



**HOUSE OF COMMONS
CANADA**

**CHAPTER 5, MANAGING THE DELIVERY OF LEGAL
SERVICES TO GOVERNMENT – DEPARTMENT OF
JUSTICE CANADA OF THE MAY 2007 REPORT OF THE
AUDITOR GENERAL OF CANADA**

**Report of the Standing Committee on
Public Accounts**

**Hon. Shawn Murphy, M.P.
Chair**

June 2008



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THE STANDING COMMITTEE ON PUBLIC ACCOUNTS

has the honour to present its

SEVENTEENTH REPORT

Pursuant to Standing Order 108(3)(g), the Standing Committee on Public Accounts has considered the Chapter 5, Managing the Delivery of Legal Services to Government – Department of Justice Canada of the May 2007 Report of the Auditor General of Canada. The Committee has agreed to table this Report as follows:

INTRODUCTION

The Department of Justice Canada employs approximately 2,500 lawyers and had an annual budget of close to \$1 billion in 2006-2007. As the Department provides legal services to the government and its departments and agencies, it is sometimes referred to as the law firm of the federal government. These services include providing legal advice on policies and programs, drafting new and amending existing legislation and regulations, and representing the government in court—whether in defence of civil litigation or to enforce Canada’s laws through prosecutions. (It should be noted that the passage of the *Federal Accountability Act* in December 2006 led to the creation of the Office of the Director Public Prosecutions, which now contains the prosecution services that were formerly part of the Department of Justice. In 2008-2009, this Office has planned spending of \$184 million and has 750 full-time employees.)

In May 2007, the Office of the Auditor General (OAG) tabled an audit of Justice Canada, entitled “Managing the Delivery of Legal Services to Government—Department of Justice Canada.”¹ Given the House of Commons Standing Committee on Public Account’s concern that the government’s legal services be well managed, the Committee had a hearing on this audit on April 8, 2008.² The Committee heard from two officials from the OAG: Sheila Fraser, Auditor General; and Hugh McRoberts, Assistant Auditor General. From the Department of Justice, the Committee heard from: John H. Sims, Deputy Minister and Deputy Attorney General of Canada; Yves Côté, Associate Deputy Minister; and Terrance McAuley, Acting Assistant Deputy Minister.

BACKGROUND

In 1993, the OAG conducted an audit of the Department of Justice’s legal advisory and litigation services.³ This audit found certain weaknesses in the Department’s management of the delivery of legal services, such as the lack of a

¹ Office of the Auditor General of Canada, May 2007 Report, “Chapter 5: Managing the Delivery of Legal Services to Government—Department of Justice Canada.”

² House of Commons Standing Committee on Public Accounts, 39th Parliament, 2nd Session, Meeting 25.

³ Office of the Auditor General of Canada, 1993 Report, “Chapter 17: Department of Justice—Legal Advisory and Litigation Services.”

corporate plan, poor management of the hiring of external legal agents, and the need to review alternative dispute resolution mechanisms.

The May 2007 audit examined whether the Department was effectively managing the delivery of legal services to meet the needs of government. It also examined whether the Department has assurance that it is delivering quality legal services, and whether it is delivering these services in a cost-effective manner. In the course of the audit, the OAG determined whether the Department had made progress since the last audit in 1993.

The OAG made six recommendations in its most recent audit. The Committee fully supports these recommendations. The Committee notes that the Department agreed with all of the recommendations. Consequently, the Committee expects that the Department will implement these recommendations in a timely and complete manner.

ACTION PLAN

At the completion of an audit by the OAG, most departments prepare an action plan that outlines what actions they intend to take to address the weaknesses identified by the OAG. It is especially helpful if departments provide their action plan to the Committee prior to the hearing because it allows members to review the plan and to ask questions. Just as importantly, a detailed action plan enables departmental officials to demonstrate clearly that they take the OAG's findings seriously, intend to take action, and can be held to account for implementing the plan. Some departments provide their action plan prior to the hearing, but unfortunately most do not.

When the Deputy Minister of the Department of Justice, John Sims, appeared before the Committee to discuss the audit, he was asked on several occasions to provide timelines for initiatives the Department was taking in response to the audit. However, Mr. Sims was not able to provide these timelines during the hearing. The Committee believes that an action plan prepared prior to the hearing would have allowed the Deputy Minister to provide more specific information to the Committee.

