

Crown Prosecutors and Government Lawyers: A Legal Ethics Analysis of Under-Funding

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ABSTRACT

Crown prosecutors and government lawyers are reliant on governments for their funding but exert no meaningful influence or control over such funding decisions. Nonetheless, this article demonstrates that as a question of law, under-funded Crown prosecutors and government lawyers risk violating their professional duties. If so, they must promptly inform the government, refuse new matters and, if necessary, withdraw from existing matters. If the government purports to block such refusal or withdrawal and does not provide adequate funding, resignation will become necessary. While law societies will likely not prioritize disciplinary action against such lawyers, the policy reasons to forego such proceedings do not mean that the legal answer is wrong and should or will change. This discordance with practical reality demonstrates that legal ethics generally – and the rules of professional conduct more specifically – do not adequately appreciate the practice settings of government lawyers and Crown prosecutors. Nonetheless, any changes to the legal framework governing all lawyers should be considered carefully as they would have major implications for the regulation of the legal profession.

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I. INTRODUCTION

Recent years have seen dramatic growth in academic interest in legal ethics for government lawyers.¹ These lawyers often face tension between their professional obligations as lawyers and their duties as government employees.² Little if any academic or regulatory attention, however, has been directed towards one of the stark realities of government practice: both government lawyers and Crown prosecutors are often under-funded.³

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- ¹ See e.g. Adam M Dodek, “Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law” (2010) 33 Dal LJ 1; Elizabeth Sanderson, *Government Lawyering: Duties and Ethical Challenges of Government Lawyers* (Toronto: LexisNexis Canada, 2018). For an analysis of this literature, see Andrew Flavelle Martin, “Where Are We Going? The Past and Future of Canadian Scholarship on Legal Ethics for Government Lawyers” (2021) 99:2 Can Bar Rev 322 [Martin, “Where”].
 - ² See e.g. Andrew Flavelle Martin, “Legal Ethics for Government Lawyers: Confronting Doctrinal Gaps” (2022) 60:1 Alta L Rev 169 [Martin, “Government Lawyers”].
 - ³ Under-funding of Crown prosecutors tends to receive more media and political attention (and more public concern) than under-funding of government lawyers. See e.g. “Crown attorneys help on its way” *Canadian Lawyer* (May 2007) 7 at 7 [*Canadian Lawyer*]; “The Association [the Manitoba Association of Crown Attorneys] had expressed its concern over the heavy workloads carried by many of its prosecutors ... and the threat that posed to professional standards.” See also e.g. Masha Scheele, “Crown prosecution crisis impacts rural justice” *The Canadian Press* (30 December 2021), online: *The Toronto Star* <<https://www.thestar.com/news/canada/2021/12/30/crown-prosecution-crisis-impacts-rural-justice.html>>; “The ACAA [Alberta Crown Attorney’s Association] believes the province’s Crown prosecutors are overworked, burnt out, and are subject to less support and lower wages than in other Canadian jurisdictions.”; Janice Johnston, “State of continual crisis: Alberta Crown prosecutors overworked, understaffed” *CBC News* (12 December 2019), <<https://www.cbc.ca/news/canada/edmonton/alberta-crown-prosecutors-justice-government-1.5393024>>; Shane Magee, “Province plans 50 per cent increase in prosecutors after union warns of N.B. court ‘crisis’” *CBC News* (6 April 2003), online: <<https://www.cbc.ca/news/canada/new-brunswick/new-brunswick-crown-prosecutors-budget-1.6802135>>; Scott Edmonds, “Manitoba Crown lawyers staging revolt over crushing caseloads” *The Canadian Press* (8 March 2003); Pat Healey, “Justice critic sees wasted time” *The Weekly Press (Enfield, NS)* (26 October 2011) 3, quoting MLA Allan MacMaster: “there’s not enough Crown Attorneys The Crown Attorneys are overworked so they don’t prepare properly for a trial...”; Steve Lambert, “Manitoba Crowns file grievance” *The Globe and Mail* (2 December 2006) A18, 2006 WLNR 20807437; “Manitoba Crown attorneys say they are so overworked, public safety is at risk.”; Tu Thanh Ha, “Quebec prosecutors walk off the job” *The Globe and Mail* (12 April 2001) A9, 2001 WLNR 10219046: “Scores of criminal cases were postponed across Quebec after provincial prosecutors, who are in the midst of contract talks, walked off their jobs for most of yesterday, complaining that they’re overworked and underpaid.”; Don MacPherson, Op-Ed, “It will take more than one

At one level, this persistent under-funding is an intractable problem of scarce public resources. At another level, however, this under-funding is squarely and unavoidably a legal ethics issue.

Consider the following three scenarios:

- Lawyer X is a Crown prosecutor with an excellent reputation and a record of impeccable professionalism. After recent staffing and budget cuts, X is now responsible for more files than they can adequately manage. For the first time, X fails – and fails repeatedly – to make complete and timely disclosure to the accused.⁴
- Lawyer Y is employed by the provincial government as a constitutional litigator, primarily in appellate matters. Y typically relies on an articling student for research support. This year, the office in which Y practices does not have an articling student and no substitute support has been provided to Y. Due to a combination of time pressures and inadequate research resources, Y fails to identify relevant case law that changes the result of several appeals. For similar reasons, the

good speech to erase years of damage” *Montreal Gazette* (26 February 2011) B7, 2011 WLNR 9046470: “And the well-received creation of the permanent anti-corruption squad last week was followed by the imposition of new contracts on underpaid, overworked, increasingly demoralized government lawyers, including the ones who will prosecute corruption cases.”; Andrew Duffy, “Crown prosecutors set up picket lines in Gatineau” *Ottawa Citizen* (9 February 2011) B1, 2011 WLNR 9018551: “The lawyers say they are underpaid, understaffed and overworked.”; Betsy Powell, “Prosecutors faced with staffing crisis, letter says” *The Toronto Star* (16 April 2018), 2018 WLNR 14476467. Contrast e.g. Joseph J Arvay, QC & Alison Latimer, “Cost Strategies for Litigants: The Significance of *R. v. Caron*” (2011), 54 SCLR (2d) 427 at 449, 449 n 64: “It is difficult to take too seriously the notion that advance costs orders need to be unduly constrained on fiscal grounds given that the (usually) government defendant that is alleged to have violated the citizens’ rights or freedoms exercises little or no such fiscal restraint when defending itself.... Having been a government lawyer, I know just how spoiled and privileged I was, given the resources at my command in comparison to those available to lawyers on the other side acting for poor or even middle-class individuals.”

⁴ See Richard Devlin & Pooja Parmar, “The Lawyer-Client Relationship” in Alice Woolley, Richard Devlin & Brent Cotter, eds, *Lawyers’ Ethics and Professional Regulation*, 4th ed (Toronto: LexisNexis Canada, 2021) 77 at 118, Scenario Six, citing *Canadian Lawyer*, *supra* note 3: “Assume you are a Crown Attorney. Because of a lack of funding, your office is understaffed by 25% with the consequence that a significant number of lawyers are carrying approximately 500 cases at any one time. You and your colleagues have decided that because of the excess of files you cannot properly prepare for trials, especially in the context of disclosure. Considered in light of the *Model Code* are you in breach of any ethical obligations? If so, what are your options?”

approvals process internal to the government likewise fails to identify Y's errors. The appellate panels each note these errors in their respective reasons.

- Lawyer Z is employed by the federal government as a solicitor, with a practice focusing on class action settlements and Crown liability. Under similar circumstances as Y, Z inadvertently releases multiple parties from the bulk of their financial obligations under a settlement agreement.⁵

What, if anything, should X, Y, and Z have done differently in these situations to meet their professional obligations as lawyers? What should they do moving forward? And what, if any, is the appropriate disciplinary role for the corresponding law societies as regulators? I address these questions below.

In this article, I demonstrate that under-funding may cause a government lawyer or Crown prosecutor to violate their professional duty of competence.⁶ Under-funding may also cause Crown prosecutors to violate their professional duty of disclosure.⁷ If these lawyers are under-funded to the extent that they cannot fulfill these duties, they must promptly inform the government as their employer (and, for government lawyers, as the client). If that government declines to correct the under-funding, a government lawyer or Crown prosecutor must first refuse new matters and then, if necessary, withdraw from existing matters. If this refusal and withdrawal are insufficient to allow the lawyer to meet their

⁵ On somewhat parallel facts, see *Fontaine v Canada (Attorney General)*, 2015 SKQB 220. (I express no opinion as to whether the conduct in that case should lead to law society proceedings.)

⁶ See Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2009, last amended October 2022), online: <<https://flsc.ca/flsc-s3-storage-pub/u/flsc-s3-storage-pub/Model%20Code%20Oct%202022.pdf>> [FLSC *Model Code*], r 3.1-2. (See also r 3.1-1 for the definition of competence.) See also *Code of Professional Conduct of Lawyers*, CQLR c B-1, r 3.1 [Quebec Code], arts 20 ("A lawyer owes his client duties of integrity, competence, loyalty, confidentiality, independence, impartiality, diligence and prudence"), 21 ("A lawyer must engage in his professional activities with competence. To this end, he must develop his knowledge and skills and keep them up to date.").

⁷ Disclosure of evidence in criminal cases is a specific professional obligation of Crown prosecutors, not merely a legal obligation: *Krieger v Law Society of Alberta*, 2002 SCC 65 at paras 54-55 [Krieger], quoting with approval from *R v Stinchcombe*, [1991] 3 SCR 326 at 339, 668 CCC (3d) 1 [Stinchcombe]; FLSC *Model Code*, *supra* note 6, r 5.1-3, commentary 1. See also *Quebec Code*, *supra* note 6, art 112: "When acting as prosecutor in a criminal or penal matter, the lawyer must act in the public interest and in the interest of the administration of justice and the fairness of the judicial process."

duty of competence, or if the lawyer's superiors purport to forbid this refusal and withdrawal, then the lawyer must resign. A failure to do so leaves the lawyer vulnerable to professional discipline by their corresponding law society.

