

## IMMIGRATION ISSUES—2016 UPDATE PAPER 5.1

# Ethics in Immigration: Considerations for Counsel on Both Sides

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## **ETHICS IN IMMIGRATION: CONSIDERATIONS FOR COUNSEL ON BOTH SIDES**

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### **I. Introduction**

While private and Government lawyers have some differing ethical obligations, I view our similarities as predominant. These similarities are reposed in our duties to clients, the Courts and the public. Certainly there are considerations particular to Government legal practice, but many of these overlap or amplify matters of concern shared throughout the bar. This provides a strong basis for civil and good faith conduct in all litigation.

In fact, civility and good faith have marked my experience as an immigration lawyer in British Columbia. Unfortunately, this cannot be taken for granted: it must be guarded and renewed. This is because risks to civility are inherent in an adversarial system. Under the *Immigration and Refugee Protection Act* (“IRPA”)<sup>1</sup> and *Citizenship Act*,<sup>2</sup> lawyers represent individuals who often become involved in stressful, bitter disputes with the Government of Canada. Over time, counsel may become critical of how the Government manages the immigration system or the resulting litigation. Likewise, Government lawyers should vigilantly avoid overlooking the personal stakes of litigants and their families. If cynicism becomes entrenched, it may be projected onto opposing counsel, undermining collegiality and, in turn, lessening our ability to meet professional and ethical standards.

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1 SC 2001, c 27.

2 RSC 1985, c C-29.

As a lawyer for the Government of Canada, I hope to promote collegiality, ethics, and professionalism by describing some of issues which confront Department of Justice (“DOJ”) counsel in this context. I will review the ethical obligations owed by all lawyers in British Columbia and some additional duties specific to DOJ lawyers. I will then discuss some of these considerations in the context of a few immigration practice points.

## II. Legal Ethics

### A. Ethics and Professionalism

There is much room to debate whether “legal ethics” is a philosophical matter outside the law or if it is better understood by reference to rules of professionalism.<sup>3</sup> As the Honourable Warren Winkler, Former Chief Justice of Ontario put it:

Professionalism is understood to be at the heart of being an ethical lawyer, and the basis upon which we uphold public confidence in the justice system and meet our obligations to serve the public, defend the rule of law, and promote true access to justice.<sup>4</sup>

With due regard to Aristotle, for the purposes of this paper I adopt the view that professionalism and ethics cannot be separated in the practice of law. To a great extent, professional standards *are* ethical standards, and *vice versa*.

This perspective has several advantages: It is accurate, in that abiding professional obligations will generally ensure that ethical obligations are met.<sup>5</sup> It is functional, in that all lawyers within the jurisdiction will have a shared reference point for how they identify and contend with ethical issues. And it is enforceable, in that alleged breaches can be assessed objectively and addressed consistently.

This view also seems to be shared by the Legislature and the Law Society of British Columbia, as reflected in the *Legal Professional Act*,<sup>6</sup> *Law Society Rules*,<sup>7</sup> and *Code of Professional Conduct for British Columbia* [BC Code].<sup>8</sup>

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3 For example, see Sean Stynes, *Legal Ethics and Illegal Migrants: The Bounds of Ethical Conduct for Lawyers Helping ‘Illegals’ Become Legal*, <https://open.library.ubc.ca/cIRcle/collections/ubctheses/831/items/1.0077734> at 26-62. This is a complex area of philosophy that is beyond the scope of my paper.

4 The Advocates’ Society, *Principles of Professionalism for Advocates*, <http://www.advocates.ca/assets/files/pdf/publications/principles-of-civility.pdf> at 3.

5 The Philosopher (with whom I am sympathetic) would part ways here, asserting that of course there are ethical matters not captured by the rules governing lawyers.

6 SBC 1998, c 9.

7 <https://www.lawsociety.bc.ca/page.cfm?cid=4089&t=Law-Society-Rules-2015>.

8 <https://www.lawsociety.bc.ca/page.cfm?cid=2578&t=BC-Code-Table-of-Contents>. See also: Federation of Law Societies, *Model Code of Professional Conduct*, <http://flsc.ca/wp-content/uploads/2014/10/Model-Code-as-amended-march-2016-FINAL.pdf> and The Advocates’ Society, *Principles of Professionalism for Advocates* and *Principles of Civility for Advocates*, <http://www.advocates.ca/assets/files/pdf/publications/principles-of-civility.pdf>.

## B. Duties of All Lawyers in British Columbia

All lawyers in British Columbia are subject to the BC Code. Through its text and accompanying Commentaries, it implants ethical principles into our profession. Some of these duties are explicit and specific, while others require interpretation and a greater exercise of judgment.

