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"In the Public Interest": Understanding the Special Role of the Government Lawyer

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The concept of the "public interest" is the foundational principle that guides and structures the special role of government lawyers. This public interest role is derived from a number of constitutional and statutory sources but, in Ontario, it finds its foundation in section 5(b) of the *Ministry of the Attorney General Act*,[1] which provides that the Attorney "shall see that the administration of public affairs is in accordance with the law". This responsibility to uphold and advance the rule of law falls not just to the Attorney but to all government lawyers who act on his or her behalf.

What does this mean in practical terms for government lawyers on a day-to-day basis? In my view, there are three principles that must serve as touchstones in the fulfilment of our public interest role, namely: (i) independence; (ii) a commitment to principled decision-making; and (iii) accountability. In this paper I elaborate the significance and implications of each of these fundamental principles. I also consider whether, in light of the public interest role of government lawyers, we should be held to a higher or different standard of professional responsibility. Finally, I explain why I believe that solicitor-client privilege plays a critical enabling role in the fulfilment of our responsibilities.

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* Deputy Attorney General of Ontario. This is a revised draft of a paper presented at a meeting of the Public Law section of the Ontario Bar Association in March 2013. The views expressed are those of the author alone and should not be attributed to the Ministry of the Attorney General or the Government of Ontario. Without implication, I am grateful to a number of my colleagues in the Ministry of the Attorney General, namely, James Cornish, Raj Dhir, Howard Leibovich, Tom McKinley and Malliha Wilson, as well as former Deputy Murray Segal, for their helpful comments on an earlier draft of this paper.

[1] R.S.O. 1990, c. M.17.

I. INDEPENDENCE

The concept of independence has long been understood to be a central feature of the Attorney General's role, particularly in relation to decision-making in criminal matters. Crown counsel, as agents of the Attorney General, share the Attorney's independence from partisan political influence.

The role of Crown counsel in the criminal law realm has rightly been described as that of a "Minister of Justice" with a duty to ensure that the criminal justice system operates fairly to all: the accused, victims of crime and the public. Perhaps the most well-known description of this pivotal role is that offered by Rand J. in *R. v. Boucher*:

> ... Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be performed with an ingrained sense of the dignity, the seriousness and justness of judicial proceedings.[2]

More recently, the Supreme Court of Canada has held that the independence of the Attorney General is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched.[3] This constitutionally mandated independence means not just that the Attorney must act independently of political pressures from government but also that the Crown's exercise of prosecutorial discretion is beyond the reach of judicial review, subject only to the doctrine of abuse of process. As the Court explained in *Krieger*, this independence is a hallmark of the free society:

> It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions…The quasi- judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of

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2 [1954] S.C.J. No. 54, [1955] S.C.R. 16, at 23-24 (S.C.C.).

3 *Miazga v. Kvello Estate*, [2009] S.C.J. No. 51, [2009] 3 S.C.R. 339, at para. 46 (S.C.C.), *per* Charron J.

> prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict.[4]

The obligation to act in an independent and impartial manner, independently of partisan political considerations, is not limited to government lawyers acting in relation to criminal law matters. It is a responsibility shared in common by all government lawyers who are expected to conduct litigation and offer legal advice on the basis of an independent and principled analysis of what the law requires, even when that advice may be inconsistent with the policy aims of the government of the day.

This public interest role was aptly captured some years ago by then-Deputy Attorney General of Canada John Tait, who underscored the duty of objectivity and impartiality that must guide the public service lawyer in the performance of his or her role:

> The duty to promote and uphold the rule of law means that there is a quality of objectivity in the interpretation of the law that is important to the public service lawyer. There must be a fair inquiry into what the law actually is. The rule of law is not protected by unduly stretching the interpretation to fit the client's wishes. And it is not protected by giving one interpretation to one department and another to another department.[5]