I recognize that professional discipline of government lawyers and Crown prosecutors, or the resignation of such lawyers, is not a solution to this under-funding problem. The only true solution is for governments to adequately fund government lawyers and Crown prosecutors. Nonetheless, the reluctance or intransigence of governments to meet their responsibilities does not mean that law societies can ignore their own responsibilities or that the obligations of lawyers should be "torqued" to negate the problem.⁸ My conclusions necessarily follow from existing case law and the rules of professional conduct on the duty of competence as they apply to lawyers in private practice, including criminal defence lawyers on legal aid certificates. I certainly do not suggest that my analysis is beyond criticism. However, in the absence of any apparent indication that the existing case law is wrongly decided or any apparent grounds to distinguish that case law, and in the absence of any apparent grounds for amendments to the rules of professional conduct, there is no principled basis to change my analysis or its outcome.

I do not dispute, and none of my analysis disputes, that many stakeholders in the justice system are under-funded. The fact that under-funding of Crown prosecutors and government lawyers raises legal ethics issues – and is otherwise fundamentally problematic – does not mean that the under-funding of, for instance, legal aid (whether through the certificate system or the clinic system), as well as of court services themselves, are not also fundamentally problematic and do not potentially raise issues of legal ethics or judicial independence. None of that, however, changes the underlying law or my legal conclusions. It may inform and should inform what law societies as regulators do in these circumstances.

This article is organized in five Parts. In Part 2, I examine the professional duties of competence and disclosure. I emphasize that the

⁸ Martin, "Where", *supra* note 1 at 341-342: "if government lawyers find the implications of their professional obligations 'untenable', they should choose a different practice instead of torquing those obligations to their comfort. There is an important distinction between recognizing that government lawyers operate under multiple legal regimes that do not interlock neatly and relieving them from core professional obligations because the consequences of those obligations are severe. The former is critical to empowering government lawyers to comply with the letter and spirit of both their professional obligations and their obligations as public servants. The latter would lower the standards of the legal profession, or at least exempt government lawyers from them."

government cannot waive these duties, either as the employer or as the client, although under-funding may negate the fault element for a disclosure violation. In Part 3, I explain what Crown prosecutors and government lawyers must do when they know or should know that they are underfunded to an extent that causes them to violate their duty of competence or disclosure. If the government declines to correct the under-funding, such a lawyer must first refuse new matters and then, if necessary, withdraw from existing matters. If this refusal and withdrawal are insufficient to allow the lawyer to meet their duty of competence, or if the lawyer's superiors purport to forbid this refusal and withdrawal, the lawyer must resign. In Part 4, I consider the professional responsibility of lawyers' superiors for this under-funding. While such professional responsibility is most explicit in the *Quebec Code of Professional Conduct of Lawyers*,⁹ it is implicit in the *Model Code* of the Federation of Law Societies of Canada.¹⁰ I conclude in Part 5 by reflecting on the implications of my analysis. In particular, I recognize that a legal ethics characterization of this problem does not provide a practical solution. Instead of disciplining government lawyers and Crown prosecutors for violations stemming from under-funding, law societies should engage directly with governments to ensure that they are aware of the professional risks of that under-funding. Nonetheless, the legal ethics impacts are real and serious.

At the outset, I emphasize four key points. The first is that my analysis here is restricted to the funding and resources available to the government lawyer or Crown prosecutor (which, for clarity, I will refer to as funding), as opposed to salary. Resourcing may include the number of lawyers and support staff, the qualifications and skills of those lawyers and staff – especially in a bilingual or bi-jural practice environment – and access to appropriate legal research resources and continuing legal education.¹¹ While, theoretically, the salary could be so low as to require a lawyer or Crown prosecutor to take a second job, thus potentially depleting their available time for their practice, the rule on outside interests would require them to maintain their competence.¹² Salary may influence workload insofar as lower salaries may make it more difficult to attract and retain a

⁹ *Quebec Code*, *supra* note 6, arts 5 and 6. See below notes 88-89 and accompanying text.

¹⁰ *FLSC Model Code*, *supra* note 6. See below note 91 and accompanying text.

¹¹ Thanks to Charlie Feldman on this point.

¹² See *FLSC Model Code*, *supra* note 6, r 7.3-1: "A lawyer who engages in another profession, business or occupation concurrently with the practice of law must not allow such outside interest to jeopardize the lawyer's professional integrity, independence or competence." See also *Quebec Code*, *supra* note 6, art 11.

sufficient number of lawyers. My focus, however, is on workload and practice resources themselves.

The second key point is that the professional duty of competence requires merely adequate practice, not the best practice imaginable.¹³ Under-funding becomes a legal ethics problem only when it endangers this adequacy, i.e. when it does not enable government lawyers or Crown prosecutors to meet the threshold level of adequacy to fulfill their duty of competence.

Third, I restrict my analysis to the professional duties of lawyers. While government lawyers and Crown prosecutors may have a separate duty or imperative of competence as public servants,¹⁴ such a duty is potentially very different in kind, scope, and impact.

The final – and perhaps most important – key point is that I fully acknowledge both the intuitive unfairness of my analysis and its negative implications and consequences. An individual government lawyer or Crown prosecutor does not have the bargaining power to require the government to adequately fund their practice. While lawyers governed by a collective agreement may have some combined power to influence funding via their association, that power is limited. To discipline a lawyer for the results of resource allocation decisions over which they have no meaningful influence may seem unfair, unjust, and unreasonable, as well as just plain ineffective. However, as law societies regulate lawyers – and not their employers or clients – they have no jurisdiction to directly require governments to adequately fund their lawyer employees. Nonetheless, if law societies were to focus discipline on competence violations that resulted from under-funding, that focus would have severe negative implications for the public interest. The individual or small-scale withdrawal and resignation of government lawyers or Crown prosecutors will likely exacerbate the funding challenges faced by those who remain while

¹³ *FLSC Model Code*, *supra* note 6, r 3.1-2, commentary 15: “This rule [competence] does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described by the rule.”

¹⁴ See e.g. *Public Service of Ontario Act*, 2006, SO 2006, c 35, Sch A, s 1, para 2 [PSOA]: “The following are the purposes of this Act: ... To ensure that the public service of Ontario is non-partisan, professional, ethical and competent.” See also e.g. *Federal Public Sector Labour Relations Act* (being section 2 to the *Public Service Modernization Act*, SC 2003, c 22), s 148(a): “the necessity of attracting competent persons to, and retaining them in, the public service in order to meet the needs of Canadians”. See also *Values and Ethics Code for the Public Service* (Ottawa: Minister of Public Works and Government Services, 2003), online: <https://www.tbs-sct.canada.ca/pubs_pol/hrpubs/tb_851/vec-cve-eng.pdf> at 8: “Professional Values: Serving with competence, excellence, efficiency, objectivity and impartiality”.

realistically having little (or no) impact on government funding decisions, whereas the mass withdrawal and resignation of government lawyers and Crown prosecutors would paralyze public affairs and would certainly not serve the public interest. Thus, the short-term impact of law society discipline on government funding decisions might well be negligible, while the long-term impact could be negligible at best and negative at worst.

This situation is, therefore, one where the legal answer of whether law societies can discipline government lawyers or Crown prosecutors is potentially different from the policy answer of whether law societies should or will exercise that disciplinary jurisdiction. However, this discordance and the discomfort of these questions are not good reasons to ignore the realities of the situation, pretend otherwise, or forego this analysis.

At a fundamental and principled level, my analysis provides a more complete understanding of the professional duty of competence and its wide-ranging potential implications – as well as the unique professional challenges facing government lawyers and Crown prosecutors.

II. THE PROFESSIONAL DUTY OF COMPETENCE AND THE PROSECUTORIAL DUTY OF DISCLOSURE

In this Part, I assess the professional duty of competence applicable to all lawyers, as well as the disclosure duty unique to Crown prosecutors. I explain that government lawyers and Crown prosecutors, like all other lawyers, have a duty of competence that cannot be reduced or waived. I draw in part on the US legal literature on under-funded public defenders. Canadian Crown prosecutors also have a duty of disclosure that the government cannot negate, directly or indirectly. I argue that where under-funding interferes with these duties of competence or disclosure, the lawyer will be vulnerable to professional discipline. However, under-funding may be a mitigating factor as to penalty.

A. The Meaning and Importance of the Duty of Competence

All lawyers have a professional duty of competence.¹⁵ Competence is now so integral to the regulation of the legal profession that it is often explicitly identified as part of the mandate or function of law societies in legislation on the legal profession.¹⁶ In her majority reasons in *Groia v The*

¹⁵ See above note 6.

¹⁶ See e.g. Amy Salczyn, “From Colleague to Cop to Coach: Contemporary Regulation of

Law Society of Upper Canada, Cronk JA noted that “[t]he competency and professionalism of lawyers is the bedrock on which self-regulation of the legal profession rests.”¹⁷ While this duty of competence may not have existed before the 1970s,¹⁸ it is uncontroversial today. The duty of competence explicitly includes “performing all functions conscientiously, diligently and in a timely and cost-effective manner”, “applying intellectual capacity, judgment and deliberation to all functions”, “complying in letter and spirit with all rules pertaining to the appropriate professional conduct of lawyers”, and “managing one’s practice effectively.”¹⁹ While diligence may be distinguished from competence,²⁰ I follow the *Model Code* approach in which diligence is a component of the definition of competence.²¹ A lawyer who is not competent and cannot become competent within a reasonable time – or whose client does not consent to the lawyer becoming competent – must decline the matter or withdraw.²²

This duty of competence is reinforced by other concepts and rules. The duty of quality service includes competence.²³ Indeed, one component of

Lawyer Competence” (2017) 95:2 Can Bar Rev 489 at 498-499 [Salyzyn]. See e.g. *Law Society Act*, RSO 1990, c L.8, s 4.1(a): “It is a function of the Society to ensure that... all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide.” See also e.g. *Legal Profession Act*, SBC 1998, c 9, s 3(b) “it is the object and duty of the society to uphold and protect the public interest in the administration of justice by ... ensuring the independence, integrity, honour and competence of lawyers”. See also e.g. *Legal Profession Act*, CCSM c L107, s 3 “The purpose of the [Law Society of Manitoba] is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence.... In pursuing its purpose, the society must establish standards for the education, professional responsibility and competence of persons practising or seeking the right to practise law in Manitoba... [and] regulate the practice of law in Manitoba.”