A brief review will demonstrate some of the ethical content running through the BC Code:

- “A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.”<sup>9</sup>
- “A lawyer must encourage public respect for and try to improve the administration of justice.”<sup>10</sup>
- “When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.”<sup>11</sup> In particular, lawyers must not:
  - knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable;
  - knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;
  - knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;
  - knowingly assert as fact that which cannot reasonably be supported by the evidence or taken on judicial notice by the tribunal; and
  - deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party.<sup>12</sup>

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9 BC Code, s 7.2-1. The Commentary adds: “[2] Any ill feeling that may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. The presence of personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system.” and “[4] A lawyer should agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities and similar matters that do not prejudice the rights of the client.”

10 BC Code, s 5.6-1. The Commentary adds: “[1] The obligation outlined in the rule is not restricted to the lawyer’s professional activities but is a general responsibility resulting from the lawyer’s position in the community. A lawyer’s responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet, for the same reason, a lawyer should not hesitate to speak out against an injustice.”

11 BC Code, s 5.1-1.

12 BC Code, s 5.1-2(b), (e)-(g), (i).

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- A lawyer is also expected to “raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client’s case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer’s duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties’ right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.”<sup>13</sup>
- Self-evidently, “A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud.”<sup>14</sup>
- Further, each “lawyer must perform all legal services undertaken on a client’s behalf to the standard of a competent lawyer.”<sup>15</sup> A “competent lawyer” is a defined term and includes “complying in letter and spirit with all rules pertaining to the appropriate professional conduct of lawyers.”<sup>16</sup>
- “A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.”<sup>17</sup>
- “A lawyer must advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must discourage the client from commencing or continuing useless legal proceedings.”<sup>18</sup>
- Finally, a lawyer must withdraw from a case if “a client persists in instructing the lawyer to act contrary to professional ethics”.<sup>19</sup>

As set out in the Canons of Legal Ethics,<sup>20</sup> each lawyer is a “minister of justice, an officer of the courts, a client’s advocate” and owes duties to:

- The state, to maintain its integrity and its law.
- Courts and tribunals, which at all times should be accorded candour, fairness, courtesy and respect.

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13 BC Code, s 5.1-1, Commentary [1].

14 BC Code, s 3.2-7. The Commentary adds: “[4] A bona fide test case is not necessarily precluded by this rule and, so long as no injury to a person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case. In all situations, the lawyer should ensure that the client appreciates the consequences of bringing a test case.”

15 BC Code, s 3.1-2.

16 BC Code, s 3.1-1(g). The Commentary adds: “Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles.”

17 BC Code, s 3.4-1. The Commentary adds: “a conflict of interest exists when there is a substantial risk that a lawyer’s loyalty to or representation of a client would be materially and adversely affected by the lawyer’s own interest or the lawyer’s duties to another client, a former client, or a third person.”

18 BC Code, s 3.2-4.

19 BC Code, s 3.7-7.

20 BC Code, Ch 2.

### 5.1.5

- Clients, who are entitled to objective, confidential, and competent advice.
- Other lawyers, who should be treated with courtesy and respect.
- Oneself, bearing in mind that each lawyer “can maintain the high traditions of the profession by steadfastly adhering to the time-honoured virtues of probity, integrity, honesty and dignity.”<sup>21</sup>

In my view, this brief summary amply demonstrates the high ethical obligations of British Columbia lawyers and confirms the view of Chief Justice Winkler.

The other point amply demonstrated is that all lawyers have public interest duties regarding, e.g., the administration of justice; the promotion of fair hearings; and the discharge of all responsibilities honourably and with integrity. This is particularly relevant in areas of public law, such as immigration.

### C. Duties of Department of Justice Lawyers

In addition to obligations arising under the BC Code, Department of Justice lawyers in British Columbia are subject to the *Department of Justice Act* [DOJ Act]<sup>22</sup> and the *Values and Ethics Code of the Department of Justice* [DOJ Values and Ethics Code].<sup>23</sup>

The *DOJ Act* establishes the dual role of Minister of Justice and Attorney General of Canada. The Minister presides over the Department of Justice and is the official legal advisor to the Government of Canada. The duties of this office include ensuring that the administration of public affairs is in accordance with the law.<sup>24</sup> This is co-extensive with the *ex officio* role of Attorney General, which duties include the regulation and conduct of all litigation on behalf of the federal Crown or any federal department.<sup>25</sup>

In supporting these two roles, the Department of Justice provides a variety of services including policy development, law reform, legislative drafting and review, and litigation.<sup>26</sup> These roles and duties are to be exercised transparently and in furtherance of the public interest. As the Prime Minister’s 2015 Mandate Letter states:

[the] overarching goal will be to ensure our legislation meets the highest standards of equity, fairness and respect for the rule of law...that the rights of Canadians are protected, that our work demonstrates the greatest possible commitment to respecting the Charter of Rights and Freedoms, and that our government seeks to fulfill our policy goals with the least interference with the rights and privacy of Canadians as possible.<sup>27</sup>

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21 BC Code, s 2.1-1 to 2.1-5.

