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The Attorney General's Forgotten Role as Legal Advisor to the Legislature: A Comment on Schmidt v Canada (Attorney General)

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THE ATTORNEY GENERAL'S FORGOTTEN ROLE AS LEGAL ADVISOR TO THE LEGISLATURE: A COMMENT ON *SCHMIDT V CANADA (ATTORNEY GENERAL)*

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INTRODUCTION

The role of the Attorney General and Minister of Justice is, for the most part, settled in Canadian law. The federal *Department of Justice Act* and corresponding legislation in the provinces and territories set out the core duties of the Attorney General and Minister of Justice.[1] Most importantly, as chief law officer of the Crown she oversees all litigation and legal services for the executive and provides legal advice to the Cabinet.[2] She is simultaneously the minister responsible for the justice

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[1] *Department of Justice Act*, RSC 1985, c J-2 [*DOJ Act*]. In this comment, I use "Minister of Justice" and "Attorney General" somewhat interchangeably depending on the context, bearing in mind that in the Canadian model, the Minister of Justice and Attorney General are one and the same person. The *DOJ Act* states that: "[t]he Minister [of Justice] is *ex officio* Her Majesty's Attorney General of Canada, holds office during pleasure and has the management and direction of the Department": *ibid*, s 2(2).

[2] See *ibid*, ss 4(c), 5(b), 5(d):

> 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 . . . (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 . . . .

system itself.[3] However, she also "is entrusted with the powers and charged with the duties that belong to the office of the Attorney General of England by law or usage, in so far as those powers and duties are applicable to Canada".[4] While this last provision may appear arcane, and

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> The Attorney General of Canada . . . (b) shall advise the heads of the several departments of the Government on all matters of law connected with such departments; . . . (d) shall have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada[.]

3 See *ibid* ("have the superintendence of all matters connected with the administration of justice in Canada, not within the jurisdiction of the governments of the provinces" s 4(b)). See also *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 ("[a]s the Chief Law Officers of the Crown, responsible for the administration of justice on behalf of the provinces, the Attorneys General of the provinces, and not the courts, determine the appropriate rate of compensation for *amici curiae*" at para 5).

4 *DOJ Act*, *supra* note 1, s 5(a). Section 5(a) continues:

> [A]nd also with the powers and duties that, by the laws of the several provinces, belonged to the office of attorney general of each province up to the time when the *Constitution Act, 1867*, came into effect, in so far as those laws under the provisions of the said Act are to be administered and carried into effect by the Government of Canada.

Equivalent provisions exist in all three territories and most provinces. See e.g. *Ministry of the Attorney General Act*, RSO 1990, c M.17, s 5(d):

> The Attorney General . . . (d) shall perform the duties and have the powers that belong to the Attorney General and Solicitor General of England by law or usage, so far as those duties and powers are applicable to Ontario, and also shall perform the duties and have the powers that, until the *Constitution Act, 1867* came into effect, belonged to the offices of the Attorney General and Solicitor General in the provinces of Canada and Upper Canada and which, under the provisions of that Act, are within the scope of the powers of the Legislature[.]

See also *Attorney General Act*, RSBC 1996, c 22, s 2(e) [*BC Attorney General Act*]; *The Justice and Attorney General Act*, SS 1983, c J-4.3, s 10(b); *Department of Justice Act*, RSNWT 1988, c 97 (Supp), s 5(b); *The Department of Justice Act*, RSM 1987, c A170, CCSM c J35, s 2.1(a); *Department of Justice Act*, RSY 2002, c 55, s 7(a); *Department of Justice Act*, RSNWT 1988, c 97 (Supp), s 5(b), as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28; *Government Organization Act*, RSA 2000, c G-10, Sched 9, s 2(e); *Public Service Act*, RSNS 1989, c 376, s 29(1)(f); *Executive Council Act*, SNL 1995, c E-16.1, s 4(4)(a); *An Act Respecting the Role of the Attorney General*, RSNB 2011, c 116 (referring to the common law instead of law and usage in England: "perform the duties and have the powers that at common law belong to the Attorney General" s 2(b)).

