Court file No. T-2225-12

FEDERAL COURT

SIMPLIFIED ACTION

BETWEEN:

EDGAR SCHMIDT

Plaintiff

- and -

ATTORNEY GENERAL OF CANADA

Defendant

STATEMENT OF AGREED FACTS

1. The parties wish to ensure the speedy disposition of this action on its merit. To achieve this objective, the parties admit the facts hereunder for the purposes of this action.

2. This agreement is based on the understanding the parties have at the present. The parties specifically reserve their right to call further evidence, should they consider it necessary. Should a party propose to tender additional evidence, the parties undertake to one another and to the Court to endeavour to reach further agreed statements about those additional facts.

3. The parties therefore agree to the following facts.

A. BACKGROUND INFORMATION

4. The plaintiff was, at the commencement of this action, an employee in the public service of Canada and more particularly, General Counsel and Special Advisor in the Legislative Services Branch of the Department of Justice Canada.

5. His work included performing, in support of the Minister of Justice (the "Minister"), the statutory examinations referred to in section 3 of the *Canadian Bill of Rights* and section 4.1 of the *Department of Justice Act* and, in support of the Deputy Minister of Justice (the "Deputy Minister"), the statutory examination referred to in subsections 3(2) and (3) of the *Statutory Instruments Act* (the "examination provisions").

6. The examination provisions entrust to the Minister and to the Deputy Minister the responsibility to review draft legislation to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the *Canadian Bill of Rights* or the *Canadian Charter of Rights and Freedoms* (the "guaranteed rights").

7. The Minister ascertains whether there is an inconsistency between a proposed legislative measure and the guaranteed rights by determining whether there is a credible argument to support the proposed measure (the "credible argument standard").

8. To ensure a consistent approach in review, the Department of Justice has, under the authority of the Deputy Minister, issued directives to departmental lawyers about the credible argument standard that they are expected to employ when they examine proposed legislation for inconsistency with guaranteed rights.

9. The parties agree that the credible argument standard used by the Minister, Deputy Minister and departmental lawyers is set out in the extracts from the five internal Justice publications appended to this statement of agreed facts. The parties further agree those five appended documents are sufficient to set out what standard is used and that no further evidence on this point is required. These five documents are:

    a. *Statutory Examination Responsibilities and Legal Risk Management in Drafting Services*, 09 March 2006; 16 out of 28 pages, annexed to this statement of agreed facts as Appendix 1.

    b. *Legal Risk Management in the Public Law Sector*, 26 November 2007, 5 out of 12 pages annexed to this statement of agreed facts as Appendix 2.

    c. *Effective Communication of Legal Risk*, 15 December 2006, 6 out of 14 pages, annexed to this statement of agreed facts as Appendix 3.

d. *In Our Opinion*, April 2012, 14 out of 55 pages, annexed to this statement of agreed facts as Appendix 4.

e. *Charter Certification Process*, 3 out of 3 pages, annexed to this statement of agreed facts as Appendix 5.

DATED AT OTTAWA, this 21st day of October 2014

David Yazbeck
Solicitor for the Plaintiff

Alain Préfontaine
Counsel for the Defendant

STATUTORY EXAMINATION AND LEGAL RISK MANAGEMENT IN DRAFTING SERVICES

March 9, 2006

Introduction

This paper is intended for drafters in the Branch to assist them in their legal examination functions under the *Department of Justice Act* and the *Statutory Instruments Act* as well as in managing legal risks related to the bills and regulations they prepare. It begins by outlining the role they play, including the examination functions. It then describes the management frameworks for legal risks and the types of legal risk that are typically encountered in drafting legislative texts and concludes with guidance on how to assess the level of legal risk.

Legal examination and risk management are part of the daily work of drafters, but they can sometimes pose complex challenges. Accordingly, the paper describes the steps to be followed in discharging both functions, including the threshold for raising a matter to a higher level of management. A summary of these steps is included in Appendix 2.

General Role of Drafters

The core function of drafters is to prepare in both official languages a bill or regulation that translates Government policy into law. This requires a sound understanding of both the policy

and the legal effect that the law will have.

Drafters are also concerned with the intelligibility, coherence and consistency of federal legislative texts, particularly the quality and equivalence of both language versions. They are more generally concerned with the integrity of the legal system as a whole and must, in particular, take into account the relationships between federal law and the private law of the various provinces and territories as well as the impact that rules, principles and concepts of provincial and territorial law may have on federal law.

As counsel in the Department of Justice, drafters also have an advisory role on many issues involving legal principles and policies.[1] This role flows from the *Department of Justice Act*. Section 4 provides generally that the Minister of Justice is the "official legal adviser to the Governor General and the legal member of the Queen's Privy Council for Canada" and shall "advise on all matters of law referred to the Minister by the Crown". Section 5 sets out the role of the Attorney General, notably including the duty to "advise the heads of the several departments of the Government on all matters of law connected with such departments".

When a draft bill or regulation is completed, it constitutes an opinion from the drafters that the bill or regulation will have the legal effect required to implement the policy. Arriving at this opinion almost always requires the involvement of other counsel in the Department of Justice. This is why counsel from departmental legal services Units or Justice Policy Units should be available to assist on all draftingfiles. It also explains why the various specialized advisory units within the Justice provide advice in particular areas of the law. Drafters are entitled, and indeed encouraged, to rely on their advice in preparing their drafts and any associated opinions.

Statutory Examination Responsibilities

Drafters also have particular statutory responsibilities to examine draft bills and regulations. These responsibilities originated in the *Canadian Bill of Rights* in 1960 and the *Statutory Instruments Act* in 1971. Although they considerably predate the current government and departmental policies on risk management, they share the same general concern with legality, both in terms of particular laws and in terms of the legal system generally. They engage a basic principle of the rule of law: that the Government must act in accordance with the law. It must not do anything that would bring the administration of justice into disrepute.

Bills

Section 4.1 of the *Department of Justice Act* and the *Canadian Charter of Rights and Freedoms Examination Regulations*[2] establish examination responsibilities relating to the *Canadian Charter of Rights and Freedoms*. Section 3 of the *Canadian Bill of Rights*[3] and the *Canadian Bill of Rights* Examination Regulations[4]establish comparable responsibilities relating to that Act. Under these provisions:

- The Minister of Justice is required to examine every Bill introduced in or presented to the House of Commons by a Minister.
- The examination is for the purposes of ascertaining whether any of the provisions of the Bill are inconsistent with the *Canadian Charter of Rights and Freedoms* or the *Canadian Bill of Rights*.
- Once a bill is introduced or presented to the House, the Clerk of the House of Commons refers it back to the Chief Legislative Counsel.
- A member of the Legislation Section examines the bill and reports the results of their examination to the Chief Legislative Counsel who in turn certifies, on behalf of the Deputy Minister of Justice, that the bill has been examined for compliance with the *Charter* and the *Bill of Rights*.
- Finally, the Minister of Justice has an obligation to report any inconsistencies to the House

of Commons at the first convenient opportunity.[5]

It is also important to recognize the broader context in which these procedures operate. Charter concerns may be identified by Justice counsel and addressed throughout the policy development and drafting stages. In addition, when Cabinet authority is being sought for a program or policy proposal, including the drafting of legislation, the Cabinet support system requires the memorandum to Cabinet to include an analysis of the Charter or other constitutional implications of the proposal.[6]

Regulations

Section 3 of the *Statutory Instruments Act* (*SI Act*) provides for specific examination functions related to proposed regulations:

- It requires the Clerk of the Privy Council to examine every proposed regulation in consultation with the Deputy Minister of Justice.
- This examination is for the purposes of *ensuring* that each proposed regulation satisfies the following criteria identified in subsection (2):

  (a) it is authorized by the statute pursuant to which it is to be made;
  (b) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;
  (c) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*; and
  (d) the form and draftsmanship of the proposed regulation are in accordance with established standards.

- Drafters in the Regulations Sections of the Legislative Services Branch examine proposed regulations on behalf of the Deputy Minister of Justice.
- Once they have completed their examination, they "blue-stamp" the proposed regulation for transmittal to the Office of the Assistant Clerk of the Privy Council Office-Orders in Council. The stamp indicates that the proposed regulation has been "examined" in accordance with the requirements of section 3 of the Act.
- In the absence of any further advice from the Department of Justice, it also indicates that there are no matters to draw to the attention of the regulation-making authority. In other words, the Department of Justice has no objection to raise with the Privy Council Office to the draft regulation on the basis of the criteria in section 3.
- Finally, subsection 3(3) requires the Clerk to advise the regulation-making authority that each proposed regulation has been examined and indicate any matter to which the attention of the regulation-making authority should be drawn.

Some regulations are exempted from examination under the *SI Act*, but they must nevertheless be examined under section 4.1 of the *Department of Justice Act*[7] (*DoJ Act*) as follows:

- When the Orders in Council Secretariat of the Privy Council Office registers such a regulation, it then sends a copy to the Legislative Services Branch for examination under section 4.1;
- The regulation is examined by a drafter and then the Chief Legislative Counsel on behalf of the Deputy Minister of Justice certifies that it has been examined for compliance with the *Charter*;
- Finally, as with government bills, the Minister of Justice has an obligation to report any inconsistencies to the House of Commons at the first convenient opportunity.

Examination Standards and Reports

The standards established by section 4.1 of the *DoJ Act* and section 3 of the *SI Act* are similar, but not identical.

The object of the section 4.1 examination is to "ascertain whether any of the provisions are inconsistent / *vérifier si l'une de leurs dispositions est incompatible* " with the purposes and provisions of the Charter or the Bill of Rights. The Department has interpreted this standard to be that there is "no credible argument" to support a conclusion of consistency. A report is required only when this has been "ascertained". A credible argument has been explained as one that is reasonable, *bona fide* and capable of being successfully argued before the courts.

The examination under section 3 of the *SI Act* is "to ensure that" the proposed regulation meets the examination criteria [French version: *procède ...à l'examen des points suivants*]. These criteria include consistency with the Charter and the Bill of Rights, but they also extend to other matters. Although some of these also involve potential invalidity (statutory authority), the others do not necessarily ("form and draftsmanship" and "unusual or unexpected use of the authority").

Although the reporting standard under section 3 of the *SI Act* entails considerable discretion, it should be understood to focus on matters of legality and, like the reporting standard under section 4.1 of the *DoJ Act*, to require a report if there is no credible argument to support the validity of a proposed provision or its consistency with the Charter or the Bill of Rights.

Thus, an evaluation of whether a report should be made under section 4.1 of the *DoJ Act* or section 3 of the *SI Act* depends on what legal arguments (including supporting evidence if required)[8] can be made about validity or consistency. The absence of a credible argument to support the validity or consistency of a provision entails a high probability that if a court were faced with a challenge to the provision it would find that it was invalid or inconsistent. These arguments involve the interpretation of laws generally as well as the application of the *Canadian Charter or Rights and Freedoms* and the *Canadian Bill of Rights*. An evaluation under section 3 also involves various other fields of law, most notably constitutional law (the division of legislative powers) and administrative law (judicial review of the exercise of regulation-making and other powers). International law and private law (both common law and civil law) are also often relevant.

Evaluating whether a report should be made involves identifying provisions of the law that raise legal concerns and then examining these provisions in detail to see what arguments can be made for and against their validity or consistency.

