

Duty to See that Public Administration Accords with the Law

Consultation by The John Howard Society of Canada



Funded by the
Canadian Bar Association's Law for the Future Fund



July 24, 2025

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Introduction

When Minister Fraser was recently sworn in as Minister of Justice for Canada, he pledged to ensure that public administration was consistent with the law. This reflects his statutory obligation under s. 4(a) of the *Department of Justice Act*. However, there is some confusion about what that duty entails and how it should be discharged by the Minister and his Department. The purpose of this paper is to solicit expert feedback on this provision and, ultimately, to clarify the Minister's responsibilities—responsibilities that must be clear if the rule of law is to be successfully protected.

The importance of clarifying the Minister's duties under section 4(a) are illustrated in the issue that prompted this paper: the government's alleged failure to ensure that new *Corrections and Conditional Release Act* (CCRA) provisions relating to isolated confinement were being administered in a manner that protected prisoners' Charter rights. In 2019, two Courts of Appeal determined that, among other things, periods of solitary confinement should be capped at 15 consecutive days, and prisoners subjected to such confinement should also receive an independent external review within 5 days of their placement in isolation. These decisions were followed by important amendments to the *Corrections and Conditional Release Act* (CCRA) that reflected the Charter rulings.

However, it eventually became clear that Correctional Service Canada (CSC) was not always following the new CCRA provisions. Research reports, and even an acknowledgement before a Parliamentary Committee by the Minister of Public Safety, confirmed that periods of solitary confinement beyond 15 consecutive days were persisting under the new regime. In other words, a federal government agency was applying the law in a manner that likely violated the Charter. And yet, the Minister of Public Safety, who was responsible for CSC, did not intervene.

A letter was written to the Minister of Justice asking that he discharge his duties under s. 4(a) of the *Department of Justice Act* to ensure that the administration of the CCRA was consistent with the law, specifically with the Charter. His response illuminated a contradiction at the heart of the Minister's duties. He explained that he had discharged his obligations under s. 4(a) by *advising* his colleagues. Certainly, advising and even defending federal Justice agencies like CSC are the responsibility of the Attorney General, so this interpretation seems in line with the law. And yet, the Minister of Justice is also supposed to ensure that federal departments and agencies are in *compliance* with the law. That is to say, the Minister of Justice is supposed to advise and defend federal agencies but also police and regulate those same agencies, seemingly incongruous duties that should be clarified if those responsibilities are to be effective and the rule of law protected.

Problems invariably arise if the Minister's duties are in tension or are ambiguous. For example, whatever advice the Minister provided to CSC did not relieve federal prisoners of unconstitutional periods of prolonged solitary confinement, nor did it ensure they had access to independent external reviews within 5 days of their placements in isolated confinement. Charter rights were likely being violated in the administration of the CCRA.

The Minister's failure to intervene and stop non-compliance with the law also leaves the federal government open to costly litigation. Significant damage awards have been assessed against the federal government under its previous isolated confinement regime for prisoners who were subjected to solitary confinement for more than 15 consecutive days. The likelihood of further damage awards for violating the same Charter protections is certainly possible.

A thoughtful study of s. 4(a) of the *Department of Justice Act* is clearly overdue. Therefore, this consultation will explore the Minister's statutory duty to see that public administration is consistent with the law. Feedback from this consultation will inform a final paper that will be shared with contributors and will be provided to the Minister of Justice. The final paper will, we hope, clarify the Minister's duties under s. 4(a) and lead to a more robust and effective discharge of those duties, which will promote the rule of law, provide greater access to the law, and reduce unnecessary and expensive litigation and damage awards.

We are grateful to the Canadian Bar Association's Law for the Future Fund for supporting this consultation. And we are grateful to you for your professional guidance on this very important issue. Your views are important to us. We look forward to hearing them.

Purpose of Consultation Paper

The *Department of Justice Act*¹ of Canada sets out duties for the Minister's dual roles of Attorney General and Minister of Justice. Among other things, s. 4 requires the Minister of Justice to "see that the administration of public affairs is in accordance with the law". The purpose of this paper is to seek advice on whether section 4 (a) of that Act could be used to promote the rule of law, improve access to justice, and achieve efficiencies by proactively avoiding costly litigation.²

4 The Minister is the official legal adviser of the Governor General and the legal member of the Queen's Privy Council for Canada and shall:

- (a)** see that the administration of public affairs is in accordance with law;
- (b)** have the superintendence of all matters connected with the administration of justice in Canada, not within the jurisdiction of the governments of the provinces;
- (c)** advise on the legislative Acts and proceedings of each of the legislatures of the provinces, and generally advise the Crown on all matters of law referred to the Minister by the Crown; and
- (d)** carry out such other duties as are assigned by the Governor in Council to the Minister.