some may assume it adds nothing to the other enumerated duties, lawyers and judges overlook it at their peril. Indeed, the recent case of *Schmidt v Canada (Attorney General)* demonstrates that this provision can be forgotten, relevant, and problematic all at the same time.[5]

In *Schmidt*, the Federal Court of Appeal interpreted a series of provisions in the *Canadian Bill of Rights*,[6] the *Department of Justice Act*,[7] and the *Statutory Instruments Act*.[8] These provisions require the Minister of Justice to assess government bills and proposed regulations and inform the House of Commons if they are "inconsistent with the purposes and provisions of" the *Bill* or the *Canadian Charter of Rights and Freedoms*.[9] (Under the *Statutory Instruments Act*, it is instead the Clerk of the Privy Council in consultation with the Deputy Minister of Justice who makes this determination for proposed regulations and communicates it to the regulation-maker.)[10]

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5 See *Schmidt v Canada (Attorney General)*, 2018 FCA 55, aff'g 2016 FC 269, leave to appeal to SCC requested [*Schmidt* FCA, *Schmidt* FC]. Edgar Schmidt filed an application for leave to appeal to the Supreme Court of Canada on 20 June 2018 (docket 38179). The memorandum of argument does not address the role of the Attorney General as legal advisor to Parliament. See "Application for Leave to Appeal on Behalf of the Applicant, Edgar Schmidt", *Charter Defence* (20 June 2018), online (pdf): <charterdefence.ca/uploads/3/4/5/1/34515720/applicants_memorandum_of_ argument_dated_june_20_2018.pdf>.

6 SC 1960, c 44, reprinted in RSC 1985, Appendix III [*Bill*].

7 *DOJ Act*, *supra* note 1.

8 RSC 1985, c S-22 [*SI Act*].

9 *DOJ Act*, *supra* note 1, s 4.1; *Bill*, *supra* note 6, s 3; *SI Act*, *supra* note 8, s 3; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. Section 4.1 of the *DOJ Act* refers to the *Charter*, section 3 of the *Bill* refers to the *Bill*, and section 3 of the *SI Act* refers to the *Charter* and the *Bill*. For a discussion of whether the *DOJ Act* section 4.1 obligation should have been given to the Attorney General instead of the Minister of Justice, see Kent Roach, "Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law" (2006) 31:2 Queen's LJ 598 at 622–23.

10 *SI Act*, *supra* note 8, s 3.

Edgar Schmidt, a lawyer for the Department of Justice, argued that the threshold used to trigger the reporting obligation—"when no credible argument can be made that the proposed legislation meets these standards"—was too high.[11] He sought a declaration that the correct threshold was "more likely than not inconsistent".[12] The Federal Court of Appeal, affirming and largely adopting the decision of the Federal Court, refused the declaration.

Both Stratas JA for the Federal Court of Appeal and Noël J in Federal Court relied, in part, on a separation of powers argument. They stated that the Attorney General and Minister of Justice is not a legal advisor to Parliament, and that if Parliament desires an opinion on the *Charter* compliance of government bills and regulations then Parliament should retain its own lawyer:

> It is no part of the formal job of the Minister of Justice and the Attorney General of Canada to give legal advice to Parliament regarding whether or not proposed legislation is constitutional. Neither the Minister of Justice nor the Attorney General of Canada are legal advisors to Parliament.[13]

In making this characterization, both Stratas JA and Noël J engaged in a misinterpretation of the *Department of Justice Act* that overlooked a relevant statement by the Supreme Court of Canada in *Krieger v Law Society of Alberta*.[14] This misinterpretation and oversight led to a conclusion that, with respect, is erroneous: that the Attorney General is not a legal advisor to the House of Commons.

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11 *Schmidt* FCA, *supra* note 5 at para 4. Justice Noël referred to this as "[a]n argument that is credible, *bona fide*, and capable of being successfully argued before the courts, known as the 'credible argument' standard": *Schmidt* FC, *supra* note 5 at para 5.

12 *Schmidt* FCA, *supra* note 5 at para 4.