There is a considerable degree of judgment in evaluating the strength of legal arguments. Judicial decisions dealing with the matter may be persuasive, depending on the jurisdiction and level of court and the pertinence of the decision. Appellate decisions, particularly those of the Supreme Court of Canada, are most influential.

When there are no judicial decisions on point (as is often the case), the strength of legal arguments is to be evaluated using general legal reasoning, particularly the principles and rules for interpreting legislation.

Finally, consideration has to be given to previous Justice legal opinions related to the matter. Justice counsel give advice on a departmental basis, not as individuals. The Government relies on

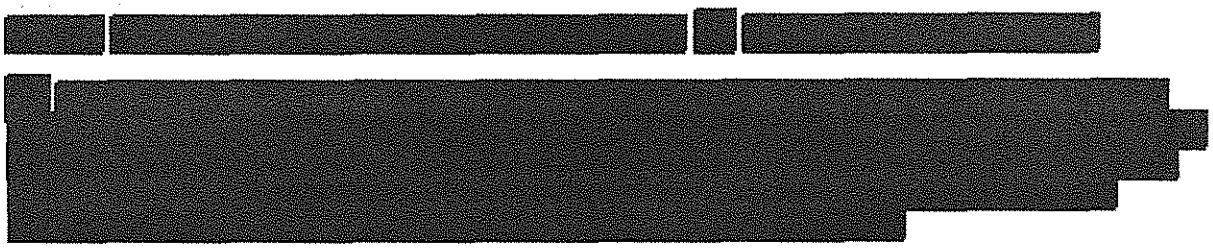
this advice, not only when making a particular decision, but also to make later related decisions. The advice must be consistent and departures from previous opinions should not be made without sound reasons and in consultation with managers and other units concerned.

Given the nature of their work and training, drafters are in a good position to determine whether there is a credible legal argument in relation to legal questions that they frequently deal with, such as the interpretation of laws or the scope of regulation-making authority. However, in many cases, before they provide advice on whether a report should be made, they should consult with counsel in Departmental Legal Services (or the instructing Justice Policy Unit in the case of Justice bills and regulations) or one of the specialist advisory sections of the Department. This is particularly true of complex areas such as constitutional law that often have a bearing on the validity or application of laws.

If there is no credible legal argument to support a conclusion that a provision is valid or consistent, the provision should be reported and no further risk analysis is needed to justify the report.

Next

[5] In this paper, further references to the Charter examination under section 4.1 examination should be read as including the Bill of Rights examination.



[8] For example, evidence needed to support arguments under section 1 of the *Charter* or the existence of conditions precedent to the making of regulations.

Date Modified: 2011-03-15

STATUTORY EXAMINATION AND LEGAL RISK MANAGEMENT IN DRAFTING SERVICES

Legal Risk Management

Introduction

Risk management is an essential part of the process for making policy or program decisions. Legal risks are an important subset of the risks that the Government must take into account in the more general risk assessments it makes in relation to its policies and programs.[1] Many of the risks that typically arise in law-making jeopardize policy or program objectives that depend on either the validity of a law or the way in which it is interpreted or applied.

The following are some fundamental concepts related to legal risk management:

"Risk" refers to the uncertainty that surrounds future events and outcomes.

"Legal Risk" is a risk arising out of an issue or event giving rise to a need for a legal response. A legal risk may also arise from a legal issue requiring a response or action by the government of a legal, communication-related, organisational or political nature.[2]

"Level of a risk" is quantified in terms of the *likelihood* (chance, probability) of an adverse outcome or unwanted event that has the potential to influence the achievement of an organization's objectives, and the *severity* or magnitude of the consequences of that outcome or event.

Accountability Frameworks

The Treasury Board's Management Accountability Framework (MAF) establishes the standards for management in the Government of Canada and is the basis for management accountability between departments/agencies and the Treasury Board Secretariat (TBS) and the Public Service Human Resources Management Agency (PSHRMAC).[3]

Under this Framework, all departments/agencies are required to report on their management of legal risk, as evidenced by

- ongoing/regular scanning of programs for legal risks, in a manner commensurate with the nature of the department's activities and mandate;
- senior management engagement in Legal Risk Management (LRM), including the active review, avoidance, mitigation and management of legal risks;
- effective sharing of information on legal risks, including with the Department of Justice and central agencies (in large part to create a "whole of government" perspective); and
- contingency planning to respond to risks that have materialized.

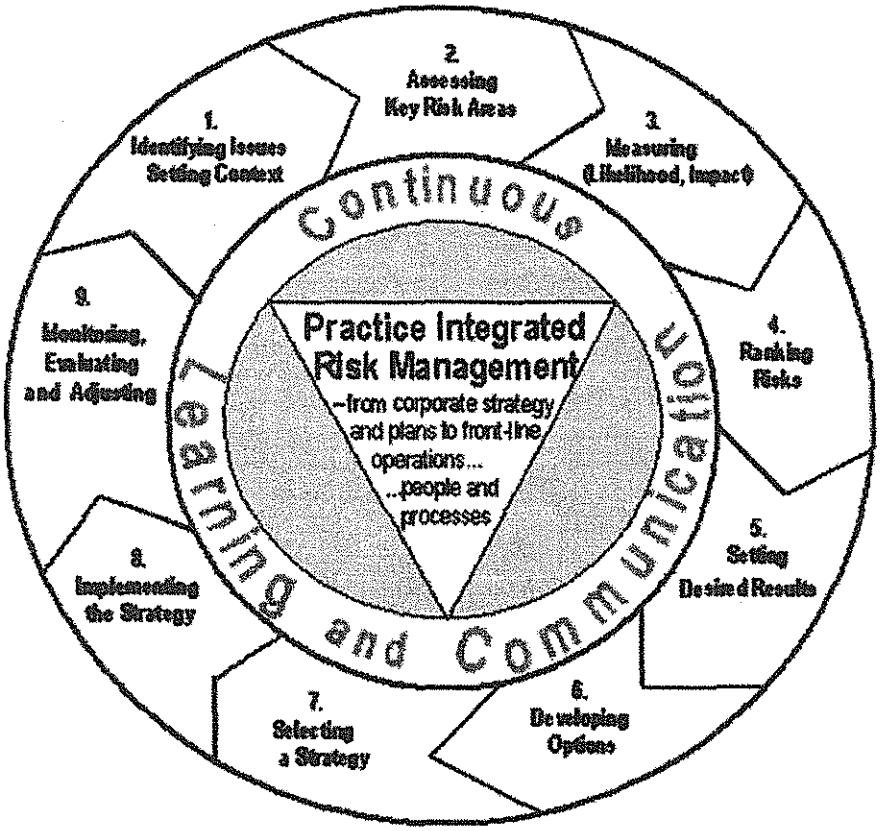
The Department of Justice Accountability Framework and Governance Structure for Legal Risk Management[4] says:

- LRM is a priority of the Department of Justice.
- LRM is the process of making and carrying out decisions that reduce the frequency and severity of legal problems that prejudice the government's ability to meet its objectives successfully. Its main components are the detection, avoidance, mitigation and

management of legal risks. LRM is linked to Integrated Risk Management, which is a component of the TBS Management Accountability Framework.

- LRM is practiced by client departments in partnership with Justice. It is one of the principal processes used by the Department to provide the highest quality legal service to the government of Canada and its institutions.
- LRM is also the responsibility of Justice itself, with respect to the legal risks of its own policies and legislation.
- LRM includes: scanning (risk identification), evaluation of the nature of legal risks, assessment of the level of the risks, information sharing, management of high impact legal risks, contingency planning, informing and engaging senior officials and Ministers (individually and collectively) on key LRM issues, identification and analysis of government-wide trends, instrument choice, dispute resolution, understanding of roles and responsibilities, case management and tracking techniques (e.g. I-Case).
- It is the responsibility of all employees and managers across the Department of Justice to know and apply LRM principles and methods appropriate to their particular positions and areas of responsibility.
- In addition, certain individuals or units have responsibility to provide functional direction and to coordinate the activities of others as they carry out their LRM duties.
- An accountability framework for a devolved system for LRM requires that senior managers in the Department ensure that responsibility and accountability cascades down within their areas of management.

The Risk Management framework utilized when developing this risk evaluation and management process is similar to the diagram below.



Identifying Legal Risks

Risk identification is critical to effective risk management. It enables DOJ and other departments to:

- Gain an awareness of emerging issues that could raise significant legal risk.
- Avoid being "blindsided".
- Get an accurate assessment of contingent liabilities.
- Manage legal risks strategically.
- Explore non-litigious ways to resolve disputes.
- Set up risk management regimes.

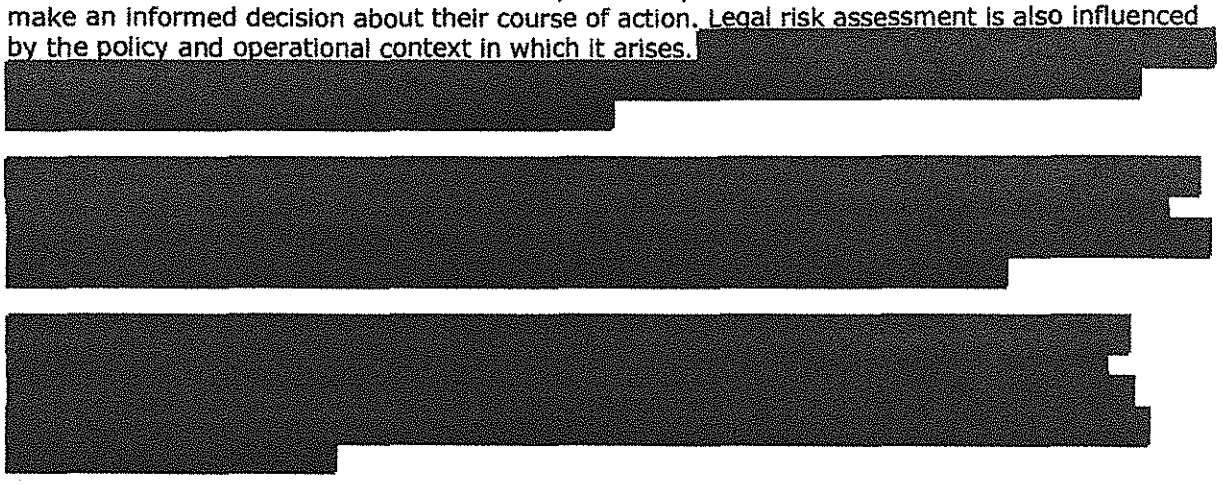
Under the Treasury Board Management Accountability Framework, all departments, including DOJ, must establish a risk management process that will identify legal risks at an early stage, including