22 RSC 1985, c J-2 [*DOJ Act*].

23 <http://www.justice.gc.ca/eng/rp-pr/cp-pm/vec-cve/index.html>.

24 *DOJ Act*, s 4(a).

25 *DOJ Act*, s 5(d).

26 For a synopsis, see Government of Canada, *Open and Accountable Government* (2015), Appendix F.5 “Ministers and the Law”, [https://pm.gc.ca/sites/pm/files/docs/OAG\\_2015\\_English.pdf](https://pm.gc.ca/sites/pm/files/docs/OAG_2015_English.pdf).

27 See e.g. Prime Minister of Canada, *Minister of Justice and Attorney General of Canada Mandate Letter*, <http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter>.

### 5.1.6

Most agree that special ethical considerations arise from this public interest mandate. The Minister and Attorney General has a positive duty to ensure public administration complies with the law. This duty transcends winning a case and includes upholding the rule of law and shielding individuals from arbitrary state action. There is also an expectation that the Attorney General will behave as a model litigant.

Implementation falls to DOJ counsel.

Accordingly, DOJ counsel with conduct of litigation approach each case with the goal of representing our clients' interests and achieving a just outcome. Often, because our client's authority will derive from an Act of Parliament, these goals will overlap. As a result, the Government will be satisfied with a fair outcome, either through negotiated resolution or judicial decision. Indeed, the overriding objective of DOJ litigation counsel is a lawful and just result.

In practice, individual DOJ lawyers will always be satisfied where justice was done, notwithstanding that a tribunal decision will be sent back for redetermination or that a deportation may be stayed pending a further decision by the Court. This is not to say that the Department accepts every decision—appeals will of course be filed when, upon due consideration, there are grounds to do so. However, unlike with individual clients, outcomes pursued by the Department cannot be defined in terms of winning and losing.

DOJ counsel, as public servants, also have personal ethical obligations as set out in the DOJ Values and Ethics Code. For example, in addition to the BC Code prohibition against actual conflicts, we must “report to the Deputy Minister...all outside activities, assets and interests that might give rise to a *real, apparent or potential conflict of interest* in relation to their official duties.”<sup>28</sup>

We must also behave in accordance with public service values, including:

- Respect for Democracy;
- Respect of the public;
- Acting with integrity;
- Efficient use of public resources; and
- Demonstrating professional excellence.

I maintain that many of these ethical concerns, while not identical and not animated by public service *per se*, will nonetheless be familiar to all members of the British Columbia bar.

## D. Conclusions

Through our shared professionalism, private and Government lawyers all have high ethical standards to meet. Accordingly, there are likely occasions where the identity of a lawyer's client will not be relevant to whether the lawyer is fulfilling ethical standards of practice. In *Everingham v Ontario*,<sup>29</sup> the Court held the following:

Central to the conclusion of the learned judge was his view that lawyers employed by the government have a higher professional obligation than other lawyers to

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28 DOJ Values and Ethics Code [Emphasis added].

29 8 OR (3d) 121, 88 DLR (4th) 755 (SC Div Ct).

observe the Rules of Professional Conduct. There is no basis for this conclusion in the laws or traditions that govern the bar of this province.

All lawyers in Ontario are subject to the same single high standard of professional conduct. It is not flattering to the lawyers of Ontario to say that most of them are held to a lower standard of professional conduct than government lawyers.

While I do not entirely agree, I do appreciate the sentiment that all counsel are held to high ethical standards. This is why, although I recognize that Government and private lawyers will sometimes encounter *different* ethical problems, I do not accept the view that private counsel have a “lower” ethical standard to meet.

### III. Immigration Litigation

Immigration litigation typically involves judicial review in Federal Court under sections 72-74 of the *IRPA*. In most cases, an individual applicant will be challenging a decision made by a member of the Immigration and Refugee Board or a Government official,<sup>30</sup> with DOJ counsel representing the responding Minister of Citizenship and Immigration or Minister of Public Safety and Emergency Preparedness.

There are thousands of such applications each year so, over time, we are likely to encounter each other again and again. We form impressions of each other based on these encounters. While being flexible and generous, we should remember that small breaches can undermine our perceived professionalism. Some issues which commonly arise, and which engage the ethics and professionalism of counsel, are discussed below.

