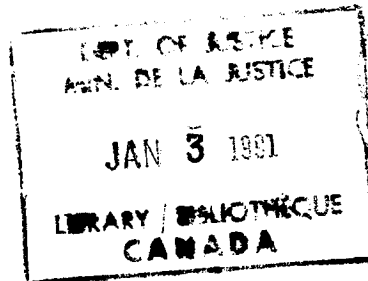


JUSTICE ECHO



No. 9

BULLETIN OF THE DEPARTMENTAL LEGAL SERVICES SECTOR

December 1990

The role of Department of Justice lawyers

by John Tait, Deputy Minister of Justice and Deputy Attorney General

This article is based on a paper presented at a meeting of federal deputy ministers earlier this year. It is published here as an appropriate message to mark the second anniversary of *Justice Echo*.

I thought it would be useful to take a few minutes today to discuss the role of my department and our departmental lawyers, who play several roles:

- they draft legislation;
- they conduct litigation on behalf of the Crown; and
- they provide legal advice to the government and to departments and agencies.

I would like to focus on the last function — the Department of Justice lawyer as your legal adviser.

What is our role as legal advisers? I don't know how many of you have asked yourselves that question. If you have, I think your answer might be, "To keep my minister, myself and my department out of legal trouble — or, if we are already in trouble, to get us out." That may not be quite how I would put it, but I can't quarrel with the sentiment. Keeping you out of trouble, and trying to rescue you if you're already there, are both legitimate roles for departmental lawyers.

Getting you out of trouble — basically, the litigation function — is

a traditional role for the Department of Justice, and one that I believe we perform well. But the financial and administrative implications of litigation can be enormous, having a major impact on the way the government can conduct its business.

The lesson? Let us do our best — as far as we are able as your legal advisers — to keep you out of trouble in the first place. "Amen," I'm sure you're saying. But how do we realize this preventive role?

The short answer is to make sure that your legal advisers are as deeply involved as possible in what you do. They are not there to make management or policy decisions on your behalf. They *are* there to advise you of the legal implications of taking those decisions. But they can do so only to the extent that they are aware

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of what you are proposing to do. This, of course, is why the heads of our legal services units sit on the executive committees of most departments and agencies — so they can become aware of, and advise on, key decisions before they are taken.

But the work of the legal adviser goes beyond the boardroom table. It must be remembered that not only legislation and regulations are open to legal action: increasingly, the very way we conduct our business is also subject to legal challenge, whether it

be on Charter or administrative law grounds (for example, whether we give people who are affected by your decisions a chance to be heard before decisions are taken). And, as I indicated earlier, situations like this, if we are not careful, can escalate into major court cases.

What can we do then, jointly, to ensure that you receive the best possible legal service?

First, here are some things we can do in the Department of Justice:

- We can, through our legal education programs, make sure that our lawyers are as technically competent and as up to date on the law as possible, both in their areas of specialization and in relation to Crown law generally.
- We can make our lawyers as sensitive as possible to their role as your "corporate counsel", to ensure that your departmental objectives are met and your business transacted as smoothly as possible from a legal point of view.
- We can help you by means of our Legal Awareness Program. This program is intended to expose managers in departments and agencies to key legal concepts and issues of particular concern to them. This is not an attempt to turn them into lawyers. It is meant to put them in a position where they will be better able to recognize and be sensitive to legal issues, so they will know when to consult their lawyers.



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What can you do on your part? Three things are particularly important.

- First, you should keep our lawyers informed of actions you are taking that could have legal implications. If they are not informed, they cannot advise. As I said earlier, in my view this should start, but not end, in the boardroom.
- Second, you should give due weight to our advice. However, we recognize that ultimately, unless

you should keep our lawyers informed of actions you are taking that could have legal implications

we tell you that a particular course of action is unlawful, the decision is yours.

- Third, it is vital for our effectiveness that you understand the roles and responsibilities of your legal advisers. Sympathize if you are able, but at least understand!