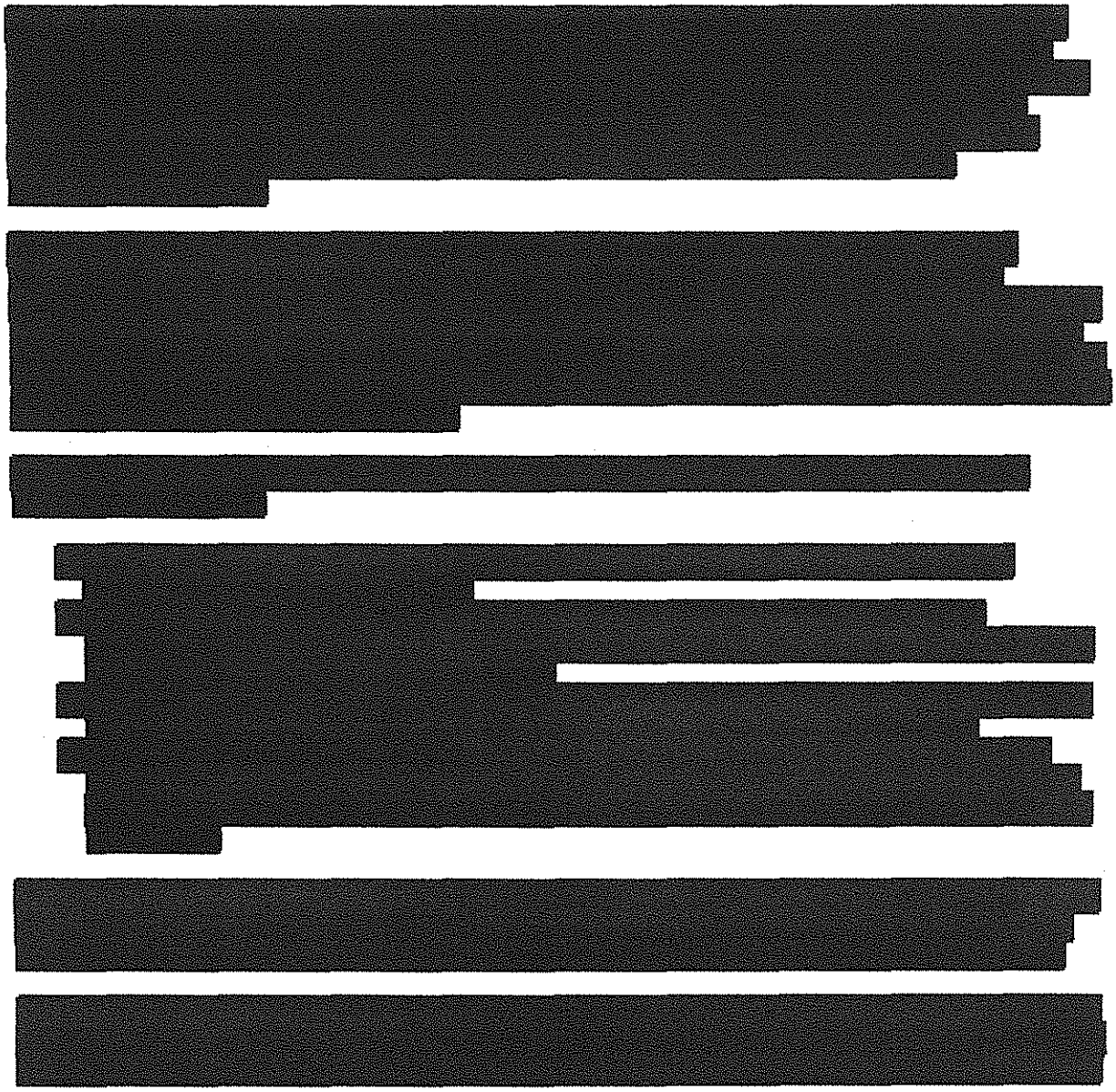
- all civil and criminal litigation;
- non-litigation legal risks that could lead to litigation or have a significant impact on
  - the national interest,
  - the Charter or the Constitution,
  - the government's, the department's or other departments' policy, law, regulations and programs,
  - the government's, the department's or other departments' finances (if the cost may exceed the ability of the department to pay),
  - federal-provincial-territorial-international relations, treaties or agreements,
  - relations with Aboriginal people or Metis, or
  - public confidence in the government or in the courts;
- legal issues or events that may be controversial, attract media attention, or involve Cabinet ministers or prominent public figures; and
- high-impact human rights, personnel, access and privacy, gender or diversity issues.

DOJ has a further obligation to inform other departments of known legal risks that could affect their policies or programs when it delivers legal services to its clients and to provide an assessment of such legal risks.

Considering the Nature of a Legal Risk

Legal risk assessment must be legally accurate and based on a solid analysis of the relevant law. It must also be relevant in the sense that it provides specific conclusions that enable clients to make an informed decision about their course of action. Legal risk assessment is also influenced by the policy and operational context in which it arises.





Assessing the Level of a Legal Risk

As indicated above, the level of a legal risk is generally quantified in terms of two dimensions:

- the *likelihood* of an adverse outcome or unwanted event that has the potential to influence the achievement of an organization's objectives, and
- the *severity* of the consequences of the adverse outcome or unwanted event if it occurs (*impact*).

Once the nature of a legal risk has been evaluated, the results of the evaluation may be used to assess the level of the risk. The following chart, particularly the numbering of risk levels, is based on risk assessment grids used throughout the government. It indicates levels of legal risk that express varying degrees of likelihood and impact (severity). The latter relates to the potential effect on the client department, other departments or the government as a whole.

This chart is suggested only as a general guide for characterizing the level of legal risk. The

expression of likelihood in terms of percentages is approximate rather than a precise measure. It should also be noted that levels 1 to 3 (which involve minimal impact) will seldom apply to legislative provisions because of the general, ongoing nature of their application.

		RISK LEVEL		
IMPACT ON GOVERNMENT	**Significant**	Medium (7)	High (8)	High (9)
	Moderate	Low (4)	Medium (5)	High (6)
	Minor	Low (1)	Low (2)	Medium (3)
LIKELIHOOD OF ADVERSE OUTCOME		Under 30%	30 to 70 %	Over 70%

The significance of the various risk levels in the context of drafting services is explained in the next section.

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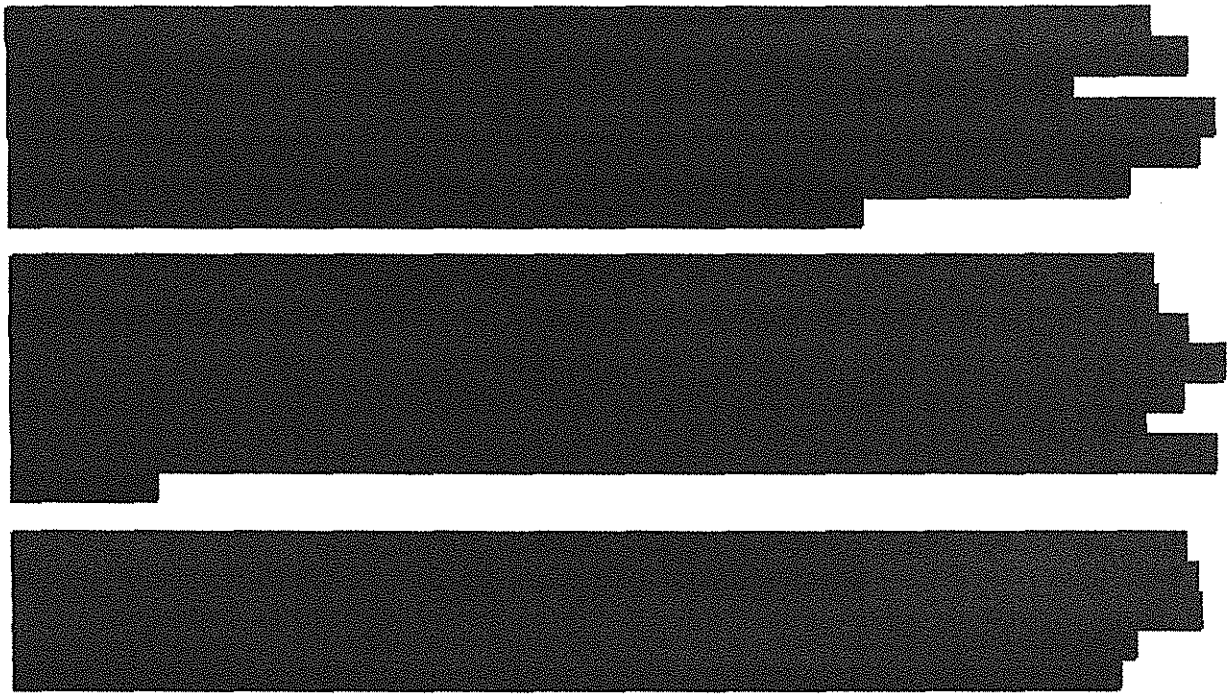
Date Modified: 2011-03-16

STATUTORY EXAMINATION AND LEGAL RISK MANAGEMENT IN DRAFTING SERVICES

Statutory Examination and Legal Risk Management Steps



Drafters in the Drafting Services Group should follow the steps outlined below in order to meet the statutory examination requirements and the Department's legal risk management objectives. Their role is to satisfy themselves that legal issues and risks raised by their drafts have been evaluated and addressed. In determining the level of risk, drafters will not necessarily, as noted above, have the information needed to assess each aspect of the risk or, indeed, to determine the overall level of the risk. There may be others in Justice, most notably in the Departmental Legal Services Units (or the Justice Policy Units in the case of Justice bills and regulations), or in client departments who are able to make these assessments. But drafters still have to participate in arriving at a conclusion as to the level of the legal risk and in managing the risk as set out below.

Initial Assessment

In reviewing draft provisions or policy instructions, drafters are attempting to understand the legislative or regulatory proposal, its policy, operational, political and financial context and the time-frame for completing it. This understanding is needed to identify any policy shortcomings or ambiguities, to uncover or highlight legal issues and to determine how to structure the proposal. In the same way, it is important that client officials understand the legal principles giving rise to any legal concerns and appreciate the need for Justice counsel to understand the applicable contextual framework. A mutual understanding of each other's "reality" will go a long way in ensuring that Justice counsel and client officials work together in resolving identified legal issues.

In the drafting of a bill or regulation, the identification and assessment of legal issues is selective. Not every legal issue needs to be discussed. In fact, drafting may proceed with little

discussion of legal issues if the proposal and its legal foundation are clear. Discussions about legal issues arise when the drafters have concerns that cannot be readily addressed within the framework of their instructions. These concerns may be raised at a very general level to prompt further policy work (for example, by asking "have you considered the impact of privacy rights on this matter?"). They may also involve the drafters' determination of the strength of legal arguments about validity or consistency, particularly in the context of the statutory examination functions under section 4.1 of the *Department of Justice Act* and section 3 of the *Statutory Instruments Act.*

Drafters are encouraged to discuss concerns with their managers and colleagues within the Legislative Services Branch (including the Advisory and Development Services Group and the Legislative Revision Services Group) and the relevant Legal Services Units (LSU), or the Justice Policy Units in the case of Justice bills and regulations. Aspects of risk, such as the scope of the risk or the risk of challenge, may require consultation with LSUs and their clients or the JPUs. Drafters may also seek input from the specialized advisory groups in Justice, for example the Human Rights Law Section in relation to Charter issues. Their contribution may be sought whenever a significant issue arises that would benefit from their views. If a formal opinion is required to address the concerns in a drafting file,[1] the drafters and the other counsel involved should agree on who is in the best position to prepare it. This may depend on which aspects of the matter are most significant and who is in the best position to consider them. It may also be appropriate for the opinion to be developed jointly with different counsel responsible for the different aspects.

Drafters should inform client officials as early as possible about any significant concerns, including a preliminary assessment of the level of risk involved and the nature and scope of any additional legal work or analysis that may be underway or required.