#### A. Correspondence

Correspondence should be direct and courteous at all times. This is an essential professional skill that cannot be underestimated for its effect on relations between counsel, clients, and the litigation process.<sup>31</sup> Avoid sending intemperate written correspondence. On the contrary, when experiencing frustration, put the matter aside for a day or consult a colleague. To this end, use email sparingly and recognize when a telephone call is more apt to diffuse conflict. DOJ counsel will observe this guidance scrupulously and generally prefer to maintain a friendly rapport throughout litigation.

#### B. Extensions of Time

In immigration litigation, there are time limits established under the *IRPA* and also under the *Federal Courts Citizenship, Immigration and Refugee Protection Rules [Immigration Rules]*.<sup>32</sup> The source is important because it will implicate DOJ counsel discretion in response.

Under rules 7 and 8 of the *Federal Courts Rules [Rules]*, parties may obtain extensions of time for the completion of litigation steps. DOJ counsel will rarely oppose such requests, as this is largely a matter of professional courtesy.

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30 Usually Immigration, Refugees and Citizenship Canada (“IRCC”) or Canada Border Services Agency (“CBSA”).

31 For a thorough discussion, see James Schuman, QC and John-Paul E. Boyd, “Remarks on Correspondence, Collegiality, and Courtesy”, CLE BC (June 2016).

32 SOR/93-22.

On the contrary, the statutory time limits for filing an application for leave must be firmly justified or risk opposition. Such limitations engage rule of law concerns: the will of Parliament must be considered and the law must be consistently applied. DOJ counsel may be expected to raise a limitation issue where an extension of time has not been properly made under rule 6 of the *Immigration Rules*, including with adequate justification in the applicant's affidavit evidence.

### C. Evidence

Affidavits are the primary form of evidence in immigration litigation at the Federal Court. Because counsel are often involved in drafting and commissioning this sworn testimony, ethical and professional obligations are deeply engaged.<sup>33</sup>

The parameters of proper affidavit evidence are set out in rule 12 of the *Immigration Rules* and rules 80-81 of the *Rules*. This includes that evidence should be confined to personal knowledge and a deponent who does not understand the official language being used must have the evidence translated by a competent and independent interpreter (who must also provide an oath).

The BC Code further provides that lawyers must not commission an affidavit unless the deponent:

- is physically present before the lawyer,
- identifies and is identifiable as the deponent,
- understands the statement contained in the document,
- swears or affirms that the contents of the document are true.<sup>34</sup>

DOJ counsel will stringently adhere to these parameters and will refrain from entering improper evidence.<sup>35</sup> By the same token, DOJ counsel may be expected to raise improper evidence as an issue.

### D. The Merits

DOJ counsel play a significant role in all immigration litigation, but it must be understood that many matters are outside our authority. We are still lawyers who take instructions from clients.

As with private counsel, DOJ lawyers do not personally endorse positions taken in litigation. We are bound to defend the Acts of Parliament and to advance all reasonable arguments in that effort. However, counsel should not conflate opposing legal positions with personal views. In most cases, the arguments on both sides are fair and brought in good faith, which is precisely why the Court must adjudicate. Failure to acknowledge this will greatly increase the risk of conflict and counsel's ability to satisfy ethical and professional obligations.

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33 For a thorough discussion, see Andrew P. Morrison, "An Ancient, Honourable and Learned Profession: Ethical Considerations for Lawyers Who Prepare, Witness or Swear Affidavits", CLE BC (October 2014).

34 BC Code, Appendix A. The Commentary adds: [11] If it appears that a deponent is unable to read the document, the commissioner must certify in the jurat that the document was read in his or her presence and the commissioner was satisfied that the deponent understood it: B.C., Rules of Court, Rule 22-2(6). If it appears that the deponent does not understand English, the lawyer must arrange for a competent interpreter to interpret the document to the deponent and certify by endorsement in Form 60 [now Form 109] that he or she has done so: Rules of Court, Rule 22-2(7).

35 In rare circumstances where an improper affidavit was filed, such as a "bootstrapping" situation, the Court has expressed disapproval through an award of costs.

## **E. Settlement**

DOJ counsel will assess early and continuously whether a decision is defensible and, if not, promptly pursue negotiation and settlement. This is consistent with the BC Code and with the role of the Attorney General.

Where DOJ counsel detect a reviewable error in the decision under review, we will raise this with our clients and seek to resolve the litigation as efficaciously as possible. As is incumbent on all lawyers, such steps are taken with the conscious recognition that a just outcome can be achieved while minimizing costs to individuals, the Court and the public.

## **IV. Conclusion**

The immigration bar in British Columbia is remarkably collegial and such an atmosphere greatly assists counsel to meet professional and ethical obligations. Although DOJ counsel have additional duties in light of our public office, these are often complementary and reinforcing of the ethical standards shared with private counsel. This is important to remember, as we ought to be unified and invigorated by our common “obligations to serve the public, defend the rule of law, and promote true access to justice.”