¹⁷ *Groia v The Law Society of Upper Canada*, 2016 ONCA 471 at para 2, Cronk JA

(Brown JA dissenting but not on this point), rev’d on other grounds 2018 SCC 27.

¹⁸ See e.g. Salyzyn, *supra* note 16 at 496; Alvin Esau, “Excessive Fees and Lawyer Discipline” (1983) 13 Manitoba LJ 287 at 293 [Esau].

¹⁹ *FLSC Model Code*, *supra* note 6, rr 3.1-1(e), (f), (g), (i).

²⁰ See e.g. Whyte, *Re*, 1993 CanLII 664 (Ont LST) at para 44 [Whyte]; *Quebec Code*, *supra* note 6, art 20 (“A lawyer owes his client duties of integrity, competence, loyalty, confidentiality, independence, impartiality, diligence and prudence”).

²¹ *FLSC Model Code*, *supra* note 6, r 3.1-1(e). Oddly, r 3.2-1 lists diligence alongside competence: “The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.”

²² *Ibid*, r 3.1-2, commentaries 5, 6; r 3.7-7(c) [on withdrawal]; *Quebec Code*, *supra* note 6, art 49 [on withdrawal].

²³ *FLSC Model Code*, *supra* note 6, r 3.2-1 [emphasis added]: “The quality of service required of a lawyer is service that is *competent*, timely, conscientious, diligent, efficient and civil.” See also *Quebec Code*, *supra* note 6, art 22: “A lawyer must provide quality services. He must not engage in his professional activities in a state or under

quality service is “maintaining office staff, facilities and equipment adequate to the lawyer’s practice”.²⁴ The rules of professional conduct are clear that a lawyer is responsible for the conduct of their staff.²⁵ Moreover, a failure to inform the client that the lawyer is not competent for a matter is a breach of the duty of candour to the client.²⁶

conditions likely to compromise the quality of his services.” See also Salyzyn, *supra* note 16 at 507, describing the rule on quality as “closely related” to the rule on competence.

²⁴ *FLSC Model Code*, *supra* note 6, r 3.2-1, commentary 5(j) (one of the “key examples of expected practices in this area”). Note here the standard of adequacy, not perfection. See e.g. *Fuglsang (Re)*, 2015 CanLII 100030 (NWT LS): “The Committee agrees with the Member that not every lawyer in private practice is required to employ administrative assistance. However, if a lawyer chooses not to do so he or she must be able to meet the needs of clients (and respond to the Law Society) on a timely basis and must be organized enough to be able to deal with client needs, even if the Member is out of town.”

²⁵ *FLSC Model Code*, *supra* note 6, r 6.1-1: “A lawyer has complete professional responsibility for all business entrusted to him or her and must directly supervise staff and assistants to whom the lawyer delegates particular tasks and functions.” It is unclear whether this rule has two separate components, the first broad (“has complete professional responsibility for all business entrusted to him or her”) and the second a specific subset of that first broad component (“must directly supervise staff and assistants to whom the lawyer delegates particular tasks and functions”). See also r 6.2-1, commentary 1: “[a] principal or supervising lawyer is responsible for the actions of students acting under his or her direction”. See also *Quebec Code*, *supra* note 6, art 35: “A lawyer... is responsible for the mandate and must adequately supervise work performed by others who are collaborating with him in the performance of the mandate.”

²⁶ On the duty of candour generally, see e.g. *R v Neil*, 2002 SCC 70 at para 19; *FLSC Model Code*, *supra* note 6, r 3.2-2 (“When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.”) and commentary 2 (“A lawyer’s duty to a client who seeks legal advice is to give the client a *competent* opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer’s own experience and expertise” [emphasis added].) More specifically see r 3.1-2, commentary 1: “the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client’s behalf.” See also *Quebec Code*, *supra* note 6, art 37: “A lawyer is honest and candid when communicating with clients or advising them.” See e.g. *Rehn (Re)*, 2008 CanLII 74643 (NWT LS) [*Rehn*]: “It is precisely because the practice of law is by nature a “busy” vocation ... that members must recognize the potential for their “busy-ness” to distract them from their obligation to execute instructions within a reasonable period of time and to communicate effectively, which is to say, at least responsibly, with clients.... Clients deserve that courtesy and it is the obligation of every lawyer to alert clients to circumstances, including their own personal and workload circumstances, that may affect their ability to carry out their professional obligations, functions and duties.”

B. Contracting Out of the Duty of Competence

Neither the rules of professional conduct nor the case law give any indication that a lawyer can contract out of the duty of competence.²⁷ Indeed, even the rule on limited-scope retainers is clear that the duty of competence applies to whatever functions are included within the scope of such a retainer.²⁸ Whereas some rules of professional conduct allow otherwise prohibited conduct if the client consents,²⁹ the rule on competence does not – which strongly suggests that client consent is irrelevant to the standard of competence. While a client whose chosen lawyer lacks competence for a matter may consent to that lawyer becoming competent (“without undue delay, risk or expense to the client”) or that lawyer engaging another competent lawyer,³⁰ there is no provision for the client to consent to the lawyer simply proceeding with the matter in violation of the duty of competence.

There are many reasons why a lawyer should not be able to contract out of the duty of competence, even if the client wishes the lawyer to do so for reasons such as cost, convenience, or choice of counsel. While the duty of competence is intuitively a duty owed to the client, many stakeholders in an adversarial system – opposing counsel, judges, and other decision-makers – are also entitled to rely on the competence of the lawyers with whom they interact. Even if the client could waive the duty of competence, these stakeholders would be adversely affected. Moreover, insofar as public confidence in the legal profession and the administration of justice is damaged by incompetent lawyers, such lawyers also breach their duty to

²⁷ See e.g. *Law Society of Ontario v Regan*, 2018 ONLSTH 167 at para 37 [Regan HP], aff’d 2021 ONLSTA 6 at paras 117–32: “It is trite law that an in house corporate or government lawyer, or indeed an associate or partner within a private law firm, may have to choose between the direction or policy of the organization and the rules and requirements of the Law Society.” For a critique, see Martin, “Government Lawyers”, *supra* note 2 at 193.

²⁸ *FLSC Model Code*, *supra* note 6, r 3.1-2, commentary 7A: “An agreement for such services [under a limited scope retainer] does not exempt a lawyer from the duty to provide competent representation.”

²⁹ See e.g. *ibid*, r 3.3-2 on confidentiality (“[a] lawyer must not use or disclose a client’s or former client’s confidential information to the disadvantage of the client or former client, or for the benefit of the lawyer or a third person without the consent of the client or former client.”) and r 3.6-1, commentary 2 on referral fees etc. (“The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the lawyer of any hidden fees. No fee, extra fees, reward, costs, commission, interest, rebate, agency or forwarding allowance, or other compensation related to professional employment may be taken by the lawyer from anyone other than the client without full disclosure to and the consent of the client...”)

³⁰ *Ibid*, *supra* note 6, r 3.1-2, commentary 6.

encourage respect for the administration of justice.³¹ The commentary to the rule on competence recognizes that “[a] lawyer who is incompetent does the client a disservice, brings discredit to the profession and may bring the administration of justice into disrepute. In addition to damaging the lawyer’s own reputation and practice, incompetence may also injure the lawyer’s partners and associates.”³² Here the commentary to the rule on integrity also seems applicable by analogy to incompetence, which neither “reflect[s] favourably on the legal profession” nor “inspire[s] the confidence, respect and trust of clients and of the community”.³³ These are all additional indications why the client’s consent to incompetence is insufficient.

A range of case law demonstrates that lawyers cannot contract out of their professional duties, including the duty of competence. For example, a hearing panel considering the duty to charge reasonable fees held that “there is great value in reminding the profession that, even with a client’s ‘consent’ to do otherwise, 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.”³⁴ Similarly, clients’ express wish to forego independent legal advice will not absolve the lawyer of the responsibility to ensure that they obtain such advice.³⁵ The overall requirement of competence is not vitiated by a decision to take on

³¹ *Ibid*, r 5.6-1.

³² *Ibid*, r 3.1-2, commentary 14.

³³ *Ibid*, r 2.1-1, commentary 2.

³⁴ *Pham (Re)*, 2015 LSBC 14 at para 72. See similarly *Esau*, *supra* note 18 at 313: “The fact that the client had agreed to the [excessive] fee did not matter. It is a firm principle that a lawyer cannot contract out of a disciplinary standard for overcharging.” See also *Law Society of Upper Canada v Neinstein*, 2015 ONLSTA 5 at para 49 [*Neinstein*], quoting reasons given by Stinson J of the Superior Court of Justice: “counsel cannot contract out of their professional obligations, and that no settlement can be approved that requires them to do so”, aff’d 2015 ONSC 7909 (Div Ct).

³⁵ See *Law Society of Saskatchewan v Shirkey*, 2014 SKLSS 9 at para 19: “In failing to insist that his clients obtain independent legal advice, the Member bowed to their expressed desire to complete the agreement quickly and without the additional cost and inconvenience of attending upon separate lawyers. The Member acquiesced, knowing that the resulting agreement did not meet the requirements of the *Family Property Act* [SS 1997, c F-6.3].... The Hearing Committee notes that although it may sometimes be difficult to disagree with the strongly expressed wishes of a client, the role of a legal professional in providing sound guidance requires such vigor.” (The panel at para 17 distinguished this knowing and “deliberate” omission from an issue of competence stemming from ignorance: “Had the Member not been aware of the provisions of the *Family Property Act*, his failure to ensure that the parties each had independent legal advice could well be considered as a lack of competence.... However, ... Mr. Shirkey’s actions were deliberate.”)

too many files,³⁶ low legal aid rates,³⁷ or market pressure on fees.³⁸ Moreover, law societies have consistently held that a lawyer's heavy workload or inadequate funding and support staff do not excuse the violation of other professional duties, including the duty to maintain

³⁶ On workload specifically, see e.g. *Law Society of Alberta v McCall*, 2014 ABL 60 at para 7 (referring not just to a failure to serve the client but an attempt to mislead the client): "The Chair identified that it was no excuse that [the lawyer] had a heavy workload and identified that [the lawyer's] obligations extended beyond that workload and beyond any personal inconvenience." On funding specifically, see *Law Society of Upper Canada v Charles David Besant*, 2013 ONLSHP 76 at para 100 ("Throughout the hearing, the Lawyer often stated that his practice was very busy, that he had many other obligations and that "you can only do so much." A busy practice is not an excuse for work not done that amounts to professional misconduct. Each client is entitled to expect that his or her case receive competent legal attention. The Lawyer's preparation was inadequate, particularly given the serious allegations and the prospect of custodial sentences, and a busy practice is no excuse. If the Lawyer did not have time to adequately prepare, he could have declined to take on the cases."), var'd on other grounds, 2014 ONLSTA 50, penalty at 2015 ONLSTA 16 [*Besant Penalty*]. See also *Rehn*, *supra* note 26: "There is a remedy for "busy-ness" that is apt to (or becomes apt to) interfere with those obligations: refer the work elsewhere."