Concerns may be resolved in either of the following ways:

- client officials modify their legislative proposal or timetable in a way that takes care of the concerns; or
- the drafters are satisfied, on the basis of the contextual framework or upon a closer analysis of the law, that their concerns are not reportable under the *DoJ Act* or the *SI Act* (in other words, a credible legal argument can be made in support of the proposal) and the level of risk is not high.

When faced with a provision that raises a legal risk, drafters should explore ways of eliminating or reducing the risk. If this can be accomplished in a way that is acceptable to the client, then it should be done. Otherwise, if the risk is low or medium, the drafters should make sure that the client is fully aware of it and then proceed to finalize the bill or blue-stamp the regulation. If the risk level appears to be high or the provision appears to be reportable, or of there is uncertainty or disagreement on these matters, the drafters should continue with the detailed analysis described next.

Detailed Analysis: Confirming Legal Position and Consultation

Legal concerns are not always readily resolved, either because clients are unwilling or unable to modify their proposal so as to resolve the problem or because a closer legal analysis confirms the initial assessment of the problem. When drafters have conducted their initial assessment in consultation with their LSU or JPU counterparts and any other Justice colleagues as appropriate they may be faced with a provision that appears to be *reportable* or raises a *high level of legal risk.*

If in such circumstances the client insists that the bill be completed and printed for review by the Privy Council Office, or that the regulation be blue-stamped, the drafters should formally bring the matter to the attention of their manager. They should also inform the client officials of this

referral and indicate that the regulation will not be blue-stamped or the bill will not be completed without instructions from their manager. The manager should immediately get in touch with his or her LSU or JPU counterpart. If more than one department is involved in the drafting of a particular provision, it may be necessary to involve all the LSUs or JPUs concerned.

Managers may also have to be brought into a file to resolve disagreements among Justice drafters and counsel.

If the managers work out a solution or agree that the legal issue is not reportable and poses a low or medium level of risk that cannot be eliminated or reduced with the concurrence of the client, then the drafting manager should inform the drafters of this conclusion and authorize the regulation to be blue-stamped or the bill to be completed. As well, the LSU or JPU manager should inform appropriate client officials of this decision.

If the managers determine that the proposal is reportable or poses a high risk, this determination may be sufficient to convince client officials to make appropriate changes to their proposal. The matter would then be returned to the drafters for appropriate next steps. However, it is also possible that client officials may continue to refuse to make the required changes and reiterate, at the highest levels, their decision to proceed with the proposal and to accept all associated risks. A formal written risk assessment should be prepared and provided to the client and a contingency plan based on the assessment should be prepared jointly with client department and the LSU or JPU counsel.

If managers are unable to work out a suitable solution or disagree on the law or level of risk associated with the issue, they should refer the matter to the next management level. Consistent with the principle that "Justice should speak with one voice", any internal disagreement within the Department of Justice must be resolved, if need be by the Deputy Minister or one of the Associate Deputies. Any provision that is determined to be reportable or to pose a high legal risk, including being in conflict with the *Charter*, may be brought to the attention of the Privy Council Office or ministers. Who specifically will make and report the determination of the Department of Justice will depend on the circumstances of each case.

Conclusion

Drafting and examining legislative texts and managing the legal risk associated with them are daunting enterprises. Laws, by their very nature, are of broad and continuing application. Efforts to ensure their legality and to minimize or eliminate risk will count their returns many times over. And just as the preparation and enactment of laws involves a host of people, both within and outside the Department of Justice, so too the assessment and mitigation of legal issues and risk do not fall on the shoulders of any one person or group. Legal examination and risk management, like the making of laws itself, can only succeed as a cooperative effort that brings together the variety of talents needed to produce laws that will achieve their goals.

Appendix 1 Appendix 2

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[1] For regulations files, see the *Guidelines for Drafting Services Group Legal Advice on Regulations* http://dojnet/lsb_e/Direction/guidel_draft.htm.

Date Modified: 2011-03-11

STATUTORY EXAMINATION AND LEGAL RISK MANAGEMENT IN DRAFTING SERVICES

Appendix 2 - Steps for Statutory Examination and Legal Risk Management

In the drafting of a bill or regulation, the identification and assessment of legal issues is selective. Not every legal issue needs to be discussed. In fact, drafting may proceed with little discussion of legal issues if the proposal and its legal foundation are clear. Discussions about legal issues arise when the drafters have concerns about a provision that cannot be readily addressed within the framework of their instructions. The following summarizes the steps that drafters should take in consultation with their Departmental Legal Services or Justice Policy colleagues when they encounter such legal issues. These steps may have to be repeated as instructions or circumstances change or new information comes to the attention of the drafters or other Justice counsel involved.

Statutory Examination

1. Identify the provisions of the bill or regulation that raise concerns in terms of the examination criteria under section 4.1 of the *Department of Justice Act* or section 3 of the *Statutory Instruments Act*.

2. Evaluate the strength of the legal arguments that can be made for and against the validity or consistency of those provisions.
   - Is there relevant case law and, if so, how relevant and authoritative is it?
   - Are there relevant Justice opinions and, if so, how relevant and authoritative are they?
   - Should colleagues within the Branch or in the specialized advisory services of Justice be consulted?

3. If there is no credible argument to support a conclusion that a provision is valid or consistent, the provision may be reportable (see step 10 and following).

Legal Risk Management

Evaluating the nature of the legal risk

4. In addition to considering the results of steps 1 and 2, similarly evaluate the strength of the legal arguments relating to any other concerns that a court or other decision-making body – including the SJC or an international tribunal – might find provisions to be invalid or to apply contrary to the Government's view, including
   - Would the provision be interpreted too narrowly to sufficiently support the relevant government policy or program?
   - Would a challenge by the SJC be successful?
   - Would a challenge before an international tribunal be successful?

5. Evaluate the scope of the risk
   - Does the risk affect a multitude of actions over a period of time or is it confined to a few instances of limited duration?
   - What is the value of the financial or other interests at stake?
   - Will the legal issue arise in other circumstances?

6. Evaluate the probability of challenge
   - Who is affected by the Act or regulation?
   - What is the likelihood that someone will challenge the validity or application of the Act or regulation?
   - What is the likelihood that the SJC will challenge the validity of the regulation?

7. Evaluate the probable consequences
   - What remedy would a court grant if it finds that an Act or regulation is invalid?
   - Would the scope of the remedy be confined by reading down or severing invalid provisions?
   - Will the remedy affect similar matters arising in other circumstances?
   - What disposition would the SJC make if it considers a regulation to be invalid?
   - Will the disposition affect similar matters arising in other circumstances?

Assessing the level of the legal risk

8. The level of a legal risk is generally quantified in terms of two dimensions:
   - the *likelihood* of an adverse outcome or unwanted event that has the potential to influence the achievement of an organization's objectives, and
   - if it happens, the *severity* of its consequences (*impact*).

Use the following chart as a general guide to determine the level of a legal risk:

		RISK LEVEL		
IMPACT ON GOVERNMENT	**Significant**	Medium (7)	High (8)	High (9)
	Moderate	Low (4)	Medium (5)	High (6)
	Minor	Low (1)	Low (2)	Medium (3)
LIKELIHOOD OF ADVERSE OUTCOME		Under 30%	30 to 70 %	Over 70%

Resolving and Managing Legal Issues and Risks

9. Explore with the client ways of eliminating or reducing the risk.

10. If it appears that the provision is reportable or that the risk is *high*, immediately raise the matter with manager and inform client.

11. Manager consults immediately with Departmental Legal Services or Justice Policy manager. If they conclude that the provision is not reportable, that the risk is low or medium and that it cannot be eliminated or reduced, proceed to complete drafting or examination (blue-stamping).

12. If managers conclude that the provision is reportable or that the risk is high and the client insists on proceeding, they should raise the matter to the next management level. Contingency plans should be prepared in consultation with legal services counsel and the client department.

13. If no resolution is reached with the client through successive management levels, the matter may be raised with Privy Council Office and ministers.

Date Modified: 2011-03-16

Legal Risk Management in the Public Law Sector

This document has been developed for the purposes of counsel providing legal services in the Public Law Sector (PLS). Primarily this will be counsel in the Constitutional and Administrative Law Section, the Human Rights Law Section, the Information Law and Privacy Section, the Public International Law Section and the Trade Law Bureau. Counsel in the Judicial Affairs Unit, the Public Law Policy Section and the International Private Law Section may also be implicated to the extent they provide legal advice, alongside their policy function (which is not covered here).

The aim of this paper is twofold: (1) to explain to PLS advisory counsel how the ongoing daily work of Public Law and Legal Risk Management (LRM) fit together, and (2) to outline in a practical way the responsibilities of PLS advisory counsel in implementing LRM.

Role of Public Law (Advisory) Counsel

The work of Public Law counsel providing legal services has three different aspects:

(1) We provide **legal advice** on government decision-making, in both the policy and operational contexts – either directly to counsel in policy or program units in the Department of Justice, to client departments through their DLSUs or in some cases to client departments directly (e.g. PCO, DFAIT). PLS counsel also regularly assist DOJ drafters by providing specific expert advice during the course of the drafting process, working alongside DLSU or policy counsel.

(2) We provide **litigation support** to civil and criminal litigators in Ottawa and in the regions in cases raising public law issues.

(3) In certain circumstances we are the government's **litigator** ourselves, for example in JLT which handles the government's international trade litigation and HRLS which responds to international human rights petitions. Counsel in the Public International Law Section can also be litigators before the International Court of Justice, and are instructing counsel in *amicus curiae* briefs filed by the Attorney General in foreign courts.

Section 4.1 of the *Department of Justice Act*

Counsel in the Human Rights Law Section also have a unique role to play under s. 4.1 of the *Department of Justice Act*. This provision creates a statutory responsibility for the Minister of Justice to examine government bills presented to the House for consistency with the *Charter* and to report any such inconsistency to the House.[1]

[1] Section 4.1 of the *Department of Justice Act* provides as follows: "... the Minister shall.... examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and every Bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and

While closely related to the legal risk advisory function, the Minister's statutory obligation to report legislation inconsistent with the *Charter* is not the same as and should not be confused with it. To begin with, because the threshold for reporting a *Charter* inconsistency is very high (*i.e.,* the measure is manifestly unconstitutional, such that no credible argument exists in support of it), it will only be triggered in rare cases. Moreover, this obligation relates exclusively to the *Charter* (and the *Canadian Bill of Rights)* and does not extend to reporting other legal risks, or even those associated with other constitutional or legislative instruments.

Legal Risk Management

LRM is a key governmental and Departmental priority that is practiced by client departments in partnership with DOJ. Launched as a formal initiative in 2000, LRM is one of the main processes whereby DOJ provides the highest quality legal services to the government.

A "legal risk" is a risk arising out of an issue or event giving rise to a need for a legal response. A legal risk may also arise from a legal issue requiring a response or action by the government of a legal, communication-related, organizational or political nature.

Legal risk management is the process of making and carrying out decisions that reduce the frequency and severity of legal problems that may affect the government's ability to meet its objectives successfully. The three main stages of LRM are: risk detection, avoidance and management (including mitigation).