A similar philosophy guides the Office of the Legal Counsel ("OLC") in the United States which, by delegation, exercises the Attorney General's authority under the *Judiciary Act of 1789*[6] to provide the President and executive agencies with advice on questions of law. In performing this function, the OLC assists the President in fulfilling his constitutional duty to defend the Constitution and to "take Care that the Laws be faithfully executed". To this end, OLC lawyers are instructed to provide candid, independent and principled advice, even when that advice is inconsistent with the aims of policymakers:

> OLC must provide advice based on its best understanding of what the law requires — not simply an advocate's defence of the contemplated action or position proposed by an agency or the Administration. Thus, in rendering legal advice, OLC seeks to provide an accurate and honest

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[4] *Krieger v. Law Society of Alberta*, [2002] S.C.J. No. 45, [2002] 3 S.C.R. 372 (S.C.C.) [hereinafter "*Krieger*"].

[5] John Tait, "The Public Service Lawyer, Service to the Client and the Rule of Law" (1997) 23 Commonwealth L. Bull. 542, at 543-44.

[6] Chapter 20, 1 Stat. 73.

> appraisal of applicable law, even if that appraisal will constrain the Administration's or an agency's pursuit of desired practices or policy objectives. This practice is critically important to the Office's effective performance of its assigned role, particularly because it is frequently asked to opine on issues of first impression that are unlikely to be resolved by the courts — a circumstance in which OLC's advice may effectively be the final word on the controlling law.[7]

Of course, the OLC also has a responsibility to facilitate the work of the President and the Executive Branch. Thus, in instances where it concludes that a particular course of action would be unlawful, it considers and, where appropriate, recommends lawful alternatives that would achieve the policy objectives of the relevant decision-maker. At the same time, its legal analysis must always be "principled, forthright, as thorough as time permits, and not designed merely to advance the policy preferences of the President or other officials".[8]

II. PRINCIPLED AND CONSISTENT DECISION-MAKING

The commitment to independence and objectivity on the part of government lawyers requires, by implication, that their actions and advice be based on a principled and consistent view of what law requires in a particular situation.[9] This adherence to principled consistency ensures that high quality legal advice is provided across government.

On the civil side, the Ontario government is organized so that all lawyers have a direct relationship to the Attorney General, even though many of them are seconded to ministries.[10] This direct relationship means that all government lawyers are aware of their legal responsibility to provide advice that is thorough, balanced and principled. In recent years, the Legal Services Division of the Ministry was reorganized in order to strengthen the linkages between the seconded legal branches in the various Ministries of the government and the Ministry of the Attorney General, as well as to provide greater consistency in the delivery of legal

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[7] See Office of the Assistant Attorney General, "Best Practices for OLC Legal Advice and Written Opinions" (U.S. Department of Justice, Office of Legal Counsel), July 10, 2010, at 1.

[8] *Id.*, at 2.

[9] See the Honourable Ian Scott, "Law Policy and the Role of the Attorney General" (1989) 39 U.T.L.J. 109, at 112-15.

[10] See Mark Freiman, "Convergence of Law and Policy and the Role of the Attorney General" (2002) 16 S.C.L.R. (2d) 335, at 338.

advice on civil law matters.[11] This more coherent form of organization ensures that legal advice is consistent, both horizontally across government and over time, and that the specialized expertise that each lawyer brings to bear is channelled into one legal voice. As Wilson, Wong and Hille explain:

> [T]his [centralized] structure makes clearer that the role of counsel situated in other ministries is not to advocate on behalf of individual ministries. Whether a lawyer works within a legal branch in the Ministry of the Attorney General or in another Ministry, the obligation of all government lawyers is the same: to provide objective legal advice to our common client, the Crown.[12]

On the criminal law side, the Attorney General's responsibilities with respect to criminal prosecutions are carried out by Crown counsel, who deal with the hundreds of thousands of criminal cases which flow through the courts every year in Ontario. Given this volume of cases, as well as the desire to avoid the potential for suggestions of political influence, it would be imprudent and impractical for the Attorney General to become involved in individual cases on a routine basis. The common practice is for the Attorney General to grant broad areas of discretion in criminal prosecutions to Crown counsel, except in those few circumstances where the *Criminal Code*[13] requires the Attorney General's personal involvement or consent. This grant of decision-making latitude reflects respect for the professional judgment of Crown counsel.[14]

