Role Call: Can a Backbench Legislator Practice as a Criminal Defence Lawyer? A Legal Ethics Analysis

ANDREW FLAVELLE MARTIN* & BRANDON TRASK**

ABSTRACT

Legislators come from a range of backgrounds. Many legislators happen to be lawyers. Parliamentary rules typically allow legislators who are not members of Cabinet to practice a profession part-time. However, the part-time practice of law poses special legal ethics challenges. In this article, we consider the legal ethics issues that arise when a backbench legislator of the governing party practices criminal defence law part-time. We argue that such a dual role engages three serious, unavoidable, and perhaps even unresolvable legal ethics issues. The first issue is the time constraints imposed

* Assistant Professor, Schulich School of Law, Dalhousie University.

** Assistant Professor, Faculty of Law, University of Manitoba.

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by outside interests. The second issue is conflicts of interest, specifically the risk that the legislator-lawyer may favour their political future over their clients' interests by soft-peddling their advocacy to avoid embarrassing the government. The third issue is the duty to encourage respect for the administration of justice, i.e. the risk that Crown prosecutors may be, or perceived to be, pressured to give lenient treatment to the legislator-lawyer's clients due to the possibility of retaliation. Thus, we recommend that legislators avoid this situation and law societies actively consider these issues.

I. INTRODUCTION

In October 2023, Mark Wasyliw was re-elected in the Manitoba election, moving from the opposition to the government backbench after his party won a majority. Wasyliw, who practiced criminal defence law while serving as an opposition MLA, announced that he would continue his practice despite having indicated during the campaign that he would wind it down after the election – ostensibly because his exclusion from Cabinet left him with "a lot of time on [his] hands".[1]

These circumstances are unusual and perhaps even unique. While some opposition legislators have practiced criminal law – like Wasyliw himself did before the 2023 election – different issues arise when government-side backbench legislators do so. While we cannot rule out the possibility that some lawyer-legislators have done so at some point in the long and rich history of Canada, they have not been addressed in Canadian media coverage or case law or legal ethics literature.

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1 Ian Froese, "MLA 'more than a full-time job,' Manitoba premier says, after caucus member decides to stay on as lawyer" *CBC News* (24 October 2023), online: <https://www.cbc.ca/news/canada/manitoba/mla-more-than-full-time-job-mark-wasyliw-lawyer-1.7006444>.

Can and should a political career and a legal practice overlap? In other words, should elected politicians practice law? The Canadian legal literature on legal ethics for lawyer-politicians is limited and focuses primarily on how the rules of professional conduct might apply to politicians who happen to be non-practicing lawyers.[2] While there is some literature on legal ethics for the Minister of Justice and Attorney General, that literature focuses on how that unique role bridges the role of politician and the role of chief law officer of the Crown.[3] Thus, as it happens, none of this literature has yet addressed the particular and perhaps peculiar issue of a legislator of the governing party who engages in the private practice of law, specifically criminal defence law, on a part-time basis.[4] Therefore, in this article, we aim to begin that academic discussion and reflection. We do so partly from first principles, but also by considering legislation, case law, and rules of professional conduct from jurisdictions across Canada. While we do not presume to

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2 See e.g. Andrew Flavelle Martin, "Legal Ethics versus Political Practices: The Application of the Rules of Professional Conduct to Lawyer-Politicians" (2012) 91:1 Can Bar Rev 1; Andrew Flavelle Martin, "Consequences for Broken Political Promises: Lawyer-Politicians and the Rules of Professional Conduct" (2016) 10:2 JPPL 337; Andrew Flavelle Martin, "From Attorney General to Backbencher or Opposition Legislator: The Lawyer's Continuing Duty of Confidentiality to the Former Client" (2021) 43:2 Man LJ 247.