¹ *Department of Justice Act*, R.S.C., 1985, c. J-2

² The John Howard Society of Canada is grateful to the Canadian Bar Association's Law for the Future Fund for funding this project.

Analysis of Section

- a) What is included in the “administration of public affairs”?

While the “administration of public affairs” could be broadly interpreted, for the purposes of this paper, the focus is on the executive branch of the federal government’s duty to administer legislation passed by the legislative branch and clarified by the judicial branch.

- b) What is meant by “in accordance with the law”?

The courts have made it clear that “all government action must comply with the law, including the Constitution”³ This would include compliance with the federal statute providing government agents with the authority to act and the *Charter of Rights and Freedoms*. It would also include other applicable statutes such as the Criminal Code of Canada.

- c) What are the implications for duties as Minister of Justice rather than Attorney General?

In the absence of a legislated role for a Minister of Justice, some provincial statutes ascribe the duty to ensure public administration respects to law to the Attorneys General.⁴ The federal Department of Justice Act,⁵ however, clearly places the duty to correct maladministration in s.4 relating to the powers, duties, and functions of the Minister and not under s.5, which sets out the Attorney General’s powers. The Attorney General functions include advising the heads of departments on all matters of law connected with their departments. This would include advising and defending departments alleged with unlawful or negligent administration, standing in contrast with the Minister of Justice’s role of ensuring compliance.

Is it fair to suggest that in the duty of the corporate services function of the Attorney General is to provide advice to clients, but the statutory duty of the Minister of justice is to deliver compliance with the law? Does being a member of Cabinet limit the independence needed by the Minister of Justice to discharge this responsibility?⁶

- d) How should the role be discharged?

In a letter dated April 18, 2023, the Minister of Justice explained his obligation as follows:

As Minister of Justice and Attorney General of Canada, one aspect of my mandate is to see that the administration of public affairs is in accordance with the law. I ensure this by

³ *Reference re Secession of Quebec* [1998] 2 SCR 217 at para 72.

⁴ Ontario, New Brunswick and British Columbia

⁵ *Department of Justice Act*, R.S.C., 1985, c. J-2

⁶ Professor Kent Roach makes a compelling argument that Attorney General function is better placed to respect the rule of law than the Minister of Justice role given the latter’s Cabinet responsibilities. See Roach, Kent, *Not Justice the Government’s Lawyer: The Attorney General as the Defender of the Rule of Law*, (2006) 31 *Queen’s L.J.* 598

providing full and frank legal advice to my ministerial colleagues and government departments.⁷

This response seems to conflate his Attorney General corporate services responsibilities to provide advice to Departments with his Minister of Justice obligations to achieve lawful public administration. If the provision of advice does not lead to compliance with the law, then it is arguable that the Minister of Justice's duty has not been fulfilled.

In *Canadian Security Intelligence Service Act (Re)*, Justice Gleeson of the Federal Court held that the Minister's duty could not be fully discharged by providing advice alone:

Paragraph 4(a) of the *Department of Justice Act*, R.S.C., 1985, c. J-2 imposes an obligation on Department of Justice counsel to do more than simply deliver advice:

Powers, duties and functions of Minister

4 The Minister is the official legal adviser of the Governor General and the legal member of the Queen's Privy Council for Canada and shall:

(a) see that the administration of public affairs is in accordance with law.⁸

...

In the face of activity involving the administration of public affairs that is inconsistent with the rule of law, it cannot be enough to simply provide legal advice and let the chips fall where they may".⁹

In addition to providing advice, how should the statutory duty to see that public administration be in accordance with the law be discharged?

Implementation of Duty to See that Public Administration Accords with the Law

e) What is the appropriate role for Department of Justice lawyers given solicitor/client privilege?

Department of Justice lawyers have struggled with the ethical dilemma of being bound by both solicitor-client privilege and the requirement to serve the public good.¹⁰ There would no doubt be tension between the provision of legal services and ensuring compliance with the law. In his assessment of the competing loyalties of government sector lawyers, Jean Mark Keyes concludes that public sector lawyers should withdraw from activities they 'know' constitute wrongdoing and suggests that the tipping point for overriding the duty to the client is when 'there is no basis for believing there is a legal argument to support government action'.¹¹

⁷ Minister Lametti's response to letter from Catherine Latimer for the John Howard Society of Canada encouraging the Minister to act on s. 4(a) in light of findings that prolonged solitary confinement was persisting in federal prisons despite Court of Appeal findings that such confinement violated s. 12 and 7 *Charter* rights.