Consistency and principled decision-making is ensured in the administration of criminal justice through an internal reporting structure, where all Crown counsel report upward through a chain of responsibility that leads to the Assistant Deputy Attorney General for Criminal Law, the Deputy and the Attorney General. Consistency is also achieved through the Crown Policy Manual which communicates the Attorney General's guidance, in important areas of Crown practice and discretion, to Crown

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[11] See Malliha Wilson, Taia Wong & Kevin Hille, "Professionalism and the Public Interest" (2011) 38 Adv. Q. 1, at 8-10 [hereinafter "Wilson *et al*."]. Under the 2007 changes, the Legal Services Division of the Ministry was restructured into Portfolios, each led by a Portfolio Director, who ultimately report to the Assistant Deputy Attorney General for the Division. The Ministry's legal branches now report to these Portfolio Directors, which ensures more effective Ministry oversight and consistency in the work of the legal branches.

[12] *Id*., at 10.

[13] R.S.C. 1985, c. C-46.

[14] See generally the Crown Policy Manual 2005, "Preamble", online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/default.asp#CPM>.

counsel. The Crown Policy Manual is supplemented from time to time by Practice Memoranda issued by the Assistant Deputy Attorney General for Criminal Law, who has a duty to ensure that practice of the Division is consistent and in keeping with the Crown Policy Manual.[15]

Of course, legal advice within government must reflect changes in the law and the broader social context, and be updated and revised to take account of legislative change, judicial decisions and legally relevant social change. But the Ministry values consistency over time in its legal analysis. To the extent that the Ministry's legal advice on a question of law evolves, this is done in accordance with a formal process, requiring approval by the relevant Assistant Deputy Attorney General and, depending on the circumstances, either the Deputy or the Attorney General.

III. ACCOUNTABILITY

The Attorney General is accountable to the legislature and, ultimately, the public for the manner in which justice is administered in the province. This accountability flows through to each legal counsel within the Ministry, through the internal reporting structures described above.

An important goal of accountability is to maintain public confidence in the independent and impartial administration of justice. It is particularly critical that the public understand that criminal prosecutions are conducted independently and free of partisan political influences. Thus, it is common practice for Crown counsel to set forth on the record in open court the reasons for proceeding, or not proceeding, with particular criminal prosecutions.

Another important aspect of accountability is what might be termed "systemic accountability", namely, accounting to the public for the accessibility, timeliness and effectiveness of the administration of justice in the province, coupled with initiatives designed to achieve needed improvements. One important example of this systemic accountability is the Justice on Target ("JOT") initiative commenced by Attorney General Chris Bentley in 2008 and carried forward by his successor, Attorney John Gerretson. JOT is a province-wide initiative involving the Ministry, the judiciary and the legal profession, aimed at reducing delay and inefficiency in the criminal justice system.[16] It was prompted by the recognition that

[15] Only Practice Memoranda that have policy implications are vetted and approved by the Attorney General.

[16] See <http://www.attorneygeneral.jus.gov.on.ca/english/jot>.

over the past decades, the number of appearances as well as the time required to deal with criminal matters have increased significantly.

Through JOT, utilizing a partnership approach involving all the participants in the justice system, targets have now been established for the number of appearances and amount of time that should be required to deal with various categories of criminal proceedings. Moreover, public reporting on progress made in achieving these targets is now available through the publication of relevant statistics on the Ministry website. Through leadership at the local as well as provincial level, important progress has been made in reducing delay and ultimately providing better service to the public.

IV. GOVERNMENT LAWYERS AND PROFESSIONAL RESPONSIBILITY

Some authors have suggested that the public interest role of government lawyers means that we should be subject to a different, and higher, standard of professional responsibility. For example, Adam Dodek has argued that, because government lawyers "exercise state power in everything they do", it is appropriate that we be subject to higher ethical standards than the profession generally.[17] He points to the legal advice provided by the OLC to U.S. President George W. Bush with respect to the legality of the use of "enhanced interrogation techniques" on suspected terrorists as an example of the (inappropriate) exercise of state power by lawyers within government.[18]

Most legal commentators have concluded that the so-called "torture memos" failed to exhibit the thorough, candid and objective advice generally expected of OLC legal opinions. But did the failure to meet this high standard constitute an act of professional misconduct deserving of sanction by the relevant state bar association?

