm not only them and the client, but also the public interest.

In the unlikely event that a government lawyer faced employment discipline for withdrawing from a matter, or professional discipline for withdrawing from a matter or resigning, that lawyer would have a strong defense in freedom of conscience under section 2(a) of the *Charter*. Although lawyers enjoy lesser protections of their freedom of expression than members of the public,[83] mere withdrawal and resignation (as opposed to noisy withdrawal) is qualitatively different than the contexts in which that lesser protection has been applied, i.e. public criticism of the justice system or its participants.

I emphasize that government lawyers should consider these issues proactively instead of waiting until circumstances arise. While the particular circumstances once they arise may change the abstract and advance calculus, a ready framework to detect and process such circumstances should provide preparation to fulfill professional duties – as well as peace of mind.

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[83] See above note 8 and accompanying text.