³⁷ See e.g. *Besant Penalty*, *supra* note 36 at para 6: "Mr. Besant [the lawyer] places significant blame on the inadequacies in Legal Aid funding for what transpired here. Nothing we say here diminishes the importance of robust funding to enable indigent criminal defendants to make full answer and defence. However, issues surrounding the adequacy of Legal Aid funding do not in any way relieve Mr. Besant of his obligation to defend his clients, including those represented under the Ontario Legal Aid Plan, competently and diligently. If he felt that he was unable to meet his obligation to provide competent representation within the constraints of Legal Aid funding, he ought to have declined to accept these retainers."

³⁸ See e.g. *Law Society of Ontario v Loder*, 2021 ONLSTH 66 at paras 62-66, 68, rejecting the lawyer's explanation that "the volume of his practice due to competition driving down fees prevented him from providing competent and ethical service." See also, though making a curious distinction between competence and diligence, *Whyte*, *supra* note 20 at para 52: "Title searches must be professionally and properly performed, regardless of the time and fee pressures which might enter into a practice".

proper records,³⁹ to adequately supervise an articling student,⁴⁰ to avoid abdicating functions to staff,⁴¹ or to cooperate with an investigation by the law society.⁴²

Similarly, the leading case on professional discipline of Crown prosecutors, *Krieger v Law Society of Alberta*, is explicit that the government cannot require or accept lower standards of its lawyers: “[i]t 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.”⁴³ The implicit – or even explicit – consent of the government as both

³⁹ *Law Society of Alberta v Fixler*, 2010 ABLS 35 at para 17: “The Hearing Committee ... considers accurate trust accounting to be fundamental to the Member’s conveyancing practice and does not accept a “too busy” excuse any more than a governing body for surgeons would accept that a surgeon was too busy to wash his hands or that the governing body of engineers would accept that an engineer would be too busy to keep proper notes of fundamental measurements.” See also *The Law Society of Manitoba v Doolan*, 2014 MBLS 7 [Doolan], aff’d 2016 MBCA 57: “It was implied that being too busy was somehow an excuse, or at least an explanation, for his failure to follow the rules. It was also implied that his failure to hire and train sufficient support staff was somehow an excuse, or at least an explanation, for his failure to follow the rules. At some point, individuals must accept responsibility for their own actions. These were conscious decisions made by Mr. Doolan, to accept and undertake this volume of work, and to make do, and not retain sufficient support staff to enable not only the required work, but also the required recordkeeping, to be done in an appropriate manner.... These charges, and the resulting convictions, are the result of the manner in which Mr. Doolan chose to organize and administer his office. They could have been avoided if he was prepared to hire and train additional staff in order to enable him to comply with the standards expected of professionals entrusted with trust monies. We accept that he had a large and busy practice. However, Mr. Doolan knew the rules in regard to the administration of trust monies, and what was expected of him. However, for reasons of convenience and expediency, he chose not to follow and comply with such rules and expectations.” On the issue of “choice” or control, see below note 69 and accompanying text.

⁴⁰ *Law Society of Ontario v Forte*, 2019 ONLSTH 9 at para 40: “The Lawyer’s unfamiliarity with social media, or the demands of his busy practice, do not excuse this conduct.”

⁴¹ *Law Society of Upper Canada v Cunningham-McBean*, 2010 ONLSHP 97 at para 62: “It is not an excuse to say that she was a young busy practitioner with a family law practice as well as a real estate and wills and estates practice.”, var’d on other grounds 2013 ONLSAP 11.

⁴² See e.g. *Law Society of Saskatchewan v McCullough*, 2011 SKLSS 2 at para 28: “The Member acknowledges that being busy is not a valid excuse for failing to respond to the Law Society.” See also *Law Society of Upper Canada v Henryson Emeka Nwakobi*, 2013 ONLSHP 140 at para 56: “He [the lawyer] also refers to a lack of resources or assistance but that would not relieve him of his obligations as a member of the Law Society.”

⁴³ *Krieger*, *supra* note 7 at para 50.

employer and client to these lower standards is irrelevant. While Krieger was specifically about the discipline of Crown prosecutors, this holding would apply equally to government lawyers.

C. US Perspectives – Under-Funded Public Defenders

While my focus in this article is on the Canadian context, a parallel concern has been identified in the US context of under-funded public defenders.⁴⁴ The *Model Rules of Professional Conduct* of the American Bar Association explicitly provide that “[a] lawyer’s work load must be controlled so that each matter can be handled competently.”⁴⁵ Moreover, a 2006 Formal Opinion by the ABA provides that “[t]he obligations of competence, diligence, and communication under the Rules apply equally to every lawyer. All lawyers, including public defenders, have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently.”⁴⁶

The uneasy consensus in the US context appears to be that an overworked public defender should meet their ethical obligations by declining new cases or withdrawing from current cases.⁴⁷ Declining is preferable, given that there is a duty to current clients but not to potential new clients.⁴⁸

⁴⁴ See e.g. Richard Klein, "Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant" (1988) 61:4 Temple L Rev 1171; Peter A Joy, "Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads" (2010) 75:3 Mo L Rev 771; Norman Lefstein, "Excessive Public Defense Workloads: Are ABA Standards for Criminal Justice Adequate" (2011) 38 Hastings Const LQ 949; Samantha Jaffre, "'It's Not You, It's Your Caseload': Using *Cronic* to Solve Indigent Defense Underfunding" (2018) 116:8 Michigan L Rev 1465.

⁴⁵ American Bar Association, *Model Rules of Professional Conduct* (Chicago: ABA, 2023), r 1.3, commentary 2, online: <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence/comment_on_rule_1_3/>.

⁴⁶ ABA Formal Op 06-441 [ABA Formal Opinion], as quoted in Amy F Kimpel, "Violent Videos: Criminal Defense in a Digital Age" (2021) 37:2 Ga St U L Rev 305 at 346, note 273. For a critique of 06-441 see Jessica Hafkin, "A Lawyer's Ethical Obligation to Refuse New Cases or to Withdraw from Existing Ones When Faced with Excessive Caseloads That Prevent Him from Providing Competent and Diligent Representation to Indigent Defendants" (2007) 20:3 Geo J Legal Ethics 657 at 663, 665.

⁴⁷ See e.g. ABA Formal Opinion, *supra* note 46; Hafkin, *supra* note 46; Heidi Reamer Anderson, "Funding *Gideon*'s Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest" (2011) 39:2 Hastings Const LQ 421.

⁴⁸ See e.g. ABA Formal Opinion, *supra* note 46; Joy, *supra* note 44 at 782-783.

A more powerful solution for overworked public defenders would rely on the constitutional right to counsel for the accused.⁴⁹ However, there is no apparent parallel Canadian constitutional basis to require adequate funding of Crown prosecutors or government lawyers – although, in the case of Crown prosecutors, the preamble to the *Canadian Victims Bill of Rights* asserts that “victims of crime have rights that are guaranteed by the *Canadian Charter of Rights and Freedoms*”.⁵⁰ An argument that prosecutorial independence requires financial security – as a parallel to judicial independence – would be novel.⁵¹ While an interesting argument could be made that the spirit of victims’ rights legislation requires adequate funding of Crown prosecutors, particularly given the supremacy provisions of the *Canadian Victims Bill of Rights* and its recognition in its preamble that “consideration of the rights of victims of crime is in the interest of the proper administration of justice”,⁵² there is little support for a such an argument in the actual text of such statutes.⁵³ Moreover, any such statutory right could be easily repealed. No parallel arguments would be feasible for government lawyers.

While the ABA Formal Opinion emphasizes competence (and diligence), being overworked as a public defender has been characterized by Heidi Reamer Anderson as a conflict of interest – both a client-client conflict (by having simultaneous obligations to more clients than a lawyer can provide adequate service to) and a client-lawyer conflict (“between the client’s interest in competent ... representation and the lawyer’s interest in self-preservation.... [T]he client has a significant interest in exposing his public defender’s unethical lack of competence and diligence while the public defender herself has just as significant of an interest in hiding those

⁴⁹ See e.g. Anderson, *supra* note 47 at 434-442. In the Canadian legal aid context, see Jennifer Bond, “The Cost of Canada’s Legal Aid Crisis: Breaching the Right to State-Funded Counsel within a Reasonable Time” (2012) 59:1 Crim LQ 28.

⁵⁰ See e.g. *Canadian Victims Bill of Rights* [Canadian Bill], preamble, being s 2 to *Victims Bill of Rights Act*, SC 2015, c 13. For a discussion of the potential *Charter* rights of victims, see e.g. Teagan Markin, “Victim Rights in Sentencing: An Examination of Victim Impact Statements” (2017) 22:1 Can Crim L Rev 95 at 98-99. Thanks to Elizabeth Matheson on this point.

⁵¹ See e.g. *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3 at 13, 150 DLR (4th) 577. Thanks to Benjamin Perrin for this suggestion. I do note that government under-funding of counsel to courts and of judicial law clerks may raise judicial independence issues.

⁵² See e.g. *Canadian Bill*, *supra* note 50, preamble. Thanks to Elizabeth Matheson on this point as well.