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[17] See A. Dodek, "Lawyering at the intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law" (2010) 33 Dal. L.J. 1, at 27 [hereinafter "Dodek"]. For a contrary view (arguing that government lawyers have essentially the same professional obligations as do those practising in the private sector) see Alan C. Hutchinson, "'In the Public Interest': The Responsibilities and Rights of Government Lawyers" (2008) 46 Osgoode Hall L.J. 105, at 121-22; Wilson *et al*., *supra*, note 11.

[18] Dodek, *id*., at 24. These so-called "torture memos" generated a storm of controversy, with critics of these legal opinions arguing that government lawyers used the law not as a constraint on state power but as the "handmaiden of unconscionable abuse". See David Cole, ed., *The Torture Memos* (New York and London: The Free Press, 2009), at 13. See also David Luban, *Legal Ethics and Human Dignity* (Cambridge: Cambridge University Press, 2007), at c. 6 and Robert Vischer, "Legal Advice as Moral Perspective" (2006) 19 Geo. J. Legal Ethics 225.

In fact, this very question was carefully considered by the Department of Justice in response to a 2009 memorandum from the Office of Professional Responsibility ("OPR")[19] which had found that the authors of the torture memos had indeed engaged in professional misconduct.[20] The OPR recommended that its findings of misconduct on the part of these attorneys be referred to the state bar disciplinary authorities in the jurisdictions where the memos' authors were members.

However Associate Deputy Attorney General David Margolis, in a memorandum to the Attorney General reviewing the OPR Report, rejected the conclusion that the authors of the torture memos had engaged in professional misconduct.[21] In Deputy Margolis' view, there is a fundamental difference between the internal standards expected of attorneys within the OLC and those professional standards applicable to them in their capacity as members of a state bar. He agreed that the Department of Justice expects its attorneys to provide thorough, objective and candid legal advice and, further, that the "torture memos" fell short of this high standard of candour and objectivity. But Deputy Margolis concluded that it was inappropriate to conclude that failure to meet this high internal government standard constituted a breach of the less stringent minimal requirements established by the state bar Rules of Professional Misconduct. In Margolis' view, the OPR's finding that there was professional misconduct by the authors of the torture memos was based on "an analytical standard that reflects the Department's high expectations of its OLC attorneys rather than the somewhat lower standards imposed by applicable Rules of Professional Misconduct".[22]

Canadian courts have clearly held that government lawyers are subject to the same standards of professional conduct as lawyers generally. In the words of the Ontario Divisional Court in *Everingham v. Ontario*:

> It is one thing to say that a particular branch of the Crown law office or a particular law firm or lawyer has earned a reputation for a high

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[19] The Office of Professional Responsibility is responsible for investigating allegations of professional misconduct involving attorneys within the Department of Justice. See generally <http://www.justice.gov/opr>.

[20] See Department of Justice, Office of Professional Responsibility, *Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists* (July 29, 2009).

[21] See D. Margolis, "Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report on Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists" (January 5, 2010).

[22] *Id*., at 68.

> standard of professional conduct. It is quite different to say that any lawyer or group of lawyers is subject to a higher standard of liability than that required of every lawyer under the Rules of Professional Conduct.
>
> In respect of their liability under the Rules of Professional Conduct, as opposed to the public interest duties associated with their office, Crown counsel stand on exactly the same footing as every member of the Bar.
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> It is therefore an error of law to exact from government lawyers a higher standard under the Rules of Professional Conduct than that required of lawyers in private practice.[23]