This last point is, in my view, a central element of our relationship. Your lawyers' obligation as legal advisers is to provide you with sound professional advice regarding the legal implications of proposed courses of action, taking into account the facts, your objectives, and the existing state of the law. They do their best to support what you are trying to achieve, to the extent that the law — and sound legal policy — will permit.

Let me now make three related observations.

First, neither your interests nor those of the government are served if your legal advisers are less than totally objective and forthright in providing their best advice, albeit given as supportively as possible. If your lawyers are "in bed" with you, it's time to change them, in your own interests as well as theirs.

Here is my second point: just as you have a responsibility to your organization *and* to the government as a whole, so your legal advisers are both "your" lawyers and, at the same time, members of the Department of Justice. This places them in potentially conflicting positions, just as your dual obligations can impose conflicting pressures on you.

I think this difficulty can be overcome, in large part, if we follow this maxim: your legal advisers are there to support your organization's interests, except to the extent that this would conflict with a broader governmental legal interest.

For example, we cannot have legal advisers in one department giving a totally novel interpretation of, say, the *Financial Administration Act* or the *Public Service Employment Act*, if that would conflict with long-standing and well-considered advice. Nor could they proceed to court with a particular interpretation of a provision in the *Canadian Charter of Rights and Freedoms* if the Attorney General has, after due deliberation, taken an opposite position in other cases.

Thirdly, I would like to mention what I know is frequently a source of frustration for you: the fact that, on

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some occasions, your lawyers are not able to tell you precisely what the law is, or whether what you want to do is lawful or not. Uncertainty is, unfortunately, a fact of life for us all, and this will continue as the law evolves (including, I might add, laws of our own making).

Much of this uncertainty is caused by the fact that large portions of the Charter remain to be interpreted by the courts. Looking ahead, as flesh is put on Charter bones, we should be able to advise with somewhat more assurance, although rarely with absolute certainty. But my bottom line is that your legal advisers must give you their advice objectively — as I said earlier, no one's interest is served by less than that.

Let me sum up with a few "do's" and "don'ts":

- *Do* involve your lawyers before you take decisions — not to second-guess you from a management or policy point of view, but to try to prevent legal problems later.
- *Don't* leave your lawyers out in the cold, and then expect them to find magic solutions to your problems after the fact.
- *Do* recognize the constraints faced by your legal advisers: it is a challenging task to give sound legal advice in what is often a fluid policy environment and with the law evolving at a rapid pace.
- *Don't* shoot the messenger just because the advice you may be given is not what you wanted to hear, or not as firm as you would like.
- *Do* encourage your managers to take advantage of the Legal Awareness Program we will be offering, so that they will be in a better position to spot the issues on which they should be seeking legal advice.
- *Don't* think of the law only as something that puts problems in your way; remember that the law can, equally, be used creatively to achieve what you want, and that relatively little of it is unchangeable — although change does not always come with the speed that you would wish.
- Lastly, *do* remember that the provision of quality legal service to you is our overriding concern. ■

Legal Awareness Program to be launched

As part of its Client Relations Program, the Department of Justice Legal Services Sector is currently developing a Legal Awareness Program designed to help Public Service managers understand the everyday legal environment in which they work. Justice lawyers are developing the substantive legal components of the program and are receiving pedagogical assistance from the Training Programs Branch of the Public Service Commission.

With the modern world becoming more and more legally complex, and with development occurring at a rapid rate, the Legal Services Sector aims at

focusing its efforts on "preventive law" as well as on reacting to events.

The Legal Awareness Program is scheduled to be launched in early 1991. It will consist of 13 modules on subjects that will provide participants with a greater awareness of common legal problems arising in areas such as ethics and conflict of interest, environmental law, access to information and privacy law, administrative law, contracts, and human rights law (the Charter and the *Canadian Human Rights Act*). Each Legal Services Unit will offer managers in their respective departments between two and four

modules in the first year of operation.

"The program aims to sensitize managers to common legal issues and to increase the rapport between Justice lawyers and the clients they serve," says Alain Bisson, Head of the Legal Services Unit at Health and Welfare, and the program's coordinator.

Public service managers will be advised of the availability of various modules offered through the Legal Services Units located in each department.