The work of Public Law advisory counsel relates to all three stages of LRM; indeed in doing our jobs effectively we are practising LRM almost every day.[2]

LRM in the Department of Justice

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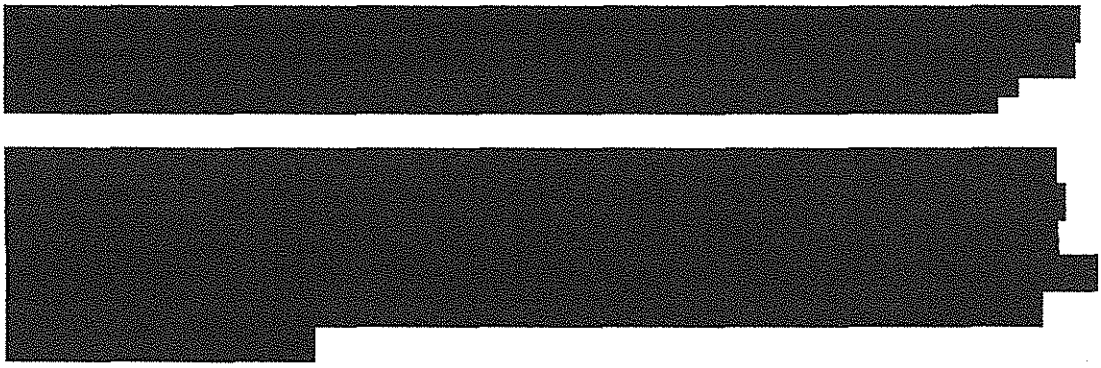
provisions of the *Canadian Charter of Rights and Freedoms* and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity." Section 3 of the *Canadian Bill of Rights* establishes comparable responsibilities relating to that Act. Similarly, s. 3 of the *Statutory Instruments Act* provides for specific examination functions for any proposed regulations to ensure that they satisfy legal and drafting criteria that include consistency with the *Charter* and the *Bill of Rights*. These issues are further explored in the paper "Statutory Examination and Legal Risk Management in Legislative Services" available at http://jusnet.justice.gc.ca/lsb_e/policy/statutory_examination/stat_exam_part1.htm.

[2] In addition to the daily business of providing legal advice, the Trade Law Bureau in Public Law also implements a very particular legal risk management tool, which is the Treasury Board Management Framework for International Trade Litigation, which helps to spread risk and responsibility (including financial responsibility) for trade litigation across all government departments. This framework (a) obliges departments to get legal advice from JLT on the trade compliance of proposed measures; (b) obliges departments to note in their Memoranda to Cabinet the trade risk of their measures; and (c) establishes a model for sharing trade litigation costs among departments whose mandates are being challenged.



Standard Terminology – Assessing the Likelihood that a Legal Challenge will Succeed

In November 2006, the Deputy Minister struck a working group in the Department to consider ways of improving how we communicate legal risk to ministers and senior officials. The result of their deliberations was a report entitled "Effective Communication of Legal Risks"[13] which makes a number of recommendations, including on standardizing risk terminology in the advisory context.

The recommendations made in the report were designed to stimulate discussion in the Department on these important issues, and to contribute to the process of LRM renewal. They have not been adopted as mandatory practices in the Department. The report contains a proposal for standard terminology, however, which the ADM Public Law has decided should be used in Public Law. This approach appears to be more easily applicable to PLS advisory work than the LRM grid considered above.

In accordance with the recommendations of the working group, the following terminology should be employed by PLS counsel when advising on whether a proposed government measure or action is consistent with law. It is based on an assessment of whether or not a legal challenge to the measure will be successful. (It should be recognized that the below approach cannot be uniformly applied to all opinions generated in Public Law, for not all opinions lend themselves to – or contain – a crystallized legal "risk assessment". The approach set out here is meant to apply only to those opinions that do.)

In making this assessment, consideration should be given to factors such as: (1) the strength of the legal arguments supporting the government's proposed measure, including the relevance and level of supporting judicial, quasi-judicial or international decisions, and (2) whether there is evidence that exists, or can be developed, to support the arguments in support of the measure.

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[12] If it is unlikely that a measure will ever be challenged, this may be a factor in the overall risk assessment as calculated by the client, but it not the question usually posed to PLS. Whether or not the measure is likely to be challenged is a separate issue from the likelihood of a successful challenge, and in our view these risks should be evaluated separately.

[13] The Report is available at http://jusnet.justice.gc.ca/lrm_e/special/.

If it is possible to determine the most likely *remedy* that a court would grant in the event of a successful challenge to the measure, this should also be mentioned to the client. This may also be a factor in the overall risk assessment associated with the proposal.

Risk Levels to be used in Public Law

1. **Very Low** – The likelihood of a successful challenge to the measure is remote. In other words, the likelihood of a successful challenge runs from non-existent to insignificant.

2. **Low** – Proceeding with the measure entails some likelihood of a successful challenge, but the measure is likely to be sustained in the event of a challenge. The likelihood is beyond the minimal range but, in terms of probabilities, the measure is more likely than not to survive the challenge.

3. **Medium** – The likelihood falls into the middle zone where the prospects of a successful vs. unsuccessful challenge are evenly balanced. This may be due to uncertainty in the law or missing facts. Alternatively, it may occur where it is difficult to determine the weight that a court or tribunal would give to the evidence or where the strengths and weaknesses of the case appear relatively evenly balanced.

4. **High** – It is more likely than not that the challenge to the measure will be successful. Connotes a condition of probable invalidity or illegality of the measure.

5. **Very High** – The likelihood of a successful challenge is almost certain.

5(a). **Minister's Statutory Obligation** (for the Human Rights Law Section only) – This is engaged where the level of likelihood is at the far end of the fifth range and is due to manifest inconsistency between proposed legislation or regulations and the *Charter*.[14] In such a case, the measure is manifestly unconstitutional, and no credible (*i.e.,* reasonable and *bona fide*) argument exists in support of it, such that the Minister's statutory obligation to issue a report to the House of Commons, or the Clerk of the Privy Council's statutory obligation to advise a regulation-making authority, is engaged. Situations of this nature are very unusual and require distinct treatment by HRLS counsel and managers (alongside other implicated DOJ counsel).

PLS should use the above terminology as much as possible in assessing legal risk. The descriptors (i.e. "low" or "high") should be used, as well as the associated terms that explain exactly what the descriptors mean (e.g. more likely than not to be found inconsistent with international law). The terms themselves must be accompanied by the descriptive language to be fully and clearly understood.

In recommending standard language of this nature, no reference is made to the "percentages" of risk associated with the various terms identified. This is intentional.

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[14] As described *supra* at note 1, this obligation also applies respecting the *Bill of Rights*, but given the extremely limited application of the *Bill* since 1982 it is highly unlikely ever to arise.

While the LRM grid uses percentages, they are not in the view of PLS entirely satisfactory – particularly the "medium" category under likelihood of adverse outcome, which ranges from 30-70%. This seems unhelpfully broad from an advisory point of view. While the risk grid proposed in the "Effective Communication of Legal Risks" Report also had percentages attached to the various risk terms used above, it is not the intention of Public Law to adopt these percentages. What is viewed as important for PLS for the time being is the adoption of common terminology in risk assessment, the explanation of which in plain language should be sufficient to convey their appropriate meaning to clients, without associated (and controversial) mathematical percentages.

Applying consistency to the terms we use in our legal analysis across the Sector will assist the Department more generally, as well as our clients, in properly identifying – and where appropriate, mitigating, managing or simply accepting – legal risks. Applying the recommendations of the "Communicating Risk" working group on terminology in the Public Law Sector will also help to assess the utility and practicality of these recommendations in the Department, as well as their interrelationship with the LRM grid.

[redacted]

Anne Lawson
Public Law Sector
November 26, 2007

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Effective Communication of Legal Risk

Issue

In November 2006, the Deputy Minister of Justice established a small working group to examine the question of how the Department of Justice (DOJ) can more effectively communicate legal risk to the Minister of Justice and Attorney General of Canada, as well as to its other clients. This working group was asked to provide a report on its conclusions and recommendations to Associate Deputy Minister, Donna Miller, by December 2006.

Mandate and Goal

The mandate of the working group was to study and identify practical measures aimed at achieving three key outcomes in support of the overall goal of better communication of risk to the Minister and other key clients:

- Consistent, clear, user-friendly and "decision-ready" legal risk terminology.
- Value-added advice for the Minister, his office and other clients.
- Engagement of Minister and his staff vis-à-vis Departmental advice.

For more on the mandate of the working group, as well as its composition, see Annex 1.[1]

Discussions and General Conclusions:

Because this specific issue cannot be easily separated from many related issues in the area of legal risk, the working group's discussions were wide-ranging. In particular, the following themes were discussed, the following points were made, and the following views were generally shared during the working group meetings:

- *DOJ's Pivotal Role* – The Department of Justice should be proud of the pivotal role it plays as the Government of Canada's legal advisor, and in identifying legal risks for the government. Although it is always important to continue improving on how we communicate legal risk to our Minister and other Ministers, we should ensure that any improvements to further this goal do not unintentionally diminish our important role in identifying and assessing all relevant legal risks.

- *Different Contexts* – It is important to understand that legal risk is communicated by DOJ counsel to clients in at least three different contexts (civil and criminal litigation, legislative files and advisory files), and does not crystallize or manifest itself in the same way in these contexts. This means that the assessment and communication of legal risk does not necessarily occur in the same way or at the same time in each context. For example, the legal risk in *litigation* files has often crystallized when the risk is communicated, since the litigation is occurring. On the other hand, the risk in *advisory* and *legislative* files is often more speculative and wide-ranging when the risk is generally assessed and communicated (*i.e.*,at the front end of those processes).

- *Legal Risk Management (LRM)* – LRM is a key governmental and Departmental priority that is practiced by client departments in partnership with DOJ. It is also one of the key processes whereby DOJ provides the highest quality legal services to the government. Indeed, the government's ability to successfully meet its objectives depends to a large extent on the detection, avoidance, mitigation and management of legal risks.[2]

- *Risk Tolerance* – It is important to understand that risk tolerance is personal, idiosyncratic and issue-specific. Some Ministers and governments may be willing to tolerate a higher level of risk than others. Likewise, risk tolerance may vary according to the relative priority of an initiative or the degree to which a given component is integral to that initiative.

- *Consequences of Risk* – In order to gauge one's risk tolerance, it is critical to understand what is at stake. For this reason, a key element of communicating risk effectively is to address the consequences of the risk, should it materialize. Indeed, this may be among the most relevant aspects of providing advice and communicating legal risk to clients, since it can be characterized as bringing a practical focus to the legal analysis by connecting it to its real-world implications.

- *Other Ministers* – Although it is critical that DOJ continue to provide the highest quality legal service to our Minister (including in terms of communicating legal risk), it must be remembered that DOJ counsel also communicate legal risk to many other Ministers and Departments on a daily basis – and this adds to the complexity of making changes to the process of assessing and communicating legal risk, or achieving any standardization quickly.