More recently, a similar approach was adopted by the Supreme Court of Canada in *Krieger*.[24] At issue here was whether the Law Society of Alberta had jurisdiction to discipline Crown prosecutors for failing to meet professional ethical standards. The Supreme Court of Canada held that the Law Society did possess such disciplinary jurisdiction, but noted that there is a clear distinction between the ethical standards set by the Attorney General for Crown prosecutors and those of the Law Society. Justices Iacobucci and Major, on behalf of a unanimous Supreme Court, noted that "[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".[25] Justices Iacobucci and Major concluded as follows:

> An inquiry by the Attorney General into whether a prosecutor has failed to meet departmental standards and should be removed from a case may involve different considerations, standards and/or procedures than an inquiry by the Law Society into whether the prosecutor has breached the rules of ethics warranting sanction. The Attorney General is responsible for determining the policies of the Crown prosecutors. The Law Society is responsible for enforcing the ethical standards required of lawyers. Certain aspects of a prosecutor's conduct may trigger a review by the Attorney General and other aspects, usually ethical conduct considerations, may mean a review by the Law Society.

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[23] [1992] O.J. No. 304, 8 O.R. (3d) 121, at paras. 20-22 (Ont. Div. Ct.).

[24] *Supra*, note 4.

[25] *Id.*, at para. 50. For example, courts have from time to time commented on the special traditions and expectations of civility associated with the Crown's role, and the need for Crown counsel to avoid demeaning or inflammatory language: see *R. v. L. (L.)*, [2009] O.J. No. 2029, 96 O.R. (3d) 412, at paras. 55-72 (Ont. C.A.).

> A prosecutor whose conduct so contravenes professional ethical standards that the public would be best served by preventing him or her from practicing law in any capacity in the province should not be immune from disbarment.[26]

Government lawyers must also understand and respect the proper limits of their professional role within government. When government action is challenged, the fundamental question for the lawyer is whether the impugned action is or is not in accordance with law. Thus, for example, the government lawyer does not decide whether to forgo an otherwise valid defence for impugned government action on the basis that the defence in question is "technical" in nature or one that, in the lawyer's view, is somehow unconnected with the "true merits" of the claim. Any such independent assessment by the government lawyer would involve an improper substitution of the lawyer's judgment of what the public interest requires for that of elected and democratically accountable government decision-makers. As Wilson, Wong and Hille conclude:

> In a democratic, post-Charter society, government lawyers cannot decide what constitutes the public interest and enforce the rule of law themselves by pre-emptively acting inconsistently with the legitimate goals of a democratically-elected government … The suggestion that government lawyers owe higher ethical duties because they exercise public power therefore collapses the roles of government lawyer and Attorney General, when in fact constitutional norms, the institutional hierarchy of government and democratic ideals require their separation. The government lawyer's job is fundamentally to give the best legal advice about what is required by the rule of law.[27]

V. GOVERNMENT LAWYERS AND SOLICITOR-CLIENT PRIVILEGE

The courts have clearly and unequivocally held that solicitor-client privilege applies to the legal advice provided by government lawyers to their clients within government or in other public settings.[28] The privilege has the same "near absolute" quality in the public sector as has been recognized in private contexts. Thus in the recent *Ontario v. Criminal*

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[26] *Id.*, at para. 58.
[27] Wilson *et al*., *supra*, note 11, at 18-19.
[28] *R. v. Campbell*, [1999] S.C.J. No. 16, [1999] 1 S.C.R. 565, at para. 49 (S.C.C.).

Lawyers' Assn.,[29] the Supreme Court upheld provisions in Ontario's freedom of information legislation which exempted from disclosure records that are subject to solicitor-client privilege. The Court also upheld the fact that a government decision not to disclose such privileged records need not be justified in accordance with a "public interest" test, since the protection of solicitor-client privilege is itself demonstrably in the public interest.

Recently, however, some commentators have argued that the privilege should be limited in its application to government or other public sector entities. Particularly notable is the recent paper by Professor Dodek who reconceives of the privilege as extending only to individuals (and only in the criminal context), which would mean that organizations, including governments, would no longer be entitled to claim the benefits of the privilege.[30]

In my view, however, solicitor-client privilege is a key legal rule that enables government lawyers to fulfil their public interest role. In fact, its elimination would seriously undermine the ability of government lawyers to fulfil their duty of ensuring that government actions are in accordance with law.