13 *Ibid* at para 82. See also *Schmidt* FC, *supra* note 5 ("Parliament is expected to assume its obligations to examine bills and debate issues that may affect guaranteed rights. *Parliament must not place its duties on the shoulders of the other branches, notably on those of the Minister of Justice*" at para 275 [emphasis added]).

14 2002 SCC 65 [*Krieger*]. In fairness to Justice Noël and Justice Stratas, this point of law was likely not raised by counsel before them.

In law—if not in reality—the Attorney General *is* a legal advisor to the House of Commons. This role is not just forgotten, it is inherently problematic. The problem arises because the Attorney General is in a joint retainer, providing legal advice to both the executive and the House of Commons, but is unable (for reasons I will explain below) to meet the ethical requirements of a joint retainer. However, this problem does not justify, and cannot effect, a judicial elimination of that role.

The decision in *Schmidt* presents an opportunity to examine this forgotten role, in order to resolve its problem or to recommend its proper elimination. To carry out this examination, this case comment proceeds in four parts. In Part I, I set out the provisions at issue in *Schmidt* and situate the Attorney General's role in the context of the reasons of the Federal Court and the Federal Court of Appeal. In Part II, I demonstrate how a proper interpretation of the *Department of Justice Act* and *Krieger* would recognize the Attorney General's role as legal advisor to the House of Commons. In Part III, I identify the problem inherent in this role and canvass the appropriate legal mechanisms by which to modify or eliminate this role. I then conclude by reflecting on the implications for the decision in *Schmidt* and for the role of the Attorney General.

I. THE DECISION IN *SCHMIDT V CANADA (ATTORNEY GENERAL)*

In this part, I set out the provisions at issue and canvass the reasons of Noël J and Stratas JA in *Schmidt* as context for my argument. I begin with the reasons of Noël J, as they were largely adopted by Stratas JA.

A. THE CHALLENGED PROVISIONS

Subsection 4.1(1) of the *Department of Justice Act* provides that:

> Subject to subsection (2), the Minister [of Justice] shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every [proposed] regulation . . . and every [government] Bill . . . 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.[15]

Similarly, subsection 3(1) of the *Bill of Rights* provides that:

> Subject to subsection (2), the Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every [proposed] regulation . . . and every [government] Bill . . . in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.[16]

Subsection 4.1(2) of the *Department of Justice Act* and subsection 3(2) of the *Bill of Rights* provide an exception for proposed regulations that have been examined under section 3 of the *Statutory Instruments Act* for inconsistency with the *Charter* and the *Bill of Rights*, respectively. That section provides that "the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, shall examine the proposed regulation to ensure that", among other things, "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 advise the regulation-making authority if it is inconsistent.[17]

B. The Reasons of Noël J of the Federal Court

Justice Noël organized his substantive analysis into three parts: plain meaning,[18] legislative intent,[19] and context.[20]

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15 *DOJ Act*, *supra* note 1, s 4.1(1).

16 *Bill*, *supra* note 6, s 3(1).

17 *SI Act*, *supra* note 8, s 3.

18 See *Schmidt* FC, *supra* note 5 at paras 105–39.

Justice Noël's plain meaning analysis focused on the terms "ascertain" / "rechercher", "whether" / "si", and "inconsistent" / "incompatible" and the phrases "shall report" / "fait rapport" and "such inconsistency"/ "toute incompatibilité".[21] He concluded that a binary determination, and only a binary determination, is required:

> [T]he Minister is required to identify, *with certainty*, whether the result of her examination identifies present inconsistencies in any of the provisions under study, with any rights guaranteed by the *Bill of Rights* or the *Charter* . . . . if the Minister, in her own examination, considers that an argument of a serious and professional nature exists, showing that the provisions under study are in conformity with guaranteed rights, she *cannot* ascertain nor conclude that there exists an inconsistency with the rights protected by the *Bill of Rights* and the *Charter*.[22]

Schmidt's proposed threshold, "more likely than not inconsistent",[23] conflicted with this textual interpretation.[24]

Justice Noël's legislative history analysis concluded that "the intent of the legislator . . . was consistent and properly reflected in the ordinary meaning approach."[25] He also concluded that legislators were aware that the obligation to report would likely prompt the Minister of Justice to resign instead of making such a report:

> The ultimate result of the duty to report, the Minister of Justice's resignation from Cabinet, was conceptualized to be of a political nature

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19 See *ibid* at paras 140–73. Justice Noël included another part, "consequences", which integrated the parts on plain meaning and legislative intent (*ibid* at paras 174–82). It is best read as an extension of the first two parts.