⁵³ See e.g. *Canadian Bill*, *supra* note 50, ss 21, 22; *Victims of Crime and Public Safety Act*, RSA 2000, c V-3; *Victims’ Bill of Rights*, 1995, SO 1995, c 6.

same unethical realities in order to continue to have a job”).⁵⁴ Anderson’s first type of conflict appears to be inapplicable in the Canadian context, as Crown prosecutors lack clients⁵⁵ and government lawyers provide legal services to the Crown as a single client. In contrast, Anderson’s second type of conflict – the conflict between the government’s interest in adequate service and the lawyer’s interest in keeping their job – would appear to apply. However, a competence analysis provides a clearer and more compelling analysis, as well as a more definitive answer, than a conflicts analysis, particularly because a client can, in some circumstances, consent to a lawyer acting where there is a conflict of interest.⁵⁶ The lawyer’s inability to provide competent service due to over-work or under-funding remains the core problem, one that under a competence analysis, the government cannot consent to as the employer or as the client.

D. A Counter-Argument: Competence is a Contextual Duty

A counter-argument would be that under-funded government lawyers and Crown prosecutors do not violate their duty of competence because competence is necessarily and appropriately an objective, yet contextual and situational, standard. Under this approach, competence should be evaluated for whatever level of funding is provided. For example, the rules of professional conduct require “a quality of service at least equal to that which lawyers generally expect of a competent lawyer in a like situation.”⁵⁷ Similarly, the commentary on competence and technology states that “[t]he required level of technological competence will depend on whether the use or understanding of technology is necessary to the nature and area of the

⁵⁴ Anderson, *supra* note 47 at 442-448, quotation is from 444 [citation omitted]. (Anderson uses the terms “current client conflict” and “personal interest conflict”.) See also Joy, *supra* note 44 at 780; Lefstein, *supra* note 44 at 959.

⁵⁵ See e.g. Alice Woolley & Amy Salzyn, *Understanding Lawyers’ Ethics in Canada*, 3d ed (Toronto: LexisNexis, 2023) at 483. (Now Justice Woolley of the Alberta Court of Appeal.)

⁵⁶ See above note 29.

⁵⁷ *FLSC Model Code*, *supra* note 6, r 3.1-2, commentary 2 [emphasis added]. See also e.g. *Fleischer c Brousseau*, 2018 QCCDBQ 17 at paras 64 [*Fleischer*] [citation omitted]: “The [Disciplinary] Council must intervene only where the standard of a reasonably competent attorney placed in the same situation as the accused would lead it to conclude that a serious error or fault has been committed, of such a nature that it is tantamount to an ethical breach”, *aff’d* 2019 QCTP 7, *aff’d* 2020 QCCS 856, leave to appeal to Qc CA refused 2020 QCCA 1651, leave to appeal to SCC refused 39746 (21 October 2021).

lawyer's practice and responsibilities and whether the relevant technology is reasonably available to the lawyer.”⁵⁸

However, the case law I have cited above is clear that contextual factors, such as workload and funding, do not reduce or otherwise modify the duty of competence.⁵⁹

E. Another Counter-Argument: Misconduct Always and Necessarily Requires Fault

According to Gavin MacKenzie, “[t]he Law Society at a minimum must always prove that a lawyer's conduct tended to bring discredit to the legal profession to support a finding of professional misconduct. This standard will generally, but not always, be met if the Law Society proves a breach of a rule of professional conduct. Such a finding will not be made in the absence of fault on the part of the lawyer.”⁶⁰ However, with respect, that proposition seems broader than the holdings that MacKenzie cites in support.⁶¹ In particular, the Appeal Panel in *Law Society of Upper Canada v Neinstein* held not only that “[o]ur jurisprudence has recognized instances

⁵⁸ *FLSC Model Code*, *supra* note 6, r 3.1-2, commentary 4B [emphasis added]. Contrast *Quebec Code*, *supra* note 6, art 21, which does not specifically qualify this aspect of competence: “[T]he knowledge and skills related to information technologies used within the scope of the lawyer's professional activities are part of the knowledge and skills that a lawyer develops and keeps up to date.”

⁵⁹ See above notes 36-38 and accompanying text.

⁶⁰ Gavin MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Toronto: Thomson Reuters Canada, 1993) (loose-leaf updated 2023, release 3) at para 26.7, citing *Neinstein*, *supra* note 34 at para 130 and *Law Society of Upper Canada v Mercy Dadebo*, 2009 ONLSHP 43 at paras 29-30 [MacKenzie].

⁶¹ *Neinstein*, *supra* note 34 at para 130: “Our jurisprudence has recognized instances in which the absence of any fault on the part of a lawyer prevents a finding of misconduct”; *Dadebo*, *supra* note 60 at para 29 is more general: “[P]rofessional misconduct is only intended to capture conduct that is properly stigmatized as such. So, to take an obvious example, if records are destroyed, through no fault of the licensee, and the licensee personally reconstructs or has these records reconstructed in a reasonable and timely fashion, it would be a misreading of the by-law to compel a finding of professional misconduct nonetheless.” (See also *Neinstein*, *supra* note 34 at paras 132, 134 [emphasis in original]: “[F]inding professional misconduct on the basis that a rule of professional conduct has been violated obviously requires consideration of the specific rule. There are important differences in the nature and/or degree of fault between different rules.... Rule 2.01(2) requires that a lawyer perform to the standard of a competent lawyer as defined. This rule requires a matter-specific inquiry into the “skills, attributes, and values” required by Rule 2.01(1).”) See also e.g. *Martin*, *Re*, 2005 LSBC 16 at para 154: “The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.”

in which the absence of any fault on the part of a lawyer prevents a finding of misconduct”, but also that “[t]here are important differences in the nature and/or degree of fault between different rules” and that the rule on competence “requires a matter-specific inquiry”.⁶² Moreover, the case law I have cited above seems to demand a minimum threshold of competence and takes a narrow view of circumstances beyond the control of the lawyer – and thus suggests a broad view of the fault of the lawyer.⁶³ Therefore, while it would be open for a government lawyer or Crown prosecutor to argue that a violation of the duty of competence due to under-funding should not constitute misconduct, the potential success of that argument is unclear.

As I will discuss below in Part 2, the under-funded Crown prosecutor or government lawyer must take particular steps in response to under-funding. Thus, even if a competence violation by such a lawyer was not itself sufficiently blameworthy for a finding of misconduct, a failure to recognize that the under-funding affected their ability to meet their duty of competence or a failure to take adequate and appropriate steps in the face of that under-funding could constitute misconduct.

F. The Prosecutorial Duty of Disclosure

While Crown prosecutors – like government lawyers – have a duty of competence, they also have a unique duty of disclosure. Indeed, competence includes compliance with the rules of professional conduct⁶⁴ and disclosure of evidence in criminal cases is a specific professional obligation of Crown prosecutors, not merely a legal obligation.⁶⁵ For example, the *Federation Model Code* provides that “[t]he prosecutor ... to the extent required by law and accepted practice, should make timely disclosure to defence counsel or directly to an unrepresented accused of all relevant and known facts and witnesses, whether tending to show guilt or innocence.”⁶⁶ The harm from a disclosure violation is not to the government’s legal interests, but rather to the fairness of the trial and “the ability of the accused to make full answer and defence” – not only as a principle of fundamental justice under section 7 of the *Canadian Charter of Rights and Freedoms* but also as “one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted”.⁶⁷ Such

⁶² Neinstein, *supra* note 34 at paras 130, 132.

⁶³ See above notes 36-38 and accompanying text.

⁶⁴ *FLSC Model Code*, *supra* note 6, r 3.1-1(g); see above note 19 and accompanying text.

⁶⁵ See above note 7.

⁶⁶ *FLSC Model Code*, *supra* note 6, r 5.1-3, commentary 1.

⁶⁷ *Stinchcombe*, *supra* note 7 at 336; *Canadian Charter of Rights and Freedoms*, Part I of the

violations may also damage public confidence in the administration of criminal justice. Thus, a Crown prosecutor who fails to make timely and complete disclosure may be liable to professional discipline. However, Iacobucci and Major JJ in *Krieger* emphasized that there is a threshold level of “intentional” blameworthiness or fault at which inadequate disclosure will be a violation of professional ethics: “[a] finding of professional misconduct must be based on an act or omission revealing an intentional departure from the fundamental duty to act in fairness”.⁶⁸ Therefore, inadequate disclosure due to underfunding appears less likely to constitute misconduct than a breach of competence due to underfunding. In parallel to what I mentioned above and will return to below in Part 3, the failure of an under-funded Crown prosecutor to recognize that they cannot meet their obligation of disclosure or their subsequent failure to take adequate and appropriate steps in the face of under-funding is different. This downstream failure could be sufficiently intentional and blameworthy to constitute misconduct.

G. Mitigation of Penalty

While under-funding is not a defence against professional violations of the duty of competence by Crown prosecutors and government lawyers, it may be a mitigating factor as to penalty. MacKenzie in his discussion of disciplinary penalties notes that “[n]either the fact that a lawyer has a heavy workload nor the fact that a lawyer relied on employees should be compelling mitigating factors, because both are within the lawyer’s control”.⁶⁹ At the same time, he notes that “the lawyer’s blameworthiness” is an important factor as to penalty.⁷⁰ Insofar as government lawyers and

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 7 [Charter].

⁶⁸ *Krieger*, *supra* note 43 at para 59, quoting with approval from Michel Proulx & David Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin, 2001) at 657 (now David Layton & Michel Proulx, *Ethics and Canadian Criminal Law*, 2d ed (Toronto: Irwin, 2015) at 617-618). See also *Fontaine c Lapointe*, 2011 QCCDBQ 101 at para 58, citing *Krieger*, *aff’d* 2013 QCTP 11 at paras 34-36: “[L]a règle suivant laquelle les manquements à l’obligation de divulgation constituent une violation de la déontologie juridique s’applique uniquement aux manquements à l’obligation de communication ou il est question de malhonnêteté ou de mauvaise foi”. (Unofficial translation: “[T]he rule according to which breaches of the duty of disclosure constitute a violation of legal ethics applies only to breaches of the duty of disclosure where there is a question of dishonesty or bad faith”).

⁶⁹ MacKenzie, *supra* note 60 at para 26.18. While MacKenzie cites only American authorities for this proposition, this passage was quoted with approval by the law society panel in *Doolan*, *supra* note 39.