As I have argued above, government lawyers have an obligation to provide candid, thorough and objective legal advice to their clients within government, even when such advice might be at odds with the policy objectives of a particular government. The provision of such thorough and objective advice is in fact essential to government officials who wish to ensure that their actions are in accordance with the rule of law. The fact that privilege attaches to the opinions provided by their legal advisors encourages and facilitates the seeking of such advice by government decision-makers in a timely way. It also enables such advice to be developed in a consistent and principled fashion, in accordance with strict standards for review and approval, thus enabling a single, authoritative source of legal advice within government. In short, solicitor-client privilege within government reinforces and advances respect for the rule of law in the administration of public affairs.

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[29] *Ontario (Public Safety and Security) v. Criminal Lawyers' Assn.*, [2010] S.C.J. No. 23, [2010] 1 S.C.R. 815, at paras. 53-56 (S.C.C.).

[30] A. Dodek, "Reconceiving Solicitor Client Privilege" (2010) 35 Queen's L.J. 493. See also Liam Brown, "The Justification of Legal Professional Privilege When the Client Is the State" (2010) 84 Aus. L.J. 624.

The connection between solicitor-client privilege and the rule of law, implicit in many of the discussions on the issue, was explicitly recognized by the House of Lords in *Three Rivers* in the following terms:

> [T]he seeking and giving of [legal] advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest … [I]t is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busy-bodies or any else (see also paras. 15.8 to 15.10 of Adrian Zuckerman's Civil Procedure where the author refers to the rationale underlying legal advice privilege as "the rule of law rationale"). I, for my part, subscribe to this idea. It justifies, in my opinion, the retention of legal advice privilege in our law, notwithstanding that as a result cases may sometimes have to be decided in ignorance of the relevant probative material.[31]

If solicitor-client privilege were to be eliminated or qualified in relation to the advice provided by lawyers within government to their clients, these important rule of law principles would be undermined. Government decision-makers would become reluctant to seek timely legal advice, or might request such advice be provided orally rather than in writing. Legal advisors themselves would become reluctant to frame their advice with the same degree of candour and objectivity for fear that such advice would be made public and cause embarrassment to their clients. The result would be to make it significantly more difficult and challenging to protect the rule of law within government. I conclude that, however well intentioned, it would be inappropriate and unwise to eliminate the full force and application of solicitor-client privilege within government.

VI. CONCLUSION

Government lawyers have a special role to play in the administration of justice. Their client is the Crown and their overarching responsibility is to advance the public interest. This provides government lawyers with

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[31] *Three Rivers District Council v. Governor and Company of the Bank of England*, [2004] UKHL 48, [2004] 3 W.L.R. 1274, at para. 34 (H.L.), *per* Lord Scott of Foscote.

a broader and more complex mandate than private sector counsel, since lawyers in government are not obliged to serve the particular interests of a private client. At the same time, government lawyers are constrained by the need to provide pragmatic as well as principled advice, advice that addresses in a practical way the realities and exigencies facing their clients within government. Moreover, there are clear lines of accountability between all government lawyers and the Attorney General who, as Chief Law Officer of the Crown, must answer to the legislature and ultimately the public for the legal conduct of the government.

Government lawyers have been described by one commentator as "the keeper's of the Crown's conscience".[32] This description seems extravagant since, as discussed above, government lawyers do not have an open-ended mandate to pronounce on the morality or wisdom of proposed government action. Still, government lawyers do have an important responsibility to advocate for, and defend, values of legality and the rule of law within government. The fact that their advice to government is protected by solicitor client privilege is essential if they are to fulfil this critical role effectively. It is therefore important that this privilege continue to be recognized and protected by the courts, and understood by the public on whose behalf government lawyers ultimately serve.

[32] See Duncan Webb, "Keeping the Crown's Conscience: A Theory of Lawyering for the Public Sector" (2007) 5 N.Z.J.P.I.L. 243, at 259.