20 See *ibid* at paras 183–279.

21 *Ibid* at paras 111–24.

22 *Ibid* at paras 133–34 [underline in original, italics added].

23 *Ibid* at para 2. See also *Schmidt* FCA, *supra* note 5 at para 4.

24 See *Schmidt* FC, *supra* note 5 at para 135.

25 *Ibid* at para 168.

> .... At the time, this remedy was considered a significant tool of persuasion and remained so for the years to come.[26]

The focus in the third part of Justice Noël's analysis—context—was on the respective roles of the judiciary, the executive, and Parliament. Justice Noël considered these roles in detail, supplemented by comparisons to the United Kingdom and Australia,[27] and including the process within the executive by which government bills are designed.[28] The crux of Justice Noël's separation of powers analysis is that if Parliament wants legal advice on bills, it should retain its own lawyers to provide that advice instead of improperly relying on a member of the executive who is not its lawyer. Given its importance to my argument, I include this passage in full:

> And herein lies a key aspect of this case: to each its own responsibilities. Parliament is expected to assume its obligations to examine bills and debate issues that may affect guaranteed rights. *Parliament must not place its duties on the shoulders of the other branches, notably on those of the Minister of Justice.*
>
> The Minister of Justice is not Atlas, carrying the world of guaranteed rights on her shoulders. As described above, the Minister of Justice has statutory obligations to examine draft legislation and to report to Parliament if she ascertains that an inconsistency with guaranteed rights exists at the end of the Executive's role in shaping draft legislation. The Minister of Justice assumes these responsibilities as a member of the Executive and as the legal advisor to Cabinet. It is true that the Minister of Justice reports an inconsistency to Parliament, but *this duty does not make her a legal advisor to the House of Commons*; others assume this role. Her loyalties remain to the Executive. *Parliament has many other means by which it can acquire more than sufficient legal advice; it simply must make the effort to do so* ....

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26 *Ibid* at para 171.

27 See *ibid* at paras 191–214.

28 See *ibid* at paras 229–39.

> To each his own obligation: the Executive governs and introduces bills to Parliament; Parliament examines and debates government bills and, if they are acceptable to Parliament, enacts them into law; the Judiciary, following litigation or a reference, determines whether or not legislation is compliant with guaranteed rights. *Each branch of our democratic system is responsible for its respective role and should not count on the others to assume its responsibilities*.[29]

Justice Noël emphasized early in his reasons that the Minister is *not* a legal advisor to Parliament:

> The duty to report to Parliament is statutory and fulfilled by the Minister of Justice in her capacity as a member of the Executive. Parliament benefits from a report *but is not the client of the Minister of Justice* . . . . If the Minister does indeed table a report, the report *will not be legal advice to Parliament* but rather a simple communication warranted by statute.[30]

This characterization was repeated and emphasized by Stratas JA on appeal.[31]

C. The Reasons of Stratas JA of the Federal Court of Appeal

Justice Stratas, writing for the Federal Court of Appeal, "agree[d] substantially" with the reasons of Noël J and also gave "additional reasons in support of the judgment".[32]

The substantive reasons of Stratas JA were organized into two parts.[33] The first part was a close textual analysis of the relevant provisions.[34] The second part was an analysis of "context and purpose".[35]

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29 *Ibid* at paras 275–77 [emphasis added].

30 *Ibid* at paras 33, 35 [emphasis added].

31 *Schmidt* FCA, *supra* note 5 at paras 82, 84.

32 *Ibid* at para 5.