⁷⁰ MacKenzie, *supra* note 60 at para 26.18: “Factors frequently weighed in assessing the

Crown prosecutors do not control their workload, being overworked may be less blameworthy for these lawyers than lawyers in private practice. In a recent decision regarding a Crown prosecutor who had improperly failed to discontinue a prosecution, the Hearing Committee of the Law Society of Saskatchewan explicitly noted in its analysis of penalty that “the Member’s office was understaffed.... He found himself struggling with complex cases, a high workload and no senior person in the office for support.”⁷¹ Penalty, as opposed to liability, may be an appropriate stage to recognize the intuitive unfairness of disciplining government lawyers or Crown prosecutors for practicing while under-funded.

III. WHAT THE UNDER-FUNDED GOVERNMENT LAWYER OR CROWN PROSECUTOR MUST DO

In Part 2, I considered why and how underfunding can cause a government lawyer to violate their duty of competence or cause a Crown prosecutor to violate their duties of competence or disclosure. What then must a lawyer do when they know or should know that they are in such a situation? In this Part, I explain why a lawyer must immediately and proactively inform the government of the problem, encourage the government to rectify the situation, refuse to accept new matters, and withdraw from existing matters if necessary. If the government fails to increase funding and purports to forbid refusal of new matters or withdrawal from existing matters, the lawyer must resign.

Competence is closely connected to withdrawal. As indicated above, clients are rightly “entitled to assume” that a lawyer is competent and so a lawyer – including a government lawyer – who cannot meet their duty of competence must inform the client as part of their professional duty of candour.⁷² While Crown prosecutors lack clients in the typical sense, the duty of candour similarly suggests that governments are rightly entitled to make the parallel assumption that the Crown prosecutors they employ can

seriousness of a lawyer's misconduct include the extent of injury, the lawyer's blameworthiness, and the penalties that have been imposed previously for similar misconduct.”

⁷¹ *Law Society of Saskatchewan v Clements*, 2022 SKLSS 1 at paras 30, 52. See also para 50, quoting from an agreed statement of facts: “The Member’s personal and work stress culminated in poor decision making and in the Member being overwhelmed by the work.” (Oddly, these factors were explicitly noted not in the reasons of the majority, which imposed a reprimand, but only in those of the dissent, which would have imposed the greater penalty of a one-month suspension.)

⁷² *FLSC Model Code*, *supra* note 6, r 3.1-2, commentary 1. See above note 26 and corresponding text.

meet their duty of competence until those lawyers inform them otherwise. Thus, firstly, the duty of candour requires that under-funded Crown prosecutors or government lawyers inform the government that under-funding is causing them to violate their duty of competence and to encourage the government to increase their funding to a level of adequacy. (In some circumstances, it may be that re-allocation of files among lawyers within an office can address discrete and file-specific under-funding.)⁷³

If the government declines to provide adequate funding, then the second step – to refuse new matters – is required by the duty of competence. This refusal is required because a lawyer not competent to handle a prospective matter must decline unless the client consents to involving a competent lawyer or becoming competent, both of which would presumably be precluded in an atmosphere of under-funding.⁷⁴

If refusing new matters is insufficient to allow the lawyer to meet their duty of competence with the funding available to them, the third step – to withdraw from existing matters – is required by the rule on mandatory withdrawal: “A lawyer must withdraw if ... the lawyer is not competent to continue to handle a matter.”⁷⁵

Where the government instructs the government lawyer to continue practicing with the problematic level of funding and purports to block the lawyer from refusing new matters or withdrawing from existing ones,⁷⁶ even after the lawyer has explained that they cannot provide competent service in those circumstances, the client is persisting in instructing the lawyer to violate their professional obligations. Thus, the lawyer’s obligatory withdrawal is triggered for two reasons: not only because “the lawyer is not competent to continue to handle a matter”, but also because the “client persists in instructing the lawyer to act contrary to professional ethics”.⁷⁷ Whether that withdrawal necessitates resignation depends partly on whether the lawyer is underfunded for a specific matter or matters, and can thus withdraw from those matters only, or is underfunded for most or all matters, in which case withdrawal will necessitate resignation.⁷⁸ Of course,

⁷³ Thanks to Eric Pierre Boucher on this point.

⁷⁴ *FLSC Model Code*, *supra* note 6, r 3.1-2, commentary 6.

⁷⁵ *Ibid*, r 3.7-7(c) [emphasis added]. See also *Quebec Code*, *supra* note 6, art 49(3).

⁷⁶ I note here that a manager or director may be able to re-allocate matters among their lawyers, but this is at best a short-term mitigation as opposed to a longer-term solution. Thanks to Charlie Feldman on this point.

⁷⁷ *FLSC Model Code*, *supra* note 6, rr 3.7-7 (b), (c). See also *Quebec Code*, *supra* note 6, arts 49(2), (3).

⁷⁸ On the relationship between withdrawal and resignation for government lawyers, which would also apply to Crown prosecutors, see Martin, “Government Lawyers”, *supra* note 2 at 198-199, citing at note 173 Sanderson, *supra* note 1 at 174 and

if the government responds to this situation by discharging the lawyer from all matters, the lawyer must withdraw completely and thus must resign.⁷⁹ Whatever the reason for withdrawal, and even where withdrawal is obligatory due to competence and the client's persistence, or both, the lawyer must provide the client with "reasonable notice."⁸⁰

Uncorrected under-funding likely does not, however, trigger the duty to report to the law society "any situation in which a lawyer's clients are likely to be materially prejudiced".⁸¹ While under-funding presumably means the interests of the government as client are "likely to be materially prejudiced", the duty does not apply where such a report would breach solicitor-client privilege.⁸² Given my analysis above, a report on under-funding would implicitly reveal the legal advice that the level of funding was inadequate.

For Crown prosecutors, even if the subrule on mandatory withdrawal in the face of persistent unethical client instructions is not triggered because Crown prosecutors lack a client, the subrule on mandatory withdrawal where the lawyer lacks competence is triggered. The Crown prosecutor may of course approach the under-funding problem by prioritizing some cases and withdrawing others, making this situation in that sense an exercise of prosecutorial discretion.⁸³ Where the superiors of the Crown prosecutors purport to block such exercise, resignation would appear unavoidable.

Thus, even if the violation of the duty of competence or disclosure is not wrongful enough to constitute professional misconduct, that violation

quoting *FLSC Model Code*, *supra* note 6, r 3.2-8, commentary 5: "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."

⁷⁹ *FLSC Model Code*, *supra* note 6, r 3.7-7 (a). See also *Quebec Code*, *supra* note 6, art 49(3).

⁸⁰ *FLSC Model Code*, *supra* note 6, r 3.7-1. See also *Quebec Code*, *supra* note 6, art 51.

⁸¹ *FLSC Model Code*, *supra* note 6, r 7.1-3(f). Thanks to Simon Wallace for raising this possibility. See similarly *Quebec Code*, *supra* note 6, art 134(7). Even if this duty was triggered, expecting lawyers to report their own client/employer would raise issues parallel to, if not more difficult than, reporting colleagues. See e.g. John Chapman, "Am I My Partner's Keeper? The Duty to Report a Colleague" (2013) 92:3 Can Bar Rev 611.

⁸² *FLSC Model Code*, *supra* note 6, r 7.1-3(f). See similarly *Quebec Code*, *supra* note 6, art 134(7). See e.g. *R v Cunningham*, 2010 SCC 10 at para 31.

⁸³ See *Krieger*, *supra* note 7 at para 46 [citations omitted]: "Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution...; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether...; and (e) the discretion to take control of a private prosecution."

triggers other duties, i.e. the duty of candour and potentially the duties of competence and withdrawal. The breach of these other duties may well be sufficiently blameworthy to constitute misconduct. That is, even if a government lawyer or Crown prosecutor cannot be disciplined for the initial breach due to under-funding, they may be disciplined for a breach of the subsequent duties triggered by that initial breach.

I readily acknowledge that this obligatory withdrawal and potential resignation only exacerbate the challenges facing any remaining government lawyers or Crown prosecutors. However, that unfortunate policy result is required by the rules of professional conduct as presently written and interpreted.

Similar considerations would apply to prospective government lawyers and Crown prosecutors who know or should know the funding that will be available to them is insufficient to fulfill the duty of competence. Such prospective lawyers must decline employment.⁸⁴

I emphasize here that in jurisdictions where government lawyers or Crown prosecutors are members of an association that bargains collectively, that association has an important – though bounded – role in circumstances where under-funding affects those lawyers' competence. The association can advocate for adequate funding during the collective bargaining process itself as well as advocate, privately and in public, for adequate funding.⁸⁵ The association can also use the grievance processes or other processes open to it to protect the employment of, and otherwise assist, lawyers who refuse to accept new matters or who withdraw from existing matters. It could even provide some degree of assistance in lawyers' dealings with the law society – as could the government as the employer.

IV. PROFESSIONAL RESPONSIBILITY OF UNDER-FUNDED LAWYERS' SUPERIORS

I have so far discussed how under-funding may cause a Crown prosecutor or government lawyer to violate their professional duties and what they must do in such a situation. In this Part, I consider the further question of whether the lawyers to whom an under-funded government lawyer or Crown prosecutor reports are also in violation of their professional duties. I emphasize here that the liability of a supervising lawyer does not displace the professional liability of the supervised lawyer.

⁸⁴ *FLSC Model Code*, *supra* note 6, r 3.1-2, commentaries 5-6.

⁸⁵ An association might also lobby for changes to the rules of professional conduct or to provincial legislation on the legal profession. In my view, such changes would be problematic for reasons that I will explain below.

Neither can a supervising lawyer assume the personal and individual professional obligations or disciplinary liability of the supervised lawyer.⁸⁶ While it is clear that a principal is responsible for the conduct of their articling student,⁸⁷ the answer is less explicit for other supervising lawyers, at least in the rules of professional conduct.