3 See e.g. Andrew Flavelle Martin, "The Lawyer's Professional Duty to Encourage Respect for – And to Improve – the Administration of Justice: Lessons from Failures by Attorneys General" (2023) 54:2 Ottawa L Rev 247 [Martin 2023]; Andrew Flavelle Martin, "The Premier Should Not Also Be the Attorney General: *Roncarelli v Duplessis* Revisited as a Cautionary Tale in Legal Ethics and Professionalism" (2021) 44:3 Man LJ 155; Andrew Flavelle Martin, "The Non-Lawyer Attorney General: Problems and Solutions" (2021) 72 UNBLJ 257; Brent Cotter, "The Prime Minister v the Chief Justice of Canada: The Attorney General's Failure of Responsibility" (2015) 18 Leg Ethics 73. See also W Brent Cotter, "Ian Scott: Renaissance Man, Consummate Advocate, Attorney General Extraordinaire" in Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer* (Vancouver: UBC Press, 2015) 202.

4 The closest is likely on whether a law society investigating a lawyer's practice can demand records of politically sensitive conversations. See Andrew Flavelle Martin, "Comment on *Law Society of Ontario v Ghamari*" (2022) 16:3 JPPL 735.

provide the last word, we can certainly provide a starting point for discussion.

Our analysis here is inspired by the particular situation in which Wasyliw finds himself, but our goal is not to accuse or attack him or to promote or oppose him or any other politician of any political party. Instead, our goal is to provide a legal ethics analysis of this type of situation for the benefit of other lawyer-legislators who may find themselves in similar circumstances now or in the future, as well as for other lawyers generally and for law societies as regulators. It was not unreasonable for Wasyliw to assume or determine that his chosen practice does not raise ethical issues – particularly because ethics codes for legislators do not seem to preclude such a practice, and indeed often appear to allow or even encourage legislators to maintain their professional practices, but most of all because the Law Society of Manitoba, as Wasyliw's regulator, appears to have no concerns.[5]

On closer examination and analysis, we argue that there are important differences between practicing criminal defence law as an opposition legislator and doing so as a backbench legislator of the governing party. We suggest that the latter situation raises potential legal ethics issues that should be considered not only by Canadian law societies but also by all lawyers in politics or considering entering politics. If law societies should choose not to act, then lawyers in these situations will have to rely on their own calculus. If nothing else, we aim to assist with that calculus here. Moreover, there is always value in politicians better understanding lawyers and

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5 Ian Froese, "Questions of conflict, time management arise as Manitoba government MLA juggles work as politician, lawyer" *CBC News* (27 October 2023), online: <https://www.cbc.ca/news/canada/manitoba/mark-wasyliw-conflict-of-interest-time-management-lawyer-mla-1.7009314> [Froese], quoting Leah Kosokowsky, Chief Executive Officer, Law Society of Manitoba: "When we look at conflicts of interest, we're merely looking at a lawyer's obligations to comply with our code of professional conduct, can they maintain their clients' confidentiality and can they maintain their duty of loyalty to a client? .... By generally sitting as an MLA and sitting on the backbench, we don't see that as a conflict of interest."

in lawyers better understanding politicians – particularly those who are both lawyers and politicians.

We argue that a backbench legislator who practices criminal defence law faces at least three legal ethics issues. First, like any legislator, their political role may leave insufficient time for the competent practice of law.[6] However, a backbencher faces two additional issues. The first additional issue is that they may face a conflict of interest where their personal political ambitions pressure them to "soft-peddle" advocacy for their clients that might embarrass the government.[7] The second additional issue is that such a lawyer may also breach their duty to encourage public respect for the administration of justice if they are perceived as exerting undue influence on Crown prosecutors or their clients are perceived as obtaining undue leniency from those prosecutors – or both.[8] Thus, with great respect, we disagree with the apparent view of the Law Society of Manitoba that the only concerns are loyalty to the client and conflicts of interest – and that merely practicing criminal defence law as a backbencher does not necessarily constitute a conflict of interest.[9]

We begin, however, by noting that such a dual role does not appear problematic as a matter of parliamentary law and ethics. Ethics codes – whether legislated or otherwise – for legislators typically prohibit members of Cabinet from practicing a profession, often with limited exceptions.[10] However, such codes typically do not specifically prohibit the

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6 See e.g. Froese, *supra* note 5.