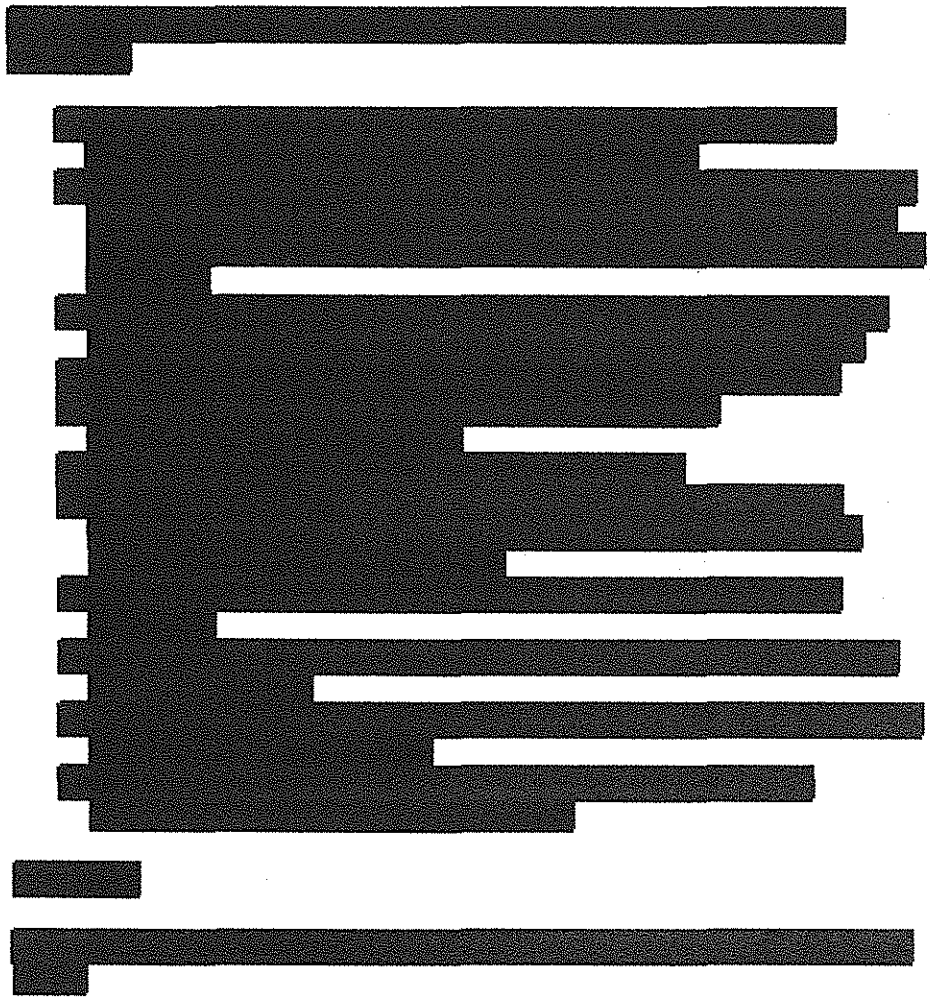
- *S.4.1, DOJ Act* – While closely related to the legal risk advisory function, the Minister's statutory obligation, under s. 4.1 of the *Department of Justice Act*, to report legislation inconsistent with

the *Charter* is not the same and should not be confused with it.[3] To begin with, because the threshold for reporting a *Charter* inconsistency is very high (*i.e.*,the measure is manifestly unconstitutional, such that no credible argument exists in support of it), it will only be triggered in rare cases. Moreover, this obligation relates exclusively to the *Charter* (and the *Canadian Bill of Rights)* and does not extend to reporting other legal risks, or even those associated with other constitutional or legislative instruments.

- [redacted]

- *Standardized Terminology* – It is generally agreed, however, that it would be ideal to achieve greater standardization of the terminology used to assess legal risks across the Department. In practical terms, this could mean reassessing the LRM risk grid as it relates to the advisory and legislative processes. Alternatively, it could mean developing a risk evaluation system for the advisory and legislative contexts that could then be synchronized with the LRM risk grid to the extent possible. Although a process of this sort would entail a fair amount of work and could not occur in a short time frame, it would be a step forward in terms of DOJ's overall articulation of legal risks to the government.

- [redacted]



ANNEX 2

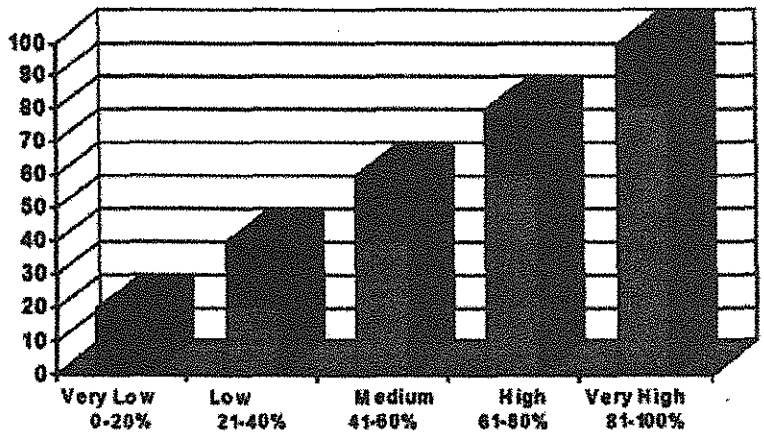
Proposed Standard Terminology in the Advisory and Legislative Contexts to Assess the Likelihood that a Legal Challenge will be Successful

It is recommended that the following scale be employed in the advisory and legislative contexts when assessing the likelihood that a legal challenge to a particular initiative or measure will be successful. However, this does not mean that the terms set out below (*e.g.*,very low, low, medium, high, very high) should be used by themselves when assessing the likelihood of a successful legal challenge. It remains important to explain clearly and fulsomely to the client why the likelihood has been assessed at a particular level, as well as the nature and degree of the risk if the client pursues the legislative or policy proposal in question. In doing so, consideration should be given to factors such as: (1) the strength of the legal arguments, including the relevance and level of supporting judicial decisions, and (2) whether there is evidence that exists, or can be developed, to support the arguments.

This assessment assumes that there will be a legal challenge taken against the measure in question. However, if it is unlikely that the measure will ever by challenged in the courts, then this point should be brought to the attention of the client. Whether or not the measure is likely to be challenged in the courts is a separate issue from the likelihood of a successful legal challenge and the risks associated with each should be evaluated separately.

If it is possible to determine the most likely *remedy* that a court would grant in the event of a successful challenge this should also be mentioned to the client. This may also be a factor in the overall risk assessment associated with the proposal.

Risk Levels:



1. **Very Low (0-20%)** – The likelihood of a successful challenge to the measure is remote. In other words, the likelihood of a successful challenge runs from non-existent to insignificant.

2. **Low (21-40%)** – Proceeding with the measure entails some likelihood of a successful challenge, but the measure is likely to be sustained in the event of a court challenge. The likelihood is beyond the minimal range but, in terms of probabilities, the measure is more likely than not to survive the challenge.

3. **Medium (41-60%)** – The likelihood falls in to the middle zone where the prospects of a successful vs. unsuccessful challenge are evenly balanced.This may be due to uncertainty in the law or missing facts. Alternatively, it may occur where it is difficult to determine the weight that a court would give to the evidence or where the strengths and weaknesses of the case appear relatively evenly balanced.

4. **High (61-80%)** – It is more likely than not that the challenge to the measure will be successful. Connotes a condition of probable invalidity of the measure.

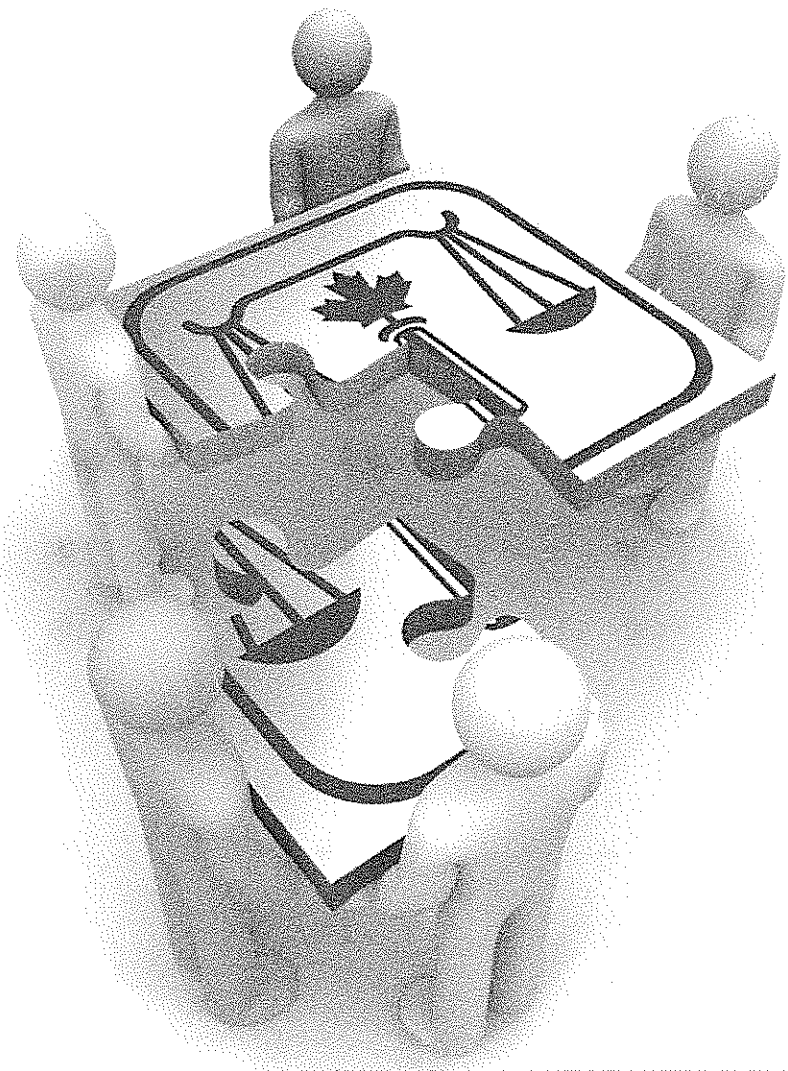
5. **Very High (81-100%)** – The likelihood of a successful challenge is almost certain.

5(a) **Minister's Statutory Obligation** – This is engaged where the level of likelihood is at the far end of the fifth range and is due to manifest inconsistency between proposed legislation and the *Charter*. In such a case, the measure is manifestly unconstitutional, and no credible (*i.e.*,reasonable and *bona fide*) argument exists in support of it, such that the Minister's statutory obligation to issue a report to the House of Commons is engaged. (Note that there is a separate process to be followed in such determinations. Inquiries respecting the Minister's reporting obligation should be directed to the Human Rights Law Section or the Legislative Services Branch.)

December 15, 2006

[redacted]

SERVING CANADIANS



IN OUR OPINION

Best Practices for Department of Justice Counsel In Providing Legal Advice

April 2012

Law Practice Management Directorate

ONE COMMUNITY, SUCCEEDING TOGETHER

Department of Justice Canada / Ministère de la Justice Canada

Canada

FOREWORD

We are pleased to present this second edition of a document originally titled *In My Opinion*. Its purpose is to assist Department of Justice lawyers and notaries in providing high-quality legal opinions. *In Our Opinion* has been widely embraced by both new and experienced departmental counsel since it was originally developed.

The practice of law in the Department has evolved in the intervening years, and this second edition reflects that evolution. Some of the most significant changes to our practice are the increased complexity of litigation and advisory work and the profound effects of the Internet, email and other technologies.

In Our Opinion seeks to reflect the current realities, constraints and unique working environment faced by Justice counsel, and to remind us of the evolving understanding of the role of government counsel and the diversity of the Department's practice. The document conveys key principles such as the need to "speak with one voice" and to provide advice that takes into account whole-of-government interests. It emphasizes the concepts of legal risk management and knowledge management, and it continues to provide practical guidance and support for practitioners.