For lawyers licensed in Quebec, the *Code of Professional Conduct of Lawyers* appears to explicitly address this sort of situation: “A lawyer who exercises authority over another lawyer must ensure that the framework within which such other lawyer engages in his professional activities allows him to comply with his professional obligations.”⁸⁸ Indeed, the *Code* suggests that all lawyers, not just supervising lawyers, “must take reasonable measures” to see that lawyer co-workers meet their professional obligations.⁸⁹ Moreover, there is no indication that this duty applies only to the immediate supervisor. All lawyers with management responsibilities would risk professional liability if they purported to overrule any lawyer’s decision to decline new matters or to discipline any such lawyer for doing so. The ultimate supervisors of Crown prosecutors or government lawyers are the Director of Public Prosecutions or the Deputy Attorney General and the Attorney General. Thus, these senior officials themselves would appear to breach their professional obligation if even one lawyer within their service or ministry lacked sufficient funding to fulfill their duty of

⁸⁶ Martin, “Government Lawyers”, *supra* note 2 at 197: “There is no mechanism for a supervising lawyer — no matter how sincere and honourably intended — to absolve or relieve a subordinate lawyer of their complete professional responsibility and disciplinary liability to the law society for a failure to follow any of the rules of professional conduct,”

⁸⁷ *FLSC Model Code*, *supra* note 6, r 6.2-1, commentary 1: “[a] principal or supervising lawyer is responsible for the actions of students acting under his or her direction”. See e.g. *Law Society of Ontario v Forte*, 2019 ONLSTH 9. However, the articulated student remains liable to professional discipline for their own violations. See *FLSC Model Code*, *supra* note 6, r 1.1, definition of “lawyer”: “**“lawyer”** means a member of the Society and includes a law student registered in the Society’s pre-call training program”.

⁸⁸ *Quebec Code*, *supra* note 6, art 6. See also *Professional Code*, CQLR c C-26, s 188.2.1: “Every person who helps or, by encouragement, advice or consent, or by an authorization or order, otherwise than by soliciting or receiving professional services from a member of an order, leads a member of a professional order to contravene ... a provision of the code of ethics adopted under section 87 is guilty of an offence”.

⁸⁹ *Quebec Code*, *supra* note 6, art 5: “A lawyer must take reasonable measures to ensure that every person who collaborates with him when he engages in his professional activities and, where applicable, every firm within which he engages in such activities, complies with the *Act respecting the Barreau du Québec* (chapter B-1), the *Professional Code* (chapter C-26) and the regulations adopted thereunder.”

competence – even though those senior officials themselves lack direct control over funding for the ministry.

What about outside Quebec, where the rules of professional conduct lack a comparable provision on the disciplinary liability of supervising lawyers? A lawyer who adopts or conveys the advice of an incompetent lawyer, or relies on an incompetent lawyer, would be at a serious risk of violating their own duty of competence. Just as the individual lawyer is not absolved because their competence is effectively beyond their control, neither is a supervising lawyer – up to and including the Deputy Attorney General, the Director of Public Prosecutions, and the Attorney General. Indeed, for the Attorney General, such a duty dovetails with the concept of ministerial responsibility.⁹⁰ Similarly, the Deputy Attorney General may have a statutory duty to ensure competence.⁹¹ Moreover, purporting to refuse to allow a Crown prosecutor or government lawyer in this situation to refuse new matters or to withdraw from existing matters would appear to be, at the least, dishonourable.⁹²

⁹⁰ See generally Peter W Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed supplemented (Toronto: Thomson Reuters Canada, 2007) (loose-leaf updated 2023, release 1) at para 9.7. See also e.g. *Stopforth v Goyer* (1978), 20 OR (2d) 262, 87 DLR (3d) 373 (HCJ) (“It is a long-standing convention of parliamentary democracy and the doctrine of ministerial responsibility which it compasses that civil servants are to remain faceless to the public. Civil servants are responsible to their Ministers. Ministers, as elected officials, are responsible to the public.”), rev’d on other grounds 23 OR (2d) 696, 97 DLR (3d) 369 (CA) (“Assuming the trial Judge could take judicial notice of such a convention as a viable one, it does not seem to me it can be permitted the effect of either enlarging or abridging the law of defamation.”)

⁹¹ See e.g. *PSOA*, *supra* note 14, s 29(3): “Deputy ministers shall promote effective, non-partisan, professional, ethical and competent public service by public servants.” Under-funded Crown prosecutors themselves may also, for these reasons beyond their effective influence or control, arguably be violating their oaths of office. See e.g. *Crown Attorneys Act*, RSO 1990, c C.49, s 8 [emphasis added]: “I swear (*or affirm*) that I will truly and faithfully, according to the best of my skill and ability, execute the duties, powers and trusts of Crown Attorney (*or assistant Crown Attorney*) without favour or affection to any party”. Thanks to a reviewer on this point.

⁹² See e.g. *FLSC Model Code*, *supra* note 6 rr 2.1-1 (“A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.”) See also *Quebec Code*, *supra* note 6, arts 4 (“A lawyer must act with honour, dignity, integrity, respect, moderation and courtesy.”), 129 (“A lawyer must contribute to preserving the honour, dignity and reputation of his profession and to maintaining the public’s confidence in the profession”).

V. REFLECTIONS AND CONCLUSIONS

In this Part, I conclude by reflecting on the implications of my legal analysis in the previous Parts.

Under-funding may cause government lawyers and Crown prosecutors to violate their professional duties. In such a situation, these lawyers must promptly inform the government and, if the government fails to rectify the situation (whether by providing adequate funding or allowing the lawyer to refuse new matters and withdraw from existing matters), the rule on obligatory withdrawal is triggered and resignation is likely required. Their supervising lawyers, up to and including the Deputy Attorney General, the Director of Public Prosecutions, and the Attorney General, share these obligations. Under-funding may mitigate the penalty for competence violations but will not be a defence, although it might be a defence to disclosure violations. The failure to recognize under-funding and its negative effects on the duties of competence or disclosure, or the failure to take appropriate steps in the face of that under-funding and those effects, are the higher disciplinary risks than the immediate consequences of the under-funding itself. That is, while the initial competence violation may not be sufficiently blameworthy, subsequent failures to fulfill the duties of candour, competence, and withdrawal may well be.

I explicitly acknowledge two important caveats to my analysis. One caveat involves lawyers for the federal government and federal Crown prosecutors. Insofar as those lawyers can practice law without being a member of any provincial or territorial law society, any such unlicensed employees are immune to law society discipline.⁹³ The second caveat is that the regulatory and disciplinary jurisdiction of the law societies is delegated to them by provincial and territorial statutes. Thus, while the meaningful solution to this problem would be for governments to adequately fund their lawyers, a provincial or territorial government could conceivably propose that the corresponding legislation be amended to narrow, or even eliminate, regulatory and disciplinary powers of the law society over government lawyers and Crown prosecutors. While my focus here is not on the US context, I do note the non-solution applied to overworked public defenders in states such as Florida: to prohibit courts from allowing public defenders to withdraw “based solely upon [the] inadequacy of funding or excess workload”.⁹⁴ In the Canadian context, a provincial or territorial

⁹³ Andrew Flavelle Martin, “The Implications of Federalism for the Regulation of Federal Government Lawyers” (2020) 43:1 Dal LJ 363 at 380 [Martin, “Federalism”].

⁹⁴ Fla Stat § 27.5303(1)(d) (2009), as discussed e.g. in Anderson, *supra* note 47 at 429.

legislature could amend legislation on the legal profession to provide either that government lawyers or Crown prosecutors do not breach their professional obligations by practicing while under-funded or that the law society shall not discipline such lawyers because of such under-funding. It is unclear that there would be a viable constitutional challenge to such a provision.⁹⁵ While, with regard to Crown prosecutors, such a provision could arguably infringe section 7 of the *Canadian Charter of Rights and Freedoms* and the principle of fundamental justice of “commitment to the client’s cause”,⁹⁶ such an infringement may well be justifiable under section 1 of the *Charter*⁹⁷ – particularly given judicial deference to spending decisions.⁹⁸ In contrast, section 7 would not be engaged by the under-funding of government lawyers.

A. The “Should” and “Would” Questions

Subject to these two caveats, law societies could, strictly as a matter of law and principle, discipline government lawyers or Crown prosecutors for a violation of the professional duty of competence stemming solely from under-funding, or for a failure to comply with the rules on declining new matters or obligatory withdrawal from existing matters, as triggered by under-funding. But would law societies do so? More importantly, should they do so?

Assuming that those breaches were serious enough to support a finding of professional misconduct – for example, in the British Columbia case law, “a marked departure”, as opposed to a mere or technical departure⁹⁹ – it is

430. See also *Public Defender, 11th Jud Circuit v State*, 115 So3d 261 at 279-282 (Fla 2013), rejecting a constitutional challenge to this prohibition on the basis of the right to effective assistance by counsel, yet holding at 282 that “the statute should not be applied to preclude a public defender from filing a motion to withdraw based on excessive caseload or underfunding that would result in ineffective representation of indigent defendants nor to preclude a trial court from granting a motion to withdraw under those circumstances.”

⁹⁵ But see above notes 50 and 52 and accompanying text.

⁹⁶ *Charter*, *supra* note 67, s 7. On this principle of fundamental justice, see *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7 at para 80, Cromwell J for the majority.

⁹⁷ On the possibility of a section 7 infringement being justified under section 7, see Hamish Stewart, “Bedford and the Structure of Section 7” (2015) 60:3 McGill LJ 575 at 589; *Canada (Attorney General) v Bedford*, 2013 SCC 72.

⁹⁸ See e.g. *Ontario v Criminal Lawyers’ Association of Ontario*, 2013 SCC 43 at paras 81-84 [Ontario v CLA].

⁹⁹ See e.g. *Foo v Law Society of British Columbia*, 2017 BCCA 151 at paras 52-53. See also e.g. *Fleischer*, *supra* note 38 at paras 59-60 [citations omitted, emphasis added]: “When accusing a professional of failing to respect a standard or duty of care in the execution of his mandate, unless the applicable standard is specifically codified in the applicable

not obvious that law societies should refrain from exercising their disciplinary jurisdiction based on considerations of fairness. Granted, it is unusual for law societies to discipline lawyers for breaches of the duty of competence.¹⁰⁰ It is also uncommon for law societies to discipline government lawyers or Crown prosecutors.¹⁰¹ However, incompetent lawyers can potentially cause great harm to clients, regardless of how sympathetic the causes of that incompetence are. Furthermore, incompetence by government lawyers and Crown prosecutors can do great harm to the public, as well as to the public interest and the public confidence in the legal profession. Disclosure in criminal cases is likewise critically important and shortcomings can cause not only real harm but the appearance of unfairness. Professional discipline is an especially blunt tool – but it may be the only meaningful tool that law societies can use.