7 See e.g. *ibid*, quoting Andrew Flavelle Martin.

8 See e.g. *ibid*, quoting Andrew Flavelle Martin.

9 See e.g. *ibid*, quoting Leah Kosokowsky, Chief Executive Officer, Law Society of Manitoba: "When we look at conflicts of interest, we're merely looking at a lawyer's obligations to comply with our code of professional conduct, can they maintain their clients' confidentiality and can they maintain their duty of loyalty to a client? .... By generally sitting as an MLA and sitting on the backbench, we don't see that as a conflict of interest."

10 See e.g. *The Conflict of Interest (Members and Ministers) Act*, CCSM c C171, ss 12-13 [Manitoba *Conflict of Interest Act*].

practice of a profession by legislators who are not members of Cabinet, although there may be more general rules in those codes that such a legislator could violate.[11] Indeed, the relevant legislation in some jurisdictions explicitly provides that it does not prohibit the practice of a profession by legislators who are not in Cabinet,[12] subject sometimes to the caveat that the legislator otherwise fulfills its requirements and their duties.[13] The Ontario *Members' Integrity Act* even explicitly provides that it does not prohibit the payment of legislators who are not in Cabinet under the provincial legal aid regime.[14] Given that a large component of legal aid involves the practice of criminal defence, it thus seems clear that legislators contemplated – and did not prohibit – members practicing criminal defence law. The Ontario *Members' Integrity Act* goes even further by stating in its preamble that "[t]he Assembly as a whole can represent the people of Ontario most effectively if its members have experience and knowledge in relation to many aspects of life in Ontario and if they can continue to be active in their own communities, whether in business, in the practice of a profession or otherwise".[15]

While these statutes more generally prohibit legislators from acting where there is a conflict of interest, i.e. "when the member exercises an official power, duty or function that provides an opportunity to further their private interests or

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11 See e.g. *ibid*, ss 2-4.

12 *Members' Integrity Act, 1994*, SO 1994, c 38, s 9(a) [*Members' Integrity Act*].

13 *House of Assembly Accountability, Integrity and Administration Act*, SNL 2007, c H-10.1, s 13(8); *Conflict of Interest Act*, RSPEI 1988, c C-17.1, s 16(a) [PEI *COI Act*].

14 *Members' Integrity Act*, *supra* note 12, s 9(b). See also e.g. *Members' Conflict of Interest Regulations, 2022*, RRS c M-11.11, Reg 2, s 3(j) (legal aid exception to the prohibition against members contracting with government in *Members' Conflict of Interest Act*, SS 1998, c M-11.11, s 15); *The Legislative Assembly Act*, CCSM c L110, s 17(1)(f) (legal aid exception); PEI *COI Act*, *supra* note 13, s 16(b): "Nothing in this Act prohibits a member who is not a Minister from… (b) receiving fees for providing professional services under any legal aid, medical, dental, health, or social services program provided by the province."

15 *Members' Integrity Act*, *supra* note 12, preamble.

those of their family or to improperly further another person's private interests",[16] with respect, it is questionable whether a backbencher exercises any powers or duties or functions that could further their clients' interests. Members of the government caucus may well have access to sensitive information about legislative and law-enforcement priorities. Sharing such information with their clients would be contrary to both parliamentary ethics[17] and legal ethics.[18] Like

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16 *Manitoba Conflict of Interest Act*, *supra* note 10, s 2. Such conduct may also be prohibited as a matter of legal ethics. See Law Society of Saskatchewan, *Code of Professional Conduct* (Regina: LSS, 2012, last amended 2023), online: <www.lawsociety.sk.ca> [Saskatchewan *Code*], r 7.4-1, commentary 6: "Subject to any special rules applicable to a particular public office, a lawyer holding such office who sees the possibility of a conflict of interest should declare such interest at the earliest opportunity and take no part in any consideration, discussion or vote with respect to the matter in question." See also *Code of Professional Conduct of Lawyers*, CQLR c B-1, r 3.1, art 78: "A lawyer who occupies a public office must avoid placing himself in a situation of conflict between his personal interests and the obligations of his office. Thus, he must not, in particular: (1) take advantage of his office in order to obtain or attempt to obtain an advantage for himself or for any other person.... [or] (3) accept an advantage from any person when he knows or should know that the advantage has been granted to him for the purpose of influencing his decision as the holder of a public office."