The Committee is nonetheless pleased to note that the Department of Justice did provide an action plan several weeks after the hearing, which includes actions already taken or to be taken in order to address the OAG's recommendations. The Auditor General indicated that she was pleased with the Department's response to the audit. She

said, “I believe that the Department is on the road to making positive changes in the way it manages the delivery of its legal services.”⁴ In order to ensure that the Department continues to make these positive changes and implements its action plan, the Committee would like to see a progress report. As several of the initiatives outlined in the action plan will not be completed until April 2009, the Committee recommends that:

RECOMMENDATION 1

The Department of Justice Canada provide the Public Accounts Committee with a detailed progress report by April 30, 2009 on its implementation of actions taken in response to the findings and recommendations of the Office of the Auditor General in its May 2007 Report, Managing the Delivery of Legal Services to Government.

While the Committee appreciates the progress the Department has made to address the OAG’s findings, the Committee has several areas of concern which are not fully addressed by the action plan.

CIVIL AGENTS

The Department of Justice sometimes hires outside legal agents to carry out civil litigation or other civil work on behalf of the Department when it lacks available lawyers or lawyers with the necessary expertise. The Committee was told that the Department spends about \$25-30 million per year on outside legal agents, and civil agents are used in approximately 1% of the Department’s cases.

The OAG found several problems in the processes of hiring and managing civil agents. The OAG found no documentation of an in-house search for qualified counsel prior to seeking outside counsel, no documented rationale for the selection of the agent, no consistent basic information, no consistent monitoring of ongoing costs, and no documented evaluation of performance.⁵ The OAG recommended that Justice Canada examine weaknesses in its management of legal agents and take corrective action.

The Deputy Minister told the Committee that the Department has made a great deal of effort since the audit to improve the process for the selection of agents to make it

⁴ Meeting 25, 11:05 am.

⁵ Chapter 5, paragraph 5.18.

open, fair, transparent, and accessible. However, he acknowledged that they did not yet have a formal evaluation system in place for civil agents as the nature of agents hired for civil matters makes this difficult. The action plan provided to the Committee specifies that actions have been completed to improve: documentation of an in-house search for qualified counsel prior to seeking outside counsel, the rationale for the selection of civil legal agents, basic information regarding work arrangements, and monitoring ongoing costs. A pilot project is underway to test a performance appraisal designed for legal agents.

When officials were questioned on whether or not the selection of civil agents was really just made on the basis of patronage, or affiliation with the political party of the Minister of Justice of the day, the Committee was informed that the Department had created pools of candidates with various expertise, but the Minister makes the final decision. The Deputy Minister said:

We think it's appropriate that the minister at the end of the day make the decision, because there's a subjective element to choosing a lawyer. He has to have confidence that the lawyers who will represent him personally in courts have the required qualifications. But that whole pool has been generated by the outsiders expressing an interest and justice department officials doing the vetting. Then from that list a recommendation is made to the minister.⁶

It is not at all clear to the Committee why it is appropriate for the Minister to make a subjective decision in the selection of civil agents, as the hired lawyer will be representing the Government of Canada and not the personal interests of the Minister. The Committee believes that the selection of civil agents should be as fair and transparent as the selection of any other contractor providing services to the government. Lawyers have just as much right as any other service provider to the government to expect that decisions to employ their services will be based upon merit and cost effectiveness. Creating pools of candidates from which to select does not remove the possibility or reality of bias in the final selection. The Committee recommends that:

⁶ Meeting 25, 12:05 pm.

RECOMMENDATION 2

The Department of Justice Canada adopt a transparent, fair and competitive process for the selection of outside civil legal agents.

COST RECOVERY

The government's Common Services Policy requires that all departments use the Department of Justice for legal services. Consequently, the Department of Justice responds to the needs of client departments and thereby does not control the volume of its incoming work. The Department developed, in consultation with client departments, a legal services policy framework based upon the principles of: joint planning; shared responsibility for costs; and shared accountability for performance, allocation, and use of resources. As a result, the Department recovers most of its costs from client departments through different financial arrangements with each department. One of the main assumptions behind these arrangements is that departments will moderate their demand for legal services if they are paying part of this bill.

As legal costs represent a small part of departments' overall budgets, the OAG believes this is not a significant factor in deciding whether to obtain additional services. The Department of Justice's total operating expenses more than doubled from 1997-98 to 2004-05.⁷ The OAG found that the Department has done little analysis to assess the assumption that cost sharing and recovery would control demand and reduce costs, and it does not know whether it is delivering its services cost-effectively.⁸

The Deputy Minister told the Committee that, with Treasury Board's approval, the Department has implemented a uniform cost-recovery approach which applies to all legal services provided to departments and agencies.⁹ According to the Deputy Minister, this will lead to arrangements that are more consistent, appropriately documented and efficient to administer.

However, this does not address the need to find a way to better manage and control the increasing demand for legal services. While the Committee recognizes that departments must have access to quality legal services, at the same time it is important to ensure that public funds are spent efficiently, economically and effectively. The

⁷ Chapter 5, paragraph 5.4.