The determinative question is whether making such disciplinary proceedings a regulatory priority would further the public interest. It is widely accepted that “[t]he purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.”¹⁰² Indeed, the Appeal Panel of the Ontario Law Society Tribunal has recognized that the rule of professional conduct on prosecutors applies to law society discipline counsel and has emphasized “the special role – and responsibilities – of the Law Society as a prosecutor acting in the public interest”.¹⁰³ At the same time, pursuant to Harry Arthurs’ concept of “ethical economy”, law societies presumably prioritize disciplinary choices that offer the most benefit and the least risk

legislation, it too must be proven.... In addition, once the standard is proven, it must also be demonstrated that the accused’s conduct constitutes a *marked departure* from that standard of care, i.e. one that is substantial enough to constitute an ethical breach.”

¹⁰⁰ Salyzyn, *supra* note 16 at 504-508.

¹⁰¹ See e.g. Dodek, *supra* note 1 at 31-32: “When we examine the regulation of Government lawyers, we are struck with a paradox. Despite their high percentage in the Canadian legal profession, it is rare for government lawyers to be subject to law society discipline.” See also Nick Kaschuk, “Who Will Prosecute the Prosecutors? On the Need for Our Law Societies to Discipline Crown Attorneys, Failing Crown Culture, and Wrongful Convictions” (2002) 70:4 Crim LQ 529 esp at 535: “it does not appear that Crown Attorneys are being investigated or disciplined in any way close to the same way that private counsel / private law firms are being investigated and disciplined.” For a qualitative analysis of this case law, see Andrew Flavelle Martin, “Twenty Years After *Krieger v Law Society of Alberta*: Law Society Discipline of Crown Prosecutors and Government Lawyers” (2023) 61:1 Alta L Rev 37.

¹⁰² MacKenzie, *supra* note 60 at para 26.1.

¹⁰³ *Law Society of Upper Canada v DeMerchant*, 2017 ONLSTA 5 at paras 36-37. Thank you to Owen Minns for bringing this case to my attention.

in terms of “public goodwill” and “professional solidarity”.¹⁰⁴ Disciplining under-funded government lawyers and Crown prosecutors would not seem to provide these benefits. Professional misconduct proceedings against under-funded government lawyers or Crown prosecutors may be necessary and appropriate responses in the short- and medium-term to specific incidents, but such proceedings ultimately seem a weak and indirect tool to rectify the systemic under-funding situation in the long-term. Discipline – successful or merely attempted – of any individual government lawyer or Crown prosecutor would have little if any positive impact on the overall situation. Indeed, such proceedings would presumably encourage government lawyers and Crown prosecutors to withdraw and resign, which would only exacerbate the situation.

Insofar as under-funding is a major systemic and long-term problem, law societies would likely be more effective by engaging with governments directly – not to negotiate resources but to ensure that governments are aware of the professional risks to Crown prosecutors and government lawyers. Such engagement would be consistent with the statutory mandate of law societies. Again, the difficulty is that the professional risks accrue to the lawyers themselves, not the governments that determine and provide their funding. Governments may be willing to accept those risks and any corresponding public fallout.

B. What Now – or So What?

Put simply, disciplining government lawyers or Crown prosecutors for practicing while under-funded will not solve that under-funding.¹⁰⁵ No law society will rush to discipline all government lawyers or Crown prosecutors for whom under-funding is the cause of violations of legal ethics, for the reasons I have discussed. I emphasize, however, that these practical realities do not make my analysis meaningless. Indeed, none of these policy or practical considerations negate the uncomfortable but correct answer as a matter of law. More generally, the fact that governments are demonstrably impeding the ability of their lawyers and of Crown prosecutors to meet their professional obligations (if they are indeed doing so) should aid stakeholders in exerting private pressure or public pressure, or both, for governments to rectify the situation. Moreover, nothing in my analysis

¹⁰⁴ See e.g. Harry Arthurs, “Why Canadian Law Schools Do Not Teach Legal Ethics” in Kim Economides, ed, *Ethical Challenges to Legal Education and Conduct* (Oxford: Hart, 1998) 105 at 112. From this premise, Arthurs argues at 112 that discipline will focus on “clear dishonesty (especially in regard to clients’ funds) and subversion of the profession’s regulatory processes.”

¹⁰⁵ In the US context of public defenders, see e.g. Hafkin, *supra* note 46 at 663, 665.

absolves governments from a moral, political, or public interest obligation – or any existing legal obligation – to adequately resource their lawyers and Crown prosecutors.¹⁰⁶ Neither does my analysis mean that this is the only under-funding problem in the justice system or that it should necessarily take priority over other under-funding problems.

Neither does it raise separation-of-powers concerns, such that the law society would be illegitimately dictating public spending on the administration of justice.¹⁰⁷ It is for governments as employers to set their funding of Crown prosecutors and government lawyers and for law societies as regulators to determine whether lawyers practicing under that level of funding are meeting their professional obligations. The law society would simply be fulfilling its statutory mandate to regulate the legal profession in the public interest. The larger ramifications do not change that statutory mandate or relieve the law society of that mandate.

Instead, my analysis simply establishes that, as a question of professional regulation, government lawyers and Crown prosecutors are accountable to the law society if they are under-funded and that under-funding negatively affects their professional duties – or at least for their failure to recognize the under-funding and take appropriate steps. Government intransigence or indifference does not absolve government lawyers or Crown prosecutors of their professional responsibilities and does not preclude regulatory action in the public interest. Under-funded government lawyers remain unavoidably and properly liable to professional discipline under current law, though under-funding may mitigate the corresponding penalty.

To the extent that this result appears unfair or unreasonable or even absurd, the result does not automatically or even necessarily mean that the analysis is flawed. Instead, those potential characteristics demonstrate that the rules of professional conduct do not adequately address the particular realities and challenges of government lawyering – and do not necessarily capture the complexity of legal ethics or public service.¹⁰⁸ While under-

¹⁰⁶ See above note 53 and accompanying text.

¹⁰⁷ Contrast here separation of powers concerns where courts purport to set the compensation for amicus, “absent statutory authority”: *Ontario v CLA*, *supra* note 98 at paras 81-84. Law societies exercise executive functions with explicitly delegated statutory authority.

¹⁰⁸ Thanks to Jacob Bakan for this insight. See generally Martin, “Government Lawyers”, *supra* note 2. See also *FLSC Model Code*, *supra* note 6, Preface at 6: “Some circumstances that raise ethical considerations may be sufficiently unique that the guidance in a rule or commentary may not answer the issue or provide the required direction. In such cases, lawyers should consult with the Law Society, senior practitioners or the courts for guidance.”

funding harms many stakeholders, the legal ethics harms of under-funding accrue to government lawyers and Crown prosecutors, not to the government as the employer – although disciplinary violations by those lawyers may reflect poorly on the government. The unfairness of the situation nonetheless does not change the result as a matter of law. Moreover, to continue in public service despite under-funding or other adversity is an intuitively honourable choice, even if it is the wrong choice as a question of law. Under-funding puts government lawyers and Crown prosecutors in a seemingly impossible position. They should, nonetheless, be conscious and aware of their vulnerability to professional discipline for factors outside of their effective control and their response to such factors.

Despite any unfairness or absurdity in the present state of the law, however, it is not clear that the solution is to lower the professional expectations and obligations of lawyers. Law societies could conceivably amend their rules of professional conduct to provide that a government lawyer or Crown prosecutor does not violate their duty of competence (or other duties) when a shortcoming is solely or primarily due to under-funding. However, it is difficult to imagine a conceptually principled basis for such a change for government lawyers and Crown prosecutors alone, as opposed to other public-sector lawyers, in-house counsel generally, or all lawyers. In other words, why should federal and provincial governments have a special exemption for funding their lawyers and Crown prosecutors? While all governments have a “duty to act in the best interests of society as a whole, and [an] obligation to spread limited resources among competing groups with equally valid claims to its assistance”,¹⁰⁹ such a duty does not justify a double standard.¹¹⁰ If neither the legal aid rate – also set by the government or its delegates – nor the market price for particular legal services relieves a lawyer from the duty of competence,¹¹¹ despite being outside the control of the individual lawyer (if not the collective profession), it is not clear why government funding considerations should relieve government lawyers or Crown prosecutors from that duty of competence.

The most practical and meaningful result of my analysis is that under-funding should not be accepted as a legally viable defence against allegations of professional misconduct by Crown prosecutors or government lawyers, at least as it relates to the duty of competence if not

¹⁰⁹ *Professional Institute of the Public Service of Canada v Canada (Attorney General)*, 2012 SCC 71 at para 127, Rothstein J for the Court, quoting with approval from *Sagharian (Litigation Guardian of) v Ontario (Minister of Education)*, 2008 ONCA 411 at paras 47-49.

¹¹⁰ Although federalism effectively provides this double standard for the federal government: Martin, “Federalism”, *supra* note 93.

¹¹¹ See above notes 37-38 and accompanying text.

the duty of disclosure. However, under-funding may well be a mitigating factor in the determination of the appropriate penalty.

I emphasize that while the professional obligations of government lawyers should be interpreted consistently with legislation on the public service, in the absence of such clashes with that legislation, professional obligations should not be “torqued” to avoid the consequences of those obligations.¹¹² To exempt government lawyers or Crown prosecutors from their duties of competence insofar as such duties are affected by government spending decisions would be a clear instance of such torquing. If any such torquing is considered truly necessary, it should be done explicitly and transparently through legislation that redefines or creates an exception to the duty of competence.

Moreover, allowing lawyers to contract out of their professional obligations when compliance is outside their meaningful control would have serious consequences. It is not clear where a line should be drawn. A greater rethinking of the rules of professional conduct would be necessary. It may be that an absolute minimum threshold for competence, applied as a matter of absolute liability, is integral to maintaining law as a self-regulated profession in which the public – and governments and legislatures – have confidence.

Ultimately, if there is a disconnect between the actual level of funding of government lawyers and Crown prosecutors and the level of funding required by the professional duty of competence, the better solution is for governments to increase that funding rather than for law societies to effectively lower their expectations of competence. Indeed, adequate funding is the only apparent long-term solution.

¹¹² See above note 8 and accompanying text.