For further information on the program, contact the Head of your department's Legal Services Unit. ■

Extracurriculum

Justice Legal Services officers are frequently asked to share their knowledge and insights with professional groups outside government. Not surprisingly, the environment is a current priority, and John Milligan, Stephen Waxman and Anne Daniel, all of Department of the Environment Legal Services, recently presented papers on environmental law issues to the Canadian Bar Association.

Beverly Hobby, also from Environment, made several presentations on environmental issues in 1990 and presided over a seminar on Bill C-78, the Canadian Environment Assessment Bill, before the Canadian Petroleum Association and native and environmental groups.

The Goods and Services Tax kept Department of Finance lawyers in demand. Wayne Lonsdale gave papers on GST topics to the CBA, as well as to the Canadian Institute of Chartered Accountants and the Petroleum Law Foundation. James Mabbutt spoke on the GST to the Association Québécoise de planification fiscale et financière, as well as to the CBA on the impact of the Charter on the income tax system.

Other CBA presenters included Daniel Therrien of Employment and Immigration, and Faye Campbell of Health and Welfare, who spoke,

respectively, on Charter issues in immigration and on crimes by and against people with AIDS. Gertrude Lavigne of the Public Service Commission participated in a CBA internship program for eastern European lawyers.

Several lawyers were invited to give papers outside Canada in 1990. Gilbert Patrice and Anthony Foster of CIDA were visiting instructors with the International Development Law Institute in Rome.

Frank Brodie of Supply and Services was guest panelist at the International Bar Association annual conference in New York. The topic was barriers to government procurement.

Bill Miller, of Consumer and Corporate Affairs, addressed the mergers, acquisitions and anti-trust departments of Shearman & Sterling in New York on Canadian competition law and merger prenotification procedures.

Ted Tax of the Correctional Service of Canada spoke in Edinburgh on equality issues to the Society for the Reform of Criminal Law, and his colleague, Kay Marshall, talked on family mediation in Canada at the Council of Europe in Strasbourg.

François Rioux of Consumer and Corporate Affairs was a panelist on

competition law issues at the Birmingham-Laval Conference. Closer to home, Lisa Hitch and Marla Vachon of the Correctional Service both gave papers to public-sector correctional law lawyers in Saint John.

Clare Beckton, of RCMP Legal Services, presented a paper on civil liability to the Atlantic Association of Chiefs of Police. Clare was recently elected to the Executive Committee of the Legal Officers' Sector of the International Association of Chiefs of Police.

In other areas of activity :

Richard Fiutowski, External Affairs Domestic Legal Services, has been appointed Federal Central Authority for the Hague Convention on the Civil Aspects of International Child Abduction.

Ellen Fry, with Industry, Science and Technology, is a member of the planning group for a symposium entitled *The Power of the Purse: Financial Incentives as Regulatory Instruments*. The symposium is co-sponsored by the Law Reform Commission, the University of Calgary Faculty of Law, and the Canadian Institute of Resources Law.

Marguerite Nadeau, Royal Canadian Mint, has been appointed Corporate Secretary of the Mint.

David Q. Patterson, of the Department of Justice Commercial and Property Law Unit, is North American Editor for *Lloyds (U.K.) Arbitration Reports*.

Two book reviews by Jean Boisjoli, Correctional Service of Canada Legal Services, were recently published in the *Refugee in International Law Journal*: one on *Droits des réfugiés*, by Jean-Yves Carlier, E. Story - scientia (Editions juridiques et fiscales) Brussels, 1989; the other on *La protection des réfugiés en France*, by Frédéric Tiberghien, Les Presses de l'Université d'Aix-Marseille, 1986.

The *New York Law School Journal* (Vol. VII, Part One) has published two articles by Lisa Hitch — "Non-discrimination and the Rights of the Child" and "International Humanitarian Law and the Rights of the Child".

John Milligan is helping edit *Canada Environmental Law*, Second Edition.

Marc Cuerrier, with Department of Finance Legal Services, provided an article for a seminar of l'Association Québécoise de planification fiscale et financière. The article was entitled "Les fiducies réputées: Usufruits, substitutions et arrangements contractuels".