⁸ *Ibid.*, paragraph 5.80.

Committee believes that the Department of Justice Canada needs to work with clients to manage the demand for legal services and seek ways to ensure that the services are delivered cost-effectively. Consequently, the Committee recommends that:

RECOMMENDATION 3

The Department of Justice Canada study ways to control the demand for legal services from client departments and provide the results of this study to the Public Accounts Committee by April 30, 2009.

PERFORMANCE REPORTING

As part of its audit, the OAG reviewed the Department of Justice's annual reports to Parliament: the Report on Plans and Priorities and the Departmental Performance Report. The OAG found that there were few meaningful performance measures in these reports.¹⁰ Consequently, the OAG recommended that the Department should define performance measures for its corporate priorities and improve its performance reporting to Parliament.

In its response the Department indicated that it will incorporate relevant measures from the annual assessment of the Management Accountability Framework completed by the Treasury Board Secretariat. It will also review the quality of data used. The action plan provided to the Committee lists this issue as being completed.

The Committee has been concerned about the quality of reporting to Parliament for some time, and it appreciates the work the OAG does in this area. The Committee believes that departments and agencies need to improve the credibility of their reporting, in part by including meaningful performance measures in their reports. The Committee reviews the OAG's performance report each year and notes that the OAG includes meaningful, numerical performance indicators, even though the long term outcomes of performance auditing are hard to identify.

It is not clear to the Committee why the Department of Justice believes that indicators from the Management and Accountability Framework (MAF) should be included in its performance report. The results of the MAF assessment are already made

⁹ Meeting 25, 11:10 am.

¹⁰ Chapter 5, paragraph 5.28.

public and do not need to be duplicated in the departmental performance report. More importantly, the role of performance reports is, quite simply, to report on the department's progress in meeting its priorities. The MAF, on the other hand, is a tool used by the Treasury Board Secretariat to assess management capacity. The Committee hopes the Department has other priorities and goals besides improving management capacity. The Committee believes that the Department can and should do better to identify meaningful performance indicators. As the Committee does not believe that the work of improving the Department of Justice's reports to Parliament is complete, the Committee recommends that:

RECOMMENDATION 4

The Department of Justice Canada define specific, meaningful performance indicators and targets for those indicators in its next Report on Plans and Priorities.

The OAG also found that there is no reporting to Parliament on the overall costs incurred across the government for legal services. The Department of Justice Canada reports on the total costs of its legal services but other legal costs paid by departments, such as legal services support and legal agents, are not readily identifiable.¹¹ Thus, there is no consolidated report to Parliament on the total costs incurred by government for legal services. Mr. Sims told the Committee that his department does not have access to some of the other costs associated with legal services, such as the cost of accommodation, support staff, computer equipment, etc. Instead, the Treasury Board Secretariat would have to consolidate the government's total costs for legal services. The Committee would like to see more information about the total costs for legal services, but does not know whether such reporting is practical or cost effective, as it may require the development of complex information systems. Hence, the Committee recommends that:

RECOMMENDATION 5

The Treasury Board Secretariat study the feasibility of reporting the Government of Canada's total costs for legal services and provide the

¹¹ Chapter 5, paragraph 5.27.

Public Accounts Committee with the results of this study by April 30, 2009.

CONCLUSION

The Department of Justice Canada provides legal services to the federal government's departments and agencies. Most of the Department's clients are quite satisfied with the services provided. However, the OAG found a number of weaknesses in the management of these legal services, such as inadequate corporate planning, a lack of an overall quality management, and a need to improve resource management. It appears that the Department is making progress in addressing the recommendations of the OAG, but the Committee has identified a few additional areas that it believes need to be addressed. The Committee believes that the Department should improve its management of civil legal agents, develop better incentives to control the demand for legal services, and provide more meaningful information in its reports to Parliament on its performance and the full cost of legal services to the government.

APPENDIX A LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
Department of Justice	2008/04/08	25
Yves Côté, Associate Deputy Minister		
Terrance McAuley, Acting Assistant Deputy Minister Management Sector		
John Sims, Deputy Minister and Deputy Attorney General of Canada		
Office of the Auditor General of Canada		
Sheila Fraser, Auditor General of Canada		
Hugh McRoberts, Assistant Auditor General		
Gordon Stock, Principal Public Safety and Emergency Preparedness Canada, Justice		

REQUEST FOR GOVERNMENT RESPONSE

In accordance with Standing Order 109, the Committee requests that the Government table a comprehensive response to the report.

A copy of the relevant *Minutes of Proceedings* ([Meetings Nos. 25 and 35 including this report is tabled](#)).

Respectfully submitted,

Hon. Shawn Murphy, M.P.
Chair