33 The analysis of the standard of review at paras 17–41 is not relevant for my purposes—particularly because Stratas JA held that while the standard of review was reasonableness, the decision was not just reasonable but correct. I note that in this

The textual analysis focused on the meaning of the word "inconsistent".[36] In essence, "are inconsistent" / "est incompatible" and the related words—in English, "ascertain whether", and in French, "rechercher si" and "vérifier si"—dictate that a binary determination be made: "either the Minister is satisfied that a provision is 'inconsistent' or she is not."[37] These words provide a different result than words such as "may be", "could be", or "is/are likely to be", which could support Schmidt's proposed threshold.[38]

The second substantive part of the reasons of Stratas JA was an analysis of "context and purpose".[39] The main element of this analysis was the separation of powers.[40] This is where Stratas JA emphasized that the Minister of Justice and Attorney General is not a legal advisor to Parliament, and that Parliament has its own legal advisors: "[i]t is not as if Parliamentarians are bereft of access to legal advice and so the examination provisions were enacted to give them that access."[41]

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respect Stratas JA reversed Noël J, who held that the standard of review was correctness. See *Schmidt* FC, *supra* note 5 at paras 40–43. It was necessary to determine a standard of review because both Noël J and Stratas JA determined that "despite being framed as an action for a declaratory judgment, the proceeding was in effect a judicial review of the interpretation of the examination provisions by the Minister, the Clerk of the Privy Council and the Deputy Minister": *Schmidt* FCA, *supra* note 5 at para 20, adopting the position in *Schmidt* FC, *supra* note 5 at para 40.

34 *Schmidt* FCA, *ibid* at paras 42–68

35 *Ibid* at paras 75–105.

36 *Ibid* at paras 42–68. Justice Stratas also examined a discrepancy between the French and English versions of section 3(2) of the *SI Act*, *supra* note 8, which is not relevant for my purposes. See *ibid* at paras 69–74.

37 *Schmidt* FCA, *supra* note 5 at paras 45, 48.

38 See *ibid* at para 68.

39 *Ibid* at paras 75–105.

40 See *ibid* at paras 80–88.

41 *Ibid* at para 84. Recall the following, quoted above, *ibid* at para 82:

> It is no part of the formal job of the Minister of Justice and the Attorney General of Canada to give legal advice to Parliament regarding whether or not proposed legislation is

The other four elements of the "context and purpose" analysis may be briefly summarized. The first was the way the House of Commons vets private members' bills:

> The House will only pass bills that clearly do not violate the Charter . . . . If the appellant's interpretation of the examination provisions is correct, it would seem perverse that the House would adopt a laxer standard than the examination provisions require for government bills. More likely is that the House adopted a standard commensurate with the one in the examination provisions.[42]

The second element was legislative history, specifically that Parliament used language for the reporting provision in the *Department of Justice Act* that was similar to that previously used in the *Bill of Rights*: "If Parliament believed that the reporting threshold in section 3 of the *Canadian Bill of Rights* was too high, it could have enacted a different threshold in section 4.1 of the *Department of Justice Act*."[43] The third element was the constitutional convention of political neutrality in the public service.[44] Justice Stratas asserted that "[t]his neutrality supports the threshold for reporting that the respondent urges upon us: one that supports the Minister in performing her duties and not one that purports to dictate how she should exercise her powers".[45] The final element was the nature of constitutional law as "a variable, debatable and frequently uncertain thing."[46] Given this uncertainty, "Parliament must be taken to have imposed an obligation on the Minister that the Minister can practically meet, not one that is impossible to meet."[47]

> constitutional. Neither the Minister of Justice nor the Attorney General of Canada are legal advisors to Parliament[.]

42 *Ibid* at para 78.

43 *Ibid* at para 79.

44 See *ibid* at para 89.

45 *Ibid*.

46 *Ibid* at para 90. See also *ibid* at paras 90–102.

47 *Ibid* at para 102.

II. THE ATTORNEY GENERAL'S FORGOTTEN ROLE AS LEGAL ADVISOR TO THE LEGISLATURE

As I will demonstrate in this part, both Stratas JA and Noël J made a legal error in concluding that the Attorney General is not a legal advisor to Parliament. Interpreted properly, the *Department of Justice Act* assigns this function to the Attorney General.