Three DLSU lawyers are currently offering courses at Ottawa University's Faculty of Law. François Coté of the Legal Services Unit at the Communications Security Establishment, is teaching a course in criminal procedure; François Rioux, with Legal Services at Consumer and Corporate Affairs, teaches competition law; and Mark Sills, with External Affairs and International Trade Legal Services, is giving a course in international trade law in the French Section of the Common Law Faculty. ■

Two years of *Justice Echo*

The following is a listing of all articles appearing in *Justice Echo* over the past two years — issues No. 1 to No. 8.

No. 1, December 1988:

- Conflicts of interest and the *Criminal Code*
- The "new" *Copyright Act* — more rights for authors, artists
- The Crown corporation and its directors

No. 2, March, 1989:

- Government procurement and free trade
- The price of disobeying a court order
- The registration of paid lobbyists

No. 3, June 1989:

- Memorandum of understanding — a cautious handshake
- Doing more with less in a small regulatory agency
- The drafting of federal bilingual legislation
- Supreme Court case confirms validity of shared jurisdiction

No. 4, September 1989:

- Solicitor-client privilege — what it means in government
- A rose by any other name? . . . trade marks and the federal Crown
- When government fenders bend . . .

No. 5, December, 1989:

- Making regulatory enforcement effective: what are the legal alternatives?
- Use of arbitration to settle disputes in contracts: one option for departments

- Legal services for public servants — when will government foot the bill?
- *Non-smokers Health Act* comes into force this month

No. 6, March, 1990:

- Contract tendering: avoiding the legal pitfalls
- Policy guidelines and ministerial announcements can create litigation
- Subpoenas and testimonies: a bit of advice

No. 7, June, 1990:

- Rafferty/Alameda, Oldman River — what the fuss is all about
- Ex-gratia payments — a handy tool for providing compensation
- Who is an employee in the Public Service?

No. 8, September, 1990:

- Facing court challenges — how the process works
- Keeping sexual harassment out of the workplace
- Crown liability for failure to enforce regulations

Justice Echo is a quarterly publication of the Departmental Legal Services Sector of the Department of Justice. Reg L. Evans, Senior Assistant Deputy Minister; Jean-Claude Demers and Mark Jewett, Assistant Deputy Ministers.

The purpose of this newsletter is to help public service managers keep abreast of legal developments and topics that have broad interest and impact across government. The contents do not constitute legal advice; managers seeking further information should contact their Departmental Legal Services Unit. Permission to reproduce articles appearing in *Justice Echo* may be obtained by contacting the Communications and Public Affairs Directorate at (613) 957-4214.

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Justice Echo Reader Survey

Justice Echo celebrates its second anniversary with this issue. To ensure that the bulletin continues to be relevant to Public Service managers, we would appreciate your comments. Please take the time to fill out this brief questionnaire and return it to the address below.

Do you receive *Justice Echo* on a regular basis (every three months)?

- Always
- Usually
- Sometimes
- Rarely
- Never

Do you read *Justice Echo*?

- Always
- Usually
- Sometimes
- Rarely
- Never

Do you pass it on to anyone else in your organization?

- Always
- Usually
- Sometimes
- Rarely
- Never

In general, do you find the articles interesting and relevant to your functions as a manager in the Public Service?

- Always
- Usually
- Sometimes
- Rarely
- Never

Do you find the length of the articles adequate for an understanding of the legal issues discussed?

- Always
- Usually
- Sometimes
- Rarely
- Never

Do you find the articles contain too much legal terminology?

- Yes
- No

As a result of reading an article in *Justice Echo*, have you ever followed up the subject with someone in your Legal Services Unit?

- Yes
- No

Please list any legal topics or issues that you believe should be explored:

How would you rate *Justice Echo* overall?

- Always useful
- Usually
- Sometimes
- Rarely
- Never

Do you have any suggestions for improving *Justice Echo*?

What is your position/title?

Thank you for your assistance.

Please mail to:
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