17 See e.g. Manitoba *Conflict of Interest Act*, *supra* note 10, s 4: "A member must not use or communicate information that is obtained in their position as a member and that is not available to the public to further or seek to further the member's private interests or those of their family or to improperly further or seek to further another person's private interests."

18 See e.g. Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2009, last amended October 2022), online: <flsc.ca> [*FLSC Model Code*], r 3.2-7: "A lawyer must never: a) knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct. b) do or omit to do anything that the lawyer ought to know assists in or encourages any dishonesty, fraud, crime, or illegal conduct by a client or others, or c) instruct a client or others on how to violate the law and avoid punishment." See also Saskatchewan *Code*, *supra* note 16, r 7.4-1, commentaries 4 ("A lawyer who holds public office must not allow personal or other interests to conflict with the proper discharge of official duties. A lawyer holding part-time public office must not accept any private legal business where duty to the client will or may conflict with official duties. If some unforeseen conflict arises, the lawyer should terminate the professional relationship, explaining to the client that official duties must prevail.") and 9 ("a lawyer who has acquired confidential information by virtue of holding public office should keep such

powers or duties or functions, however, a backbencher would likely have access to relatively little such information compared to a Cabinet member. If a backbencher did obtain confidential information relevant to their client matters, they would presumably have to withdraw from those matters (or, in the case of potential clients, decline those matters).[19]

It should be noted, however, that these statutes do not consider legislators who act as legislative or parliamentary assistants to ministers to be members of Cabinet.[20] Thus a legislative or parliamentary assistant – including one to the Minister of Justice – would not be subject to the specific prohibition on the practice of a profession. However, a legislative or parliamentary assistant, especially one to the Minister of Justice, may well have access to sensitive information that they would be prohibited from using to their clients' advantage.

At the outset, we acknowledge and appreciate the value of legislators continuing to practice a profession.[21] This ability is important for several reasons, including (as most explicitly recognized in the Ontario *Members' Integrity Act*) that they "continue to be active in their own communities".[22] There may also be legitimate financial considerations, particularly in jurisdictions where legislator salaries are low and legislator pensions are minimal or non-existent. After all, it would be sensible to want to have at least some lawmakers with a background in law.[23] Thus, any prohibition or restriction on such practice should not be adopted lightly.

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information confidential and not divulge or use it even though the lawyer has ceased to hold such office.")

19 Thanks to Nikos Harris on this point. See also Saskatchewan *Code*, *supra* note 16 , r 7.4, commentary 4.

20 See e.g. Manitoba *Conflict of Interest Act*, *supra* note 10, s 1(1): "The following definitions apply in this Act ... **"minister"** means a member of the Executive Council."

21 Thanks to Nikos Harris on this point.

22 *Members' Integrity Act*, *supra* note 12, preamble.

23 See e.g. Christopher Brinson, "The Potential Positive Impact of the Ethical

We also emphasize that it would be quite proper and desirable for any legislator – even a member of Cabinet – to bring experiential knowledge to their work as legislators, including their understanding of the criminal justice system and the situation of criminal defendants and appellants, as well as victims of crime. Indeed, the rules of professional conduct explicitly recognize that "[a] lawyer, by training, opportunity and experience, is in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions and public authorities. A lawyer should, therefore, lead in seeking improvements in the legal system".[24] It is unclear, however, whether a lawyer-legislator would be captured by the rule of professional conduct requiring that "[a] lawyer who seeks legislative or administrative changes must disclose the interest being advanced, whether the lawyer's interest, the client's interest or the public interest".[25]

II. ISSUE ONE: POLITICAL OFFICE AS AN "OUTSIDE INTERES[T]"

The rules of professional conduct on "outside interests" specifically contemplate a lawyer who practices law while holding elected office.[26] These rules provide that "[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" and "[a] lawyer must

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Layer-Legislator on American Legislative Politics" (2008) 32 J Leg Prof 273 [Brinson].

24 *FLSC Model Code*, *supra* note 18, r 5.6-1, commentary 4.

25 *Ibid*, r 5.6-2.