As a preliminary matter, I consider the assertion that the Minister of Justice's report is not legal advice and Parliament is not the client of the Minister of Justice. As a matter of legal ethics and professionalism, this assertion is suspect. Whether a lawyer's statement constitutes legal advice does not depend on whether that advice is explicitly labelled or described as legal advice.[48] It is the substance of the communication that matters. Similarly, whether there is a lawyer-client relationship does not depend on whether the relationship is described that way. As stated in the *FLSC Model Code*, "[a] lawyer-client relationship may be established without formality."[49] Indeed, it is the client's reasonable and subjective understanding of the relationship that is relevant.[50] The report of inconsistency, if one were ever to be made, is a legal conclusion based on a legal interpretation of the bill and of existing constitutional law, made by a person who ostensibly has legal qualifications.[51] The fact that the

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48 See e.g. *Law Society of Upper Canada v Boldt*, [2006] OJ No 1142, 70 WCB (2d) 771 (SC), aff'd 2007 ONCA 115. The Court held that documents titled "Memorandum of Understanding" were in substance separation agreements and the preparation of these documents constituted the practice of law: "This argument is based largely on the title of the document. . . . However, *it is the substance of the document that must be considered*": *ibid* at para 60 [emphasis added].

49 The Federation of Law Societies of Canada, *Model Code of Professional Conduct*, last amended 2017 (Ottawa: FLSC, 2009) r 1.1-1, commentary 1, online: *FLSC* <www.flsc .ca> [*FLSC Model Code*].

50 See *ibid* ("'client' means a person who: (a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or (b) having consulted the lawyer, *reasonably concludes that the lawyer has agreed to render legal services on his or her behalf*" r 1.1 [emphasis added]).

51 While I acknowledge that the Attorney General may sometimes be a non-lawyer, I adopt my conclusion elsewhere that advice from a non-lawyer Attorney General does

report is mandated by legislation does not determine or change its nature. It is entirely reasonable for Parliament and its individual members to interpret such a report—and the legislative obligation to make such a report—as meaning that the Minister of Justice is acting as a lawyer to Parliament.

Moreover, the mere fact that Parliament does, or can, obtain legal advice from its own lawyers does not mean that it could not and would not seek legal advice from an additional lawyer, in the form of the Minister of Justice. Indeed, there may be good reasons for Parliament to want to know the legal opinion that the Minister of Justice has provided to Cabinet. The choice of counsel is up to Parliament as the client.

In the same vein, Stratas JA and Noël J both overemphasize the separation of powers between the executive and Parliament as a near-absolute.[52] However, the relationship between these two branches of government is more nuanced. For example, the Supreme Court of Canada in *Reference Re Canada Assistance Plan (BC)* observed that "the dichotomy of the executive on the one hand and Parliament on the other. . . . [i]gnores the essential role of the executive in the legislative process of which it is an integral part".[53] As I will demonstrate below, a

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constitute legal advice that is protected by solicitor-client privilege. See Andrew Flavelle Martin, "The Attorney General as Lawyer (?): Confidentiality upon Resignation from Cabinet" (2015) 38:1 Dal LJ 147 at 167–69 [Martin, "Attorney General"].

52 *Schmidt* FCA, *supra* note 5 at paras 80–84; *Schmidt* FC, *supra* note 5 at paras 275–278.

53 *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 559, 83 DLR (4th) 297, as quoted in Andrew Flavelle Martin, "Consequences for Broken Political Promises: Lawyer-Politicians and the Rules of Professional Conduct" (2016) 10:2 JPPL 337 at 347. See also Peter W Hogg, *Constitutional Law of Canada*, 5th ed supp (Toronto: Thomson Reuters, 2016) (loose-leaf revision 2017-1), vol 1 ("[a]s between the legislative and executive branches, any separation of powers would make little sense in a system of responsible government" ch 7 at 7.3(a), 7-37 to 7-38); *ibid* ("[i]t will now be obvious that in a system of responsible government there is no 'separation of powers' between the executive and legislative branches of government" ch 9 at 9.5(e), 9-22.1); *ibid* ("[t]he close link between the executive and legislative

strict dichotomy does not apply to the historical role of the Attorney General, a role that continues today via section 5 of the *Department of Justice Act*. Furthermore, the duties of the Minister of Justice and the Attorney General are those duties set out in legislation and Parliament is free to add to or change those duties by amendment.