⁸ *Canadian Security Intelligence Services Act (Re)*, 2020 FC 616 (CanLII), at para 138.

⁹ *Ibid* at para 144.

¹⁰ Keyes, John Mark Loyalty, Legality and Public Sector Lawyers" (2019), 97 *Can. Bar Rev.* 129

¹¹ Keyes at page 149.

Should the likelihood of the legal argument's success be a factor in assessing when to withdraw from participating in unlawful activities and reporting them to the Minister of Justice? Should the policy be that unlawful activities should be reported to the Minister of Justice for s. 4(a) purposes when a corporate services lawyer withdraws from unlawful activities?

Some guidance is provided by Justice Gleeson in the *Canadian Security* case referenced above. In that decision, it was noted that the failure to act once notified that CSIS proposed to continue using unlawfully obtained information in its warrants, failed to meet the Minister of Justice's obligations under the section.

Should there be a hierarchy of when corporate service lawyers should trigger s. 4 obligations? If the non-compliance with the law is criminal or a Charter violation perhaps the s. 4 duty should be engaged earlier than if it is another form of statutory non-compliance.

f) What triggers the statutory duty besides information from corporate service lawyers?

There are many sources of findings that public administration is noncompliant with the law. Courts often rule that Charter rights have been violated or that departments have misapplied the law. Governments often establish oversight mechanisms that report to Parliament with such findings. Parliamentary Committees often hear witnesses alleging maladministration of statutes. Department of Justice lawyers have been known to argue in court that legislation is compliant with the Charter but misapplied by officials. There are many public allegations and findings of legal non-compliance.

Should findings in the public domain themselves engage the s. 4 (a) obligations of the Minister of Justice or should something more be required? Should the Minister's response depend on the source of the allegation of non-compliance – a judicial finding might require action in the way that an academic article might not. Should it be necessary for a stakeholder or a Parliamentarian to ask the Minister to act?

Verification of Non-Compliance

Some findings of non-compliance may be credible without the need for verification by the Minister of Justice. If a Minister responsible for administering a statute confirms that it is being misapplied before a Parliamentary Committee or if Department of Justice lawyers attest to maladministration in formal pleadings tendered before the courts, this might be an adequately sound basis for the Minister of Justice to proceed to consider remedies. If a court makes a finding of non-compliance that is not appealed by the government, that too should engage s. 4(a) obligations. If government oversight bodies such as the Auditor General, Inspectors, Advisory Panels, Parliamentary Committees, etc. make findings of non-compliance, those should trigger the Minister of Justice's section 4 duties but might warrant an investigation and verification of non-compliance before proceeding to remedies. Independent reports by academics or stakeholders that find non compliance with the law, including the Charter, might warrant more in depth investigation and verification to assess whether deficiencies exist and, if so, how best to correct them.

g) Should the rigour of a verification of maladministration findings or allegations depend on the source of the findings or allegations?

h) When should s. 4(a) obligations be triggered?

Remedies available to the Minister of Justice to carry out his statutory duty

Implied in the assignment of statutory duties is the means to carry out those duties. The provision of corporate legal services advice may not be adequate to correct maladministration as clients are free to reject legal advice. The Minister of Justice must have other mechanisms to ensure compliance with the law. There could be a range of remedies depending on the seriousness of the non-compliance or the ineffectiveness of previously applied measures. This could include the Minister advising his colleague responsible for the statute to comply on one end to the Minister asserting superintendence by taking over legal decision-making from a recalcitrant department or agency until the non-compliance has been corrected.

i) Could a possible range of remedies include:

- A request from the Minister of Justice to the Minister responsible for the statute to correct the non-compliance.
- A direction from the Minister of Justice to the Minister responsible for the statute to correct the non-compliance?
- What if the statute is one that the Minister of Justice administers?
- If the non-compliance amounts to a possible breach of trust, could it be referred to the Public Prosecution Service to determine if action under s. 122 of the Criminal Code should be taken?
- Could the tort of abuse of process be invoked to achieve a remedy for continued statutory non-compliance following a direction from the Minister to correct it?
- Could persistent failures to correct result in the imposition of a type of receivership such that the Minister of Justice takes responsibility for management under the statute until the maladministration has been corrected?
- Are regulations or other legal tools needed to clarify possible remedial actions that are available to the Minister of Justice to ensure that public administration is consistent with the law?