26 See e.g. *ibid*, r 7.3-2, commentary 1: "The term "outside interest" covers the widest possible range of activities and includes activities that may overlap or be connected with the practice of law such as engaging in the mortgage business, acting as a director of a client corporation or writing on legal subjects, as well as activities not so connected, such as a career in business, *politics*, broadcasting or the performing arts" [emphasis added].

not allow involvement in an outside interest to impair the exercise of the lawyer's independent judgment on behalf of a client."[27] They go even further to state that there is a risk to competence specifically because of the competing time demands of office and of practice: "if the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation".[28] The more specific duties at issue are those of competence and quality of service.[29] We note that while a client may be able to consent to a conflict of interest (which we will discuss in the next issue), they cannot consent to a violation of the duty of competence.[30]

There are some lawyer disciplinary decisions that recognize that the duties of a lawyer-politician's political office detracted from their diligence in their practice. The most explicit is *Patterson (Re)*, in which a newly elected territorial MLA who practiced primarily criminal law did not diligently advance a civil file.[31] That panel, recognizing the lawyer-legislator's "sense of duty" to assist clients who would otherwise be unable to retain a lawyer, nonetheless held that despite the interference with the lawyer's practice of law, "[that] interference did not amount to professional misconduct, or conduct unbecoming".[32] Conversely, in the roughly parallel case of *Law Society of Upper Canada v Galloway*, a newly elected Member of Parliament who fell behind on a client file would typically have been reprimanded

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27 *Ibid*, r 7.3-1, 7.3-2.

28 *Ibid*, r 7.3-2, commentary 2.

29 *Ibid*, r 3.1-2: "A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer; 3.2-1:"A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil."

30 Andrew Flavelle Martin, "Crown Prosecutors and Government Lawyers: A Legal Ethics Analysis of Under-Funding" (2025) 47:4 Man LJ 1.

31 *Patterson (Re)*, 1982 CanLII 235 (NWT LS): "his political duties were detracting from the time he could devote to his law practice."

32 *Ibid*.

but was instead permitted to resign as a result of their prior discipline history and the particular failures in the instant case.[33] While such outcomes are not the inevitable result of practicing while a legislator, and can minimized by careful file management, they remain a real risk.

Indeed, the current Saskatchewan rules on lawyers in public office seem to imply or at least suggest that legislators who happen to be licensed in Saskatchewan should not or even cannot practice part-time, in criminal defence or otherwise.[34] Moreover, the current Saskatchewan rules on outside interests reinforce this with reference to conflicts of interest: "In order to be compatible with the practice of law the other profession, business or occupation ... must not be such as would likely result in a conflict of interest between the lawyer and a client."[35] We turn to conflicts of interest next.

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[33] *Law Society of Upper Canada v Galloway*, [1999] LSDD No 99 at paras 9, 25-28 (LSUC). See esp para 9: "The member was elected as a Member of Parliament for Sarnia, Ontario, in 1993. It was after he went to Ottawa, Ontario, that the matters involving the estate of [the client] started to fall apart." See also *Berry v Page*, [1976] BCJ No 106, 1976 CarswellBC 1092 (SC) at para 4, where one lawyer for the plaintiff was overworked because their colleague was busy as Speaker of the provincial legislature: "I think it fair to say that the larger share of the initiative in negotiating settlement and carrying forward its terms into a consent judgment [for the plaintiff] was taken by Mr. Shortt rather than Mr. Dowding, because Mr. Dowding was not only a practising lawyer but a practising politician and this secondary characteristic resulted in his becoming fully employed after 30th August 1972 as Speaker of the British Columbia Legislature. This is only mentioned because it lends credence to Mr. Shortt's contention that he was left with a disproportionate amount of the work because Mr. Dowding was hard to reach, being otherwise engaged in pressing matters."

[34] Saskatchewan *Code*, *supra* note 16, r 7.4-1, commentary 4 [emphasis added]: "A lawyer who holds public office must not allow personal or other interests to conflict with the proper discharge of official duties. A lawyer holding part-time public office must not accept any private legal business where duty to the client will or may conflict with official duties. If some unforeseen conflict arises, the lawyer should terminate the professional relationship, explaining to the client that official duties must prevail. *The lawyer who holds a full-time public office will not be faced with this sort of conflict*."