Neither does the "uncertain" nature of constitutional law preclude the Minister of Justice from giving non-binary legal advice to Parliament, any more than it prevents the Minister of Justice from giving legal advice on constitutionality to the executive—or any other lawyer from providing advice on the constitutionality of a law to her client. Indeed, in the face of uncertainty, an opinion on *Charter* compliance that is more nuanced than a merely binary conclusion seems appropriate.[54]

Furthermore, Stratas JA's curious invocation of the political neutrality of the civil service—that the threshold triggering reporting should be "one that supports the Minister in performing her duties and not one that purports to dictate how she should exercise her powers"—deserves some scrutiny.[55] While the Minister of Justice and Attorney General fulfills her role as legal advisor through and with the support of the government lawyers of the bureaucracy,[56] she remains able to reject their opinions as she sees fit—and those opinions remain politically neutral. The use of a lower threshold does not affect the political neutrality of the public service and dictates nothing about how the Minister should fulfill her duties.

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branches which is entailed by the British system is utterly inconsistent with any separation of the executive and legislative functions" ch 14 at 14.2(a), 14-5).

54 See Roach, *supra* note 9 at 625–26, stating that:

> [T]here is something to the argument that the difficulty of predicting *Charter* jurisprudence complicates the reporting requirement. The issue of *Charter* compliance rarely yields definite answers . . . . It may be more realistic to reformulate section 4.1 to require reports when there is a serious probability, as opposed to a certainty, that a proposed bill will violate the *Charter*[.].

55 *Schmidt* FCA, *supra* note 5 at para 89.

56 See Adam M Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law" (2010) 33:1 Dal LJ 1 at 20–22.

Beyond these preliminary points, both Stratas JA and Noël J made a legal error in concluding that the Attorney General is not a legal advisor to Parliament. To support his conclusion, Stratas JA quotes sections 4 and 5 of the *Department of Justice Act* in full, which set out the duties of the Minister of Justice and the Attorney General, respectively, including subsection 5(a).[57] Subsection 5(a) reads in part: "The Attorney General of Canada . . . (a) is entrusted with the powers and charged with the duties that belong to the office of the Attorney General of England by law or usage, in so far as those powers and duties are applicable to Canada".[58] As the Supreme Court of Canada stated in *Krieger*, "[a]s in England, they [Attorneys General] serve as Law Officers to their respective legislatures".[59] Admittedly this statement was *obiter*, but it nonetheless remains relevant.

The issue in *Krieger* was whether a law society can discipline a provincial Crown attorney for misconduct.[60] As context for its examination of the concept of prosecutorial discretion, which played a key role in the analysis, Iacobucci and Major JJ for the Court began with an examination of "the unique and important role of the Attorney General and his agents".[61] It was in this context that the role of the Attorney General as legal advisor to the legislature arose.

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[57] See *Schmidt* FCA, *supra* note 5 at para 83.

[58] *DOJ Act*, *supra* note 1, s 5(a). Curiously, while Elizabeth Sanderson (Elizabeth Sanderson, *Government Lawyering: Duties and Ethical Challenges of Government Lawyers* (Toronto: LexisNexis Canada, 2018) at 25) recognizes one of the duties "associated with the office of the Attorney General of England [that] were transported into Canada" as being "to draft bills and to advise members on legal implications in matters before the House", she does not include this duty at 39 as one of the duties included by subsection 5(a). For this reason it is not surprising that she concludes at 35–38 that *Schmidt* was correctly decided.

[59] *Krieger*, *supra* note 14 at para 27, Iacobucci and Major JJ.