With the creation of the Law Practice Management Directorate in 2007, the Department committed itself to the further professional development of its lawyers and notaries, as well as of the systems and business practices we all need to carry out Justice's mandate now and in the years to come. The document was updated as another step toward that end.

The work and professionalism of Department of Justice employees is of great value to the Government of Canada. We strive as a Department to constantly achieve excellence. We hope you will find this document useful in this regard.

We would like to take this opportunity to thank all those across the Department who contributed to this edition by providing their views and suggestions for improvement. In particular, we acknowledge the leadership of Deborah MacNair in initiating an earlier revision, and the important contributions of Nancy Othmer, Andrew Saranchuk and Stephen Zaluski to that process. Finally, we salute the work of the Legal Risk Management Division in the Law Practice Management Directorate in coordinating this second edition and who will continue to update it on an ongoing basis.

Myles J. Kirvan
Deputy Minister of Justice

Yves Côté
Associate Deputy Minister of Justice

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The new version of *In Our Opinion* is a tool to assist Department of Justice counsel in writing high-quality legal opinions. Your feedback is important to us and will help us ensure that *In Our Opinion* continues to reflect the realities of your working environment.

If you have any comments or suggestions to improve the document, we invite you to send your comments to LRM-GRJ@justice.gc.ca.

Introduction

Purpose of *In Our Opinion*

In Our Opinion is a tool designed to help all Department of Justice counsel, i.e. lawyers and notaries, provide high-quality legal advice to the Government of Canada.

Structure of the Document

The first part of *In Our Opinion* begins with a description of the respective roles and responsibilities of the Minister of Justice and the Attorney General, the Department of Justice and individual counsel in the provision of legal advice to the Government of Canada. This provides a context for the values that Justice lawyers should promote in their practice of the law. The second part of *In Our Opinion* contains Best Practices meant to guide counsel on how to deal with a variety of situations, and to promote the delivery of high-quality legal services across the Government of Canada. Finally, the Appendices provide some further guidance and specific practical tools for the provision of legal advice.

Department of Justice Counsel

As counsel who practice in the federal public service, we face certain challenges that our counterparts in private practice do not. In addition to our responsibilities as officers of the court, we have responsibilities as officers of the Crown. We work for a unique "client" – the Government of Canada – which is engaged in complex activities across the country and around the world, and whose foremost commitment is to the public interest. We have a fundamental role to play in serving Canadians, their communities and the public interest under the direction of the elected government and in accordance with the law.[1] We also work within a bilingual and bijural national legal framework.

At the same time, we share the challenges all counsel face: rapidly evolving case law, expanding technology, sophisticated and complex demands, severe time pressures and heavy workloads, to name a few. We also have the same professional obligations as all other members of the provincial or territorial Bars and Quebec's Chambre des notaires.

Working for the Department of Justice is an opportunity that requires a commitment. In accepting the many advantages inherent in public sector legal practice, we also accept the challenges of working for a large and complex organization. We believe that it is a rewarding environment, and we are proud of the work we do.

[1] Consult the *Values and Ethics Code for the Public Sector* that came into force on April 2, 2012.

The Context for the Practice of Law in the Federal Government

Roles and Responsibilities

Introduction

In addition to our individual roles and responsibilities as members of the legal profession, Justice counsel are part of an essential government institution with a mandate to provide the Government of Canada as a whole with legal services. For this reason, a solid appreciation of the respective roles of Justice counsel and the Department is essential in order to develop best practices for counsel and the Department.

The Minister of Justice

The Minister of Justice is the legal adviser to the Government of Canada and the legal officer of Cabinet. The Minister is responsible for all matters relating to the administration of justice in areas of federal jurisdiction. Under the authority of the *Department of Justice Act*, the Minister of Justice ensures that the administration of public affairs is in accordance with the law and is responsible for determining whether federal bills and regulations comply with the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*. In support of this role, the Department provides advice and direction to departments and agencies throughout the course of the development of the legal content of bills, regulations and guidelines.

The Attorney General

As the chief legal officer of the Crown, the Attorney General of Canada provides legal advice to federal government departments and agencies, which includes drafting legislation for them, and has responsibility for the regulation and conduct of all litigation for or against the Crown. The Department of Justice supports the Attorney General by litigating or overseeing all civil litigation on behalf of the federal Crown, as well as all federal criminal litigation that is not conducted by the Director of Public Prosecutions. It also provides legal advice to federal government departments and agencies. In December 2006, the Public Prosecution Service of Canada was formed as independent from the Department of Justice and is responsible for criminal prosecutions within federal jurisdiction on behalf of the Attorney General of Canada.

The Department of Justice

The Department of Justice has a dual mandate, which derives from the dual role of the Minister of Justice and the Attorney General of Canada. In support of its mandate, the Department provides policy and program support to the Minister of Justice in areas falling under its jurisdiction (e.g. divorce, criminal law), and provides litigation, advisory and legislative services across the federal government through a national team of professionals working in federal government departments and agencies, regional offices or at Justice Headquarters. While roughly half of the departmental staff are counsel, the Department of Justice also comprises a variety of other skilled professionals,

including paralegals, social scientists, program managers, communications specialists, administrative services personnel, computer service professionals, and financial officers.

To fulfill its mandate, Justice performs three essential functions: (1) it carries out policy and program responsibilities in support of the Minister of Justice, (2) it provides legal services to officials, as representatives of its client, the federal Crown, and (3) it promotes legal compliance in the conduct of public affairs. By providing consistent, high-quality legal advice aimed at protecting the interests of the entire government, Justice counsel help the Department fulfill the second part of its mandate.

The mission of the Department of Justice is to:

- support the Minister of Justice in working to ensure that Canada is a just and law-abiding society with an accessible, efficient and fair system of justice;
- provide high-quality legal services and counsel to the government and to client departments and agencies; and
- promote respect for rights and freedoms, the law and the Constitution.

The Department's strength comes from all members of the organization, who are committed to working together on the basis of mutual trust, support, respect and fairness while using and caring for public resources responsibly. As public servants supporting the Minister of Justice and Attorney General, we are committed to respecting and obeying the law and upholding the Canadian Parliamentary democracy and its institutions. We are always expected to demonstrate professional excellence and uphold the highest ethical standards.[2] We must honour statutory obligations, provide sound legal advice, and serve the public interest.

Counsel

In addition to working collaboratively with senior officials of the Department or clients on legal issues, Justice counsel play a proactive role in the development of government policies and programs. We develop legally sound options, ensure the early identification of legal risks, and help mitigate and manage those risks, including defending government decisions before courts of law and various international bodies.

While the work is often complex, our fundamental responsibility is clear: to prepare and deliver sound and relevant legal advice in a timely, professional and efficient manner on behalf of the Minister of Justice and Attorney General of Canada.

Legal advice typically falls into one of several categories:

- outlining the current state of the law;
- explaining how the law applies to particular facts or a policy initiative;

[2] These values, and the expected behavior of federal public servants, are further detailed in the *Values and Ethics Code for the Public Sector* that came into force on April 2, 2012.

- interpreting the law – including the assessment of related legal risks – with respect to the development and implementation of policies, delivery of programs, litigation and other activities;
- exploring legally sound options and alternatives; and
- developing legal arguments in support of or to defend the Government of Canada's laws, programs, actions and initiatives.

As legal advisors, we must honour obligations to many people and entities, notably:

- the Government of Canada – by defending, protecting and promoting its interests and upholding the public interest;
- the Minister and Deputy Minister of Justice, Justice managers and senior officials – by enabling them to perform their functions effectively;
- departmental colleagues and the people we advise – by helping them meet their responsibilities;
- the legal community – by promoting respect for the law and maintaining the highest standards of integrity and fairness; and
- the legal profession – by abiding by the appropriate codes of professional conduct and by discharging our responsibilities as officers of the court.

[redacted]

Legal Risk Management

Risk and Risk Management

Risk is unavoidable and present in virtually every human situation. Public and private sector organizations face risks every day. The Treasury Board Secretariat's *Framework for the Management of Risk* (the "Framework") adopts the following definition of risk:

> Risk refers to the effect of uncertainty on objectives. It is the expression of the likelihood and impact of an event with the potential to affect the achievement of an organization's objectives.[4]

In a dynamic and complex public sector context, risk management plays a significant role in strengthening government capacity to recognize, understand, accommodate and capitalize on new challenges and opportunities. Effective risk management equips federal government organizations to respond actively to change and uncertainty by using risk-based information to enable more effective decision-making. In turn, increased capacity and demonstrated ability to assess, communicate and manage risk builds trust and confidence, both within the government and with the public.[5]

The Framework defines risk management as follows:

> Risk management is a systematic approach to setting the best course of action under uncertainty by identifying, assessing, understanding, making decisions on and communicating risk issues.[6]

"The purpose of this Framework is to provide guidance to Deputy Heads on the implementation of effective risk management practices at all levels of their organization."

Legal Risk Management[7]

Legal Risk Management (LRM) is the process of making and carrying out decisions that reduce the frequency and severity of legal problems that may affect the government's ability to meet its objectives successfully. LRM is an essential aspect of the work of the Department of Justice, and is practiced in partnership with departments and agencies as a component of Integrated Risk Management.[8]

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[4] See Appendix A of the Treasury Board of Canada Secretariat's Framework for the Management of Risk effective as of August 27, 2010.
[5] Ibid., at Section 2: Context.
[6] See Appendix A, supra note 4.
[7] http://jusnet.justice.gc.ca/lrm_e/lrm_practice.htm
[8] See Appendix A, supra note 4.

Individual departments and agencies are responsible for the management of risks associated with their particular programs and policy decisions. The ultimate responsibility for the development and application of risk management rests on Deputy Heads.

The Department of Justice's role is to assist client departments and agencies in the management of their risks arising in files where legal advice is sought (including litigation files). A complete legal risk assessment must consider both the likelihood of an adverse outcome and its potential impact.

When conducting a legal risk assessment, counsel is thus asked to first address the likelihood of an adverse outcome. When providing legal advice outside of a litigation context, it is generally premised on the assumption that the client's action, decision, statute, regulation or policy under consideration could be challenged before an adjudicative body.

Secondly, counsel will identify and assess the potential legal impacts, again on the assumption that the adverse outcome identified would materialize. When possible, counsel should flag potential policy, financial and media/reputation type impacts. However, the clients are better placed than counsel to assess the non-legal impacts. As a consequence, counsel should, when appropriate, seek this type of information from clients, which will allow for a more complete risk assessment.

As representatives of the Attorney General of Canada, Justice counsel advise the government as a whole, and should seek to protect whole-of-government interests when performing legal risk management. The objective is to allow departments and agencies to make informed decisions, taking into account the interests of the government as a whole.

The responsibility for advising on legal risks is often shared amongst counsel from different parts of the Department. Counsel have an obligation to work together and resolve differences of opinion where they exist, calling on managers where needed, so that the Department "speaks with one voice" and all relevant perspectives are represented.

At the end of the day, legal risk management is very much a shared responsibility, both internally amongst Department of Justice counsel, and externally with the client departments we are serving.

[redacted]

Best Practices

The first part of *In Our Opinion* provided the context for the practice of law in the Department of Justice. It described the respective roles and responsibilities of the Minister, the Attorney General, the Department of Justice and individual counsel, in the provision of legal advice to the Government of Canada.