[35] *Ibid*, r 7.3-2, commentary 5(b). (Commentary 5(b) also requires that

III. ISSUE TWO: CONFLICT OF INTEREST

The more insidious and irreducible risk for a backbencher practicing criminal defence law is that they may favour *or be seen as favouring* their own political interests over their clients' interests, in that they may soft-peddle their otherwise-resolute advocacy so as to avoid being seen as embarrassing the government.[36] A criminal defence lawyer might routinely be required to challenge the credibility of a police officer or expert witness, the constitutionality of a search or seizure, and indeed the constitutionality of a relevant statute or regulation. While such statutes or regulations would typically be federal, any one of such challenges would provide easy fodder for political attacks that the government, including the lawyer-legislator, is 'soft on crime' – making this an issue not only for backbenchers at the federal level but also at the provincial or territorial level. That these political attacks on criminal defence lawyers are considered appallingly inappropriate by the legal profession does not, unfortunately, not change the political calculus. If anything, it may make such attacks even more alluring.

Of course, an opposition legislator who practices criminal defence law may face similar political pressures. Indeed, while Wasyliw himself was an opposition legislator, he was attacked by the chair of the then-government caucus for "repeatedly fighting to make our streets less safe" by practicing as a

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[i]In order to be compatible with the practice of law the other profession, business or occupation: … must be an honourable one that does not detract from the status of the lawyer or the legal profession generally".

36 While some US literature recognizes the potential for conflicts of interest for lawyer-legislators, these focus on the interplay between client interests and public interests in legislative decision-making, and this particular kind of conflict in criminal defence matters does not appear to have been addressed. See e.g. Dennis Mitchell Henry, "Lawyer-Legislator Conflicts of Interest" (1992) 17 J Leg Prof 261; George F Carpinello, "Should Practicing Lawyers be Legislators" (1989) 41:1 Hastings LJ 87 at 91-99. See also e.g. Ulrich Matter & Alois Stutzer, "The Role of Lawyer-Legislators in Shaping the Law: Evidence from Voting" (2015) 58:2 J Leg Econ 357, arguing that lawyers will favour the interests of the legal profession over the public interest.

criminal defence lawyer.[37] However, these pressures, and the public perception of these pressures, appear stronger and more immediate for backbenchers than for opposition legislators. Likewise, a cynical observer might suggest that criminal defence counsel may soft-peddle their representation for many reasons – in the hopes of becoming a Crown attorney or a King's Counsel or appointed a judge. Our point is that those background risks, unrealistic as they are, are – if nothing else – accepted. The backbencher situation imposes an additional and more immediate and visceral risk on top of these accepted background risks. In Wasyliw's particular circumstances, there is an additional consideration; in addition to being a backbench legislator, he also acts as the legislative assistant for the Minister of Education and additionally sits as a member of cabinet's Healthy Child Committee.[38] These additional ties to cabinet have the potential to increase the risk of conflicts of interest.

A backbencher may well face a conflict of interest where their obligation as a lawyer is to challenge or criticize a law they supported in their role as a legislator.[39] This particular kind of conflict would also apply to a former legislator who continues to practice law after ending their political career.[40]

We note here that potential conflicts of interest in criminal defence practice – particularly those where the lawyer may appear to soft-peddle their advocacy – are typically client-client conflicts as opposed to lawyer-client conflicts.[41] That is, the lawyer may advance the interests of one client over those of another client. The major potential for a

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37 Danielle da Silva, "Lawyers defend MLA after Tories fire accusations" *Brandon Sun* (29 March 2023) A5 [da Silva]. This instance was also mentioned in Froese, *supra* note 5.

38 Froese, *supra* note 5.

39 Thanks to Nikos Harris on this point.

40 Consider by analogy a former judge returning to practice who may have to criticize one of their own decisions, see e.g. Stephen GA Pitel & Will Bortolin, "Revising Canada's Ethical Rules for Judges Returning to Practice" (2011) 34:2 Dal LJ 483 at 518.