Organization to discharge s. 4(a) obligations

The Department of Justice is organized to separate certain functions to ensure their integrity. An extensive review was recently undertaken by the Honourable Anne McLellan into whether the Public Prosecution Service should be separate from the Minister of Justice.¹² She concluded that structural changes were not required to protect prosecutorial independence. Among other things, the Report recommended that “detailed protocols” be developed and education programs for Parliamentarians be implemented that would clarify the nexus between the two functions. With respect to the Minister’s section 4(a) obligations, the clarification needed is between the departmental services function exercised under the Attorney General’s authorities and the Minister of Justice’s duty to ensure public

¹² [McLellan, Anne](#) (June 28, 2019). [Review of the Roles of the Minister of Justice and Attorney General of Canada](#) (PDF). Government of Canada

administration complies with the law. A detailed protocol and education on how those duties should be discharged would also be helpful.

Currently, the obligation to certify Charter compliance to Parliament of legislation proposed by government lies not with the departmental legal services branch, but with the Public Law and Legislative Service Sector in the Minister's policy sector. The 2013 Evaluation of the Public Law Sector¹³ clearly recognized the Sector's role in supporting "the Minister of Justice's legislated/statutory obligations in a number of different areas. In doing so, the PLS also assists the Minister in ensuring 'that the administration of public affairs is in accordance with the law' (thus fulfilling requirements outlined in Section 4 of the Department of Justice Act)".¹⁴ However, the Evaluation also seemed to reflect an understanding of a purely advisory role and consistency of approaches between corporate service units and the public law sector – Department speaking with one voice, etc. It did not address how the possible tension between Departmental Legal Services units, which strive to protect and advance the needs of their clients, and the Minister of Justice's obligation to correct maladministration of statutes committed by those departments could be resolved in a constructive manner.

- j) Given ethical issues identified by counsel in a solicitor/client relationship with departments administering statutes, should the responsibility for discharging s. 4 obligations rest elsewhere?
- k) Are Public Law Sector counsel able to do more than advise and support the Minister of Justice in his obligation to ensure public administration is consistent with the law?
- l) Would a new structure within the Department of Justice be needed to support the Minister in a more robust discharge of his s. 4(a) responsibilities?
- m) Could the support for this function come from a central agency like the Privy Council Office?

Conclusion

On May 13, 2025, when Minister Fraser was sworn in as Minister of Justice, he pledged to "see that the administration of public affairs is in accordance with the law". This reaffirms his statutory obligation under s. 4(a) of the *Department of Justice Act*. Core Canadian values include peace, order, and good government and understanding ourselves citizens of a law-abiding country. A robust implementation of this statutory duty would not only support justice objectives of respecting the rule of law and providing access to justice but could also save resources spent on litigation and damages for non-compliance. This paper seeks your advice on how s. 4(a) should be implemented.

¹³ Public Law Sector Evaluation, Final Report, March 2013, Evaluation Division, Office of Strategic Planning and Performance Management, Department of Justice: <https://www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/13/plse-sdpe/pdf/plse-13-sdpe-eng.pdf>

¹⁴ Public Law Sector Evaluation at p. 48

Summary of Questions:

Analysis of Section

- a) What is included in the “administration of public affairs”?
- b) What is meant by “in accordance with the law”?
- c) What are the implications for duties as Minister of Justice rather than Attorney General?
- d) How should the role be discharged – advisory or more?

Implementation of Duty to See that Public Administration Accords with the Law

- e) What is the appropriate role for DOJ lawyers given solicitor/client privilege?
- f) What triggers the statutory duty besides information from corporate service lawyers?

Verification of Non-Compliance

- g) Should the rigour of a verification of maladministration findings or allegations depend on the source of the findings or allegations?
- h) When should s. 4(a) obligations be triggered?

Remedies available to the Minister of Justice to carry out his statutory duty

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Organization to discharge s. 4(a) obligations

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- k) Are Public Law Sector counsel able to do more than advise and support the Minister of Justice in his obligation to ensure public administration is consistent with the law?
- l) Would a new structure within the Department of Justice be needed to ensure support the Minister in a more robust discharge of his s. 4(a) responsibilities?
- m) Could the support for this function come from a central agency like the Privy Council Office?

Any other Thoughts or Concerns?

Please submit responses by email to national@johnhoward.ca

ⁱ The John Howard Society of Canada is grateful to the Canadian Bar Association's Law for the Future Fund for funding this project.

The John Howard Society of Canada is also grateful to Professors Kent Roach and Nomi Lazar for their very helpful comments on an earlier draft of the paper.