The following "Best Practices" are meant to guide counsel in applying their individual judgment to actual circumstances, and promote the delivery of consistent, high-quality legal services across the Government of Canada. These practices are meant to be helpful and to encourage discussion, not to be a rigid set of directives.

The Best Practices are divided into three groups: Providing Legal Advice; Managing Relationships When Providing Legal Advice; and Form and Timing of Legal Advice.

This section is followed by appendices proposing specific practical tools for the provision of legal advice in memoranda of opinion, email, briefing notes, and legal advice provided orally.

3. Help clients make informed decisions.

Scenario
I have identified and assessed the legal risks of a file in consultation with my Justice colleagues and client officials. The risks have been clearly communicated to officials in the agency I serve, but they are going to implement their policies and programs despite my advice. What do I do next?

Best practice

We can help our clients assess the risks and provide options, but the final decision is ultimately theirs, in all but exceptional cases which are explained below.

As legal counsel, we must help officials achieve their goals within the limits of Canada's legal framework. Our job is to provide legal advice that accurately reflects the applicable law and contains informed assessments of the legal issues and risks; we are also expected to propose possible options for mitigating those risks.

Although we might not agree with the course of action chosen by the client, we should respect it, unless that course of action would be manifestly unconstitutional, be contrary to the law, have adverse implications for other government departments (e.g. horizontal impact), or entail high legal risks for any other reason, in which case the matter should be raised with the legal counsel's manager. In most cases, even if Justice counsel suggest alternative options it does not mean that the client's preferred option cannot be pursued or that the Department will not support the government in the implementation (and legal defense) of a decision once it is made at the appropriate level. Good communications between counsel and officials in departments and agencies regarding our distinct roles will help to ensure a relationship based on mutual trust and respect.

In cases where counsel identify high legal risks, particularly with implications for the whole of government and the rule of law, and clients decide not to follow our advice, it may be necessary to take matters to a higher level, perhaps involving the Deputy Minister. Brief your manager so the issue can be communicated clearly to all those who need to know within the Department of Justice and the government. This will help ensure that the appropriate decision makers are getting the necessary information.

Rationale

As Justice counsel, we must provide the best legal advice possible, which involves assessing and communicating the legal risks. However, since it is the client department or agency that will be most affected by those risks in all but exceptional cases, it will be their decision whether to proceed or not with an action and assume the risks.

Proposed Regulations and Bills – Inconsistency with the *Charter*

Section 4.1 of the *Department of Justice Act* (see below) requires the Minister of Justice to examine every proposed regulation and Bill for possible inconsistency with the *Canadian Charter of Rights and Freedoms*.

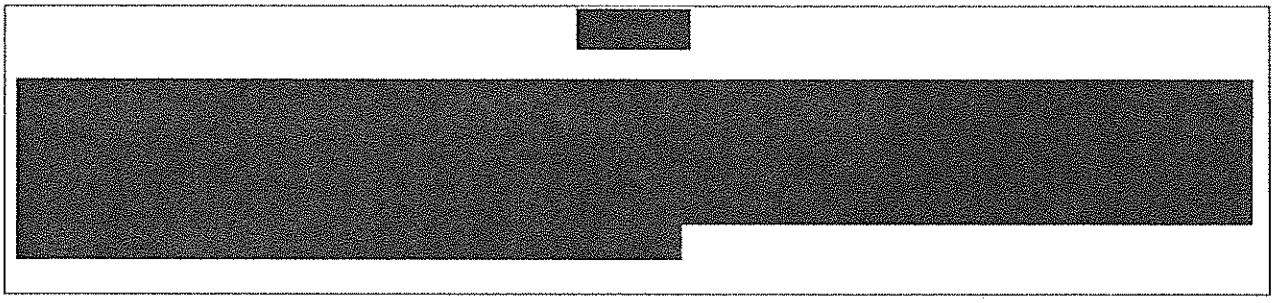
Processes exist in the Department to meet the Minister's obligations under that provision. A criterion was established, under which proposed legislation or regulations will be found inconsistent with the *Charter* if it is considered "manifestly unconstitutional", i.e. that no credible argument can be made to defend the course of action. An argument will be considered credible if it is reasoned with a minimum level of strength or credibility.

Section 4.1 of the *Department of Justice Act* provides as follows:

> (1) Subject to subsection (2), the Minister shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and every Bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity.
>
> (2) A regulation need not be examined in accordance with subsection (1) if prior to being made it was examined as a proposed regulation in accordance with section 3 of the *Statutory Instruments Act* to ensure that it was not inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms*.

Section 3 of the *Canadian Bill of Rights* establishes comparable responsibilities relating to that Act. Similarly, section 3 of the *Statutory Instruments Act* provides for specific examination functions for any proposed regulations to ensure that they satisfy legal and drafting criteria that include consistency with the *Charter* and the *Bill of Rights*. These issues are further explored in the paper "Statutory Examination and Legal Risk Management in Legislative Services", available from the Legislative Service Branch.

6. Brief managers and senior officials appropriately.



Best practice

As a rule, we must brief our managers about sensitive and new issues. Senior officials will assume that Justice managers have discussed the opinions that are being provided on these types of files. In some instances, managers and senior Justice officials will have something important to contribute to the legal advice prepared by counsel; in other cases, a simple alert that advice has been submitted will be sufficient.

Briefing management ensures that legal opinions benefit from the additional insight, experience and government-wide knowledge of managers and senior officials. Such a practice also allows us to meet our objectives of standardizing opinions and identifying horizontal issues. The form and content of briefings may vary – they may serve to elicit actions, decisions and approvals or simply to exchange relevant information.

Whenever Justice counsel are aware that an opinion will be provided to exempt staff or ministers in other departments, the matter should, as soon as possible, be brought to the attention of Justice senior management (via managers to the appropriate Assistant Deputy Minister, Assistant Deputy Attorney General or Regional Director General and, if necessary, the Deputy Minister).

Rationale

Unlike counsel in the private sector, we do not act independently, but are members of a single corporate entity: the Department of Justice. The Minister of Justice and Attorney General, via the Deputy Minister and Deputy Attorney General, is ultimately responsible for all legal advice provided by counsel. As such, for important or controversial files, the Deputy Minister or Minister may need to be personally aware of and/or endorse the advice provided. Briefing the Deputy Minister will normally come through counsel's manager, via the appropriate ADM or ADAG.

Charter Certification Process

This outline focuses on the examination of the responsibilities of the Minister of Justice under section 4.1 of the *Department of Justice Act*. Section 3 of the *Canadian Bill of Rights* establishes identical examination requirements for compatibility with it. These responsibilities are undertaken concurrently with legal risk management, which is complementary but distinct in many respects. The statutory examination responsibilities apply only in relation to the introduction of government bills in the House of Commons.

1. Examination of
   - *legislative policy proposal* by Departmental Legal Services Unit (DLSU) / Justice policy unit (JPU)
   - *draft MC for drafting a bill* by DLSU / JPU/Legislative Services Branch (LSB)[1]
   - *draft bill*[2] (DLSU / JPU / LSB)[3]

↓

2. Charter issue is identified, possibly in consultation with the Human Rights Law Section (HRLS), and
   - Charter issue is ***resolved*** (e.g. proposal abandoned / modified to avoid issue)

   OR

   - Charter issue is not resolved, but is formally referred to HRLS for an advisory opinion on whether the issue is reportable

↓

3. HRLS, after discussion with the relevant section(s), advises that
   - the issue is not reportable – ***resolved***[4]

   An issue is not reportable if there is a "credible argument" in support of the measure. The credible argument standard is met where the argument is reasonable, bona fide and capable of being successfully argued before the courts

   OR

   - the issue is reportable and proposal is abandoned or modified to avoid such an issue – ***resolved***

   OR

   - the issue is reportable and proposal is not abandoned or modified – matter is raised up management chain

↓

4. Managers of relevant sections try to resolve issue at successive management levels until ***resolved*** OR reaches DM

↓

5. DM considers Charter advice given and reaches own legal conclusion.[5] If the DM concludes that the issue is not reportable – ***resolved***

   OR

   If DM concludes that the issue is reportable, DM seeks to resolve it with Clerk of the Privy Council and other DMs involved by seeking abandonment or modification of proposal

↓

6. If DM successful – ***resolved***

OR

If not successful, DM advises Minister that a report should be made to House of Commons

↓

7. Upon receiving advice and on consideration, the Minister may conclude that the issue is not reportable – ***resolved***[6]

OR

The Minister may agree that the issue is reportable and may intervene to seek abandonment or modification of proposal

↓

[redacted]

↓

[redacted]

↓

[redacted]

↓

11. Once a bill is introduced in the House of Commons, the Clerk of the House sends copies to the Chief Legislative Counsel to certify (on behalf of the DM) that the bill has been examined as required by s. 4.1 of the *DoJ Act*. This certification does not indicate whether the bill is consistent with the Charter[9]

↓

12. Certified copies are sent to the Clerk of the House[10] and the Assistant Secretary to the Cabinet (L&HP)

Endnotes

[1] The Cabinet Support System instituted by PCO at the instance of John Tait required MCs to contain a paragraph indicating the results of Charter and other constitutional reviews. PCO appears to have discontinued this requirement although this issue has recently been raised with PCO.

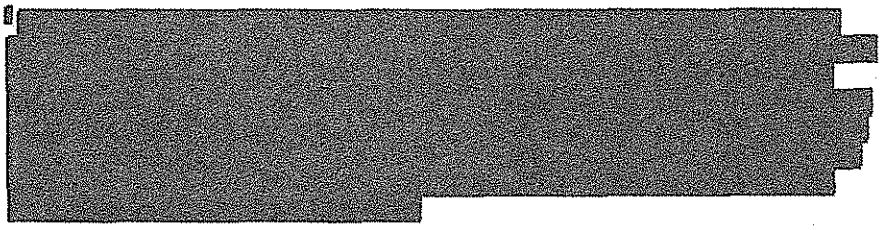
[2] Draft regulations are examined for Charter issues under s. 3 of the *Statutory Instruments Act*. This process is similar to the bills process except that it entails a report by the Clerk of the Privy Council; to the regulation-making authority, rather than by the Minister of Justice to the House of Commons.

[3] Certification issues can arise at any stage of the drafting process. The likelihood of certification issues arising during that process is greater with pre-MC drafting. LSB is working with HRLS to improve Charter review during drafting. Proposals include:

- DLSU lawyer to provide statement of all Charter issues previously raised and opinions given,
- HRLS lawyer assigned as a contact person.

[4] While a proposal may not be "reportable", it may present serious Charter risks. HRLS also has a briefing process for serious Charter risks.

[5] Although the accepted convention is to rely on the advice of Charter experts, the DM as the Department's Chief Law Officer is free to consult as widely or narrowly as is felt appropriate and on occasion may even seek an external opinion.



[7] Once a report is tabled, Parliament may take action (e.g. either amend the bill to lessen the Charter risk or add a notwithstanding clause, if applicable)

[8] However, see comment in endnote 6.

[9] The certification however is based on an internal report from the bill drafters stating that they have examined the bill and indicating whether it is inconsistent with the Charter (in the case of a reportable provision, it would indicate that the bill is inconsistent). This report is not sent to the Clerk of the House.

[10] Members of Parliament have from time to time asked to see Justice opinions relating to the certification. These requests have been refused to date on the basis of solicitor/client privilege.