41 See e.g. *R v Neil*, 2002 SCC 70 at para 19.

conflict between the interests of the lawyer and the interests of the client is when a lawyer acts as a client's surety, which situation is (understandably) explicitly prohibited by the rules of professional conduct.[42] Thus there is little precedent to anchor the analysis.

A conflict of interest does not necessarily prevent the lawyer from acting. The rules of professional conflict allow a lawyer to act where there is a conflict of interest, but only where "there is express or implied consent from all affected clients and the lawyer reasonably believes that he or she is able to represent the client without having a material adverse effect upon the representation of or loyalty to the client or another client."[43] Thus, consent alone is insufficient. Given the lack of case law on this point, it is arguable that a backbencher's inherent conflict of interest when acting as criminal defence counsel would be sufficient to meaningfully impair the representation – that is, that any contrary belief by the lawyer would not be reasonable. Moreover, even where the lawyer reasonably believes that they can adequately represent the client, the court retains the inherent jurisdiction to remove counsel due to a conflict of interest.[44]

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42 *FLSC Model Code*, *supra* note 18, r 3.4-40: "A lawyer must not act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused person for whom the lawyer acts." But see r 3.4-41: "A lawyer may act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused who is in a family relationship with the lawyer when the accused is represented by the lawyer's partner or associate."

43 *FLSC Model Code*, *supra* note 18, r 3.4-2.

44 See e.g. *MacDonald Estate v Martin*, [1990] 3 SCR 1235 at 1245, 77 DLR (4th) 249, quoted with approval e.g. in *R v Cunningham*, 2010 SCC 10 at para 18: "The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction." See also *Everingham v Ontario* (1992), 8 OR (3d) 121 at 127, 88 DLR (4th) 755, albeit not in the context of a conflict of interest: "The public interest in the administration of justice requires an unqualified perception of its fairness in the eyes of the general public."

However, whether or not the lawyer believes they can adequately represent the client despite the conflict of interest, the client may prefer such a lawyer. As the rules of professional condcut themselves recognize, there may be other factors that, in the view of the client, outweigh the conflict of interest.[45] Indeed, a client might perceive that being represented by a legislator with government connections may provide a net advantage, albeit an improper one.[46] That brings us to Issue Three.

IV. ISSUE THREE: THE DUTY TO ENCOURAGE RESPECT FOR THE ADMINISTRATION OF JUSTICE

How might the public reasonably react to the possibility that a backbench legislator-lawyer exerts inappropriate influence over Crown prosecutors or that Crown prosecutors give unduly lenient treatment to that lawyer's clients? Despite the many structures intended to promote the independence of Crown prosecutors, and particularly the existence in some Canadian jurisdictions of an independent public prosecution service, this public perception seems unavoidable regardless of the reality. Government lawyers are to some unavoidable extent employees of the government.[47] Thus they could

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45 *FLSC Model Code*, *supra* note 18, r 3.4-2, commentary 3: "As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the stage that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs."

46 Indeed, this makes the other requirement of *FLSC Model Code*, *supra* note 18, r 3.4-2 – that "the lawyer reasonably believes that he or she is able to represent the client without having a material adverse effect upon the representation of or loyalty to the client or another client" – even more important.

47 See e.g. Froese, *supra* note 5.

conceivably face the risk of improper retaliation encouraged by a backbencher who might have influence over Cabinet members – or who might be a future Cabinet member, even a future Minister of Justice. By creating this situation, the lawyer-legislator is arguably breaching their duty to "encourage public respect for and try to improve the administration of justice".[48] This duty has been held to be very broad and can be breached in many ways.[49] Likewise, there may be a risk that such a lawyer is perceived by the public to exert undue influence over judges,[50] including potential influence over future judicial appointments at the Provincial Court level.

While an opposition legislator may be in a parallel position to exert undue influence over a Crown prosecutor or judge, this risk is qualitatively different where the lawyer is a backbencher – particularly one who can credibly argue that he may be the next Attorney General.

V. DISCUSSION

Several commentators suggest that lawyer-legislators are a positive influence and improve the work of legislatures.[51] More specifically, the presence of lawyer-legislators who practice or have practiced as criminal defence counsel may perhaps help their fellow legislators better understand the criminal law and the issues facing the administration of justice, as well as the honourable and important role that defence counsel play in the administration of justice.[52] A

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48 *FLSC Model Code*, *supra* note 18, r 5.6-1.

49 Martin 2023, *supra* note 3 at 262-267.

50 See also e.g. *FLSC Model Code*, *supra* note 18, r 5.1-2(g): "When acting as an advocate, a lawyer must not ... endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate".

51 Brinson, *supra* note 23. See also *Members' Integrity Act*, supra note 12, preamble, as quoted in the text accompanying note 15.

52 See e.g. da Silva, *supra* note 37.

backbencher who previously practiced as a criminal defence lawyer would provide these benefits without raising the legal ethics issues of a backbencher actively practicing as a criminal defence lawyer.

Moreover, a client's consent to the lawyer acting in this situation is by no means determinative. Public confidence in the administration of justice would presumably outweigh the importance of the client's access to their counsel of choice – particularly where an ostensible and unfair legal advantage influences the client's choice.

We are not suggesting that any defence counsel would knowingly or unknowingly soft-peddle their representation to avoid embarrassing the government, or that many Crown attorneys – or even any Crown attorneys – would be influenced where a backbencher was acting as defence counsel. Our concern is the reasonable and actual perception of the general public and the foreseeable implications of this situation for public confidence in the administration of justice. Ideally, the general public would share this trust in the legal profession. But these suspicions are not unreasonable or implausible. In our view, the mere reasonable possibility of these situations occurring, and the difficulty in detecting any such occurrences, means that case-by-case regulation would be insufficient.

For these reasons, a specific and narrow prohibition on this situation may be appropriate. Given that the practice of criminal defence law by government-side backbenchers raises legal ethics issues as opposed to parliamentary ethics issues, any regulation – including prohibition – on such practice would be more appropriate in the rules of professional conduct for lawyers than on codes of ethics for legislators.

VI. REFLECTIONS AND CONCLUSIONS

In this article, we have argued that a backbench legislator who practices criminal defence law faces at least three legal ethics issues. The first issue, which is common to any

legislator who practices law, is that their political office may leave them with insufficient time for their legal practice. The second and third issues, however, are unique to backbench legislators practicing criminal defence law and are not engaged for opposition legislators who practice criminal defence law. This second issue is that such a lawyer-legislator may face a conflict of interest between their political interests and their duty of resolute advocacy to their client, as such resolute advocacy may prompt political embarrassment to the government. This third issue is that such a lawyer-legislator may breach their duty to encourage respect for the administration of justice – likely inadvertently – because there may be a reasonable but unfortunate public perception that they have undue influence over Crown prosecutors or otherwise receive unduly lenient treatment for their clients.

In a more perfect world, the general public would trust the legal profession, including defence counsel and Crown attorneys, such that these suspicions would be unreasonable and that political attacks against defence counsel would not resonate. However, those hopes seem unreasonable if not naïve. Such changes in attitude are unlikely to occur any time soon.

The work of legislatures may well be improved by lawyer-legislators. However, when lawyer-legislators practice law – particularly criminal defence law – issues of legal ethics are squarely engaged. While there is no explicit prohibition on a backbencher practicing criminal defence law, such a dual role raises serious, unavoidable, and perhaps even unresolvable legal ethics issues. These risks are more immediate and direct than when an opposition legislator practices criminal defence law. We note that these risks are even more severe, and a prohibition is even more necessary, when the backbencher is a legislative assistant, particularly to the Minister of Justice. With great respect, in our view the Law Society of Manitoba should be more concerned by this situation. We encourage all Canadian law societies to consider adopting a blanket prohibition on backbenchers practicing criminal defence law.

Any law societies that do not adopt such a prohibition must be alert to the potential for these risks materializing.

It is ultimately for law societies, disciplinary tribunals, and courts to determine whether the risks we have identified are serious enough to require such a prohibition given the state of public confidence in the legal profession and in politicians. We hope to have provided here a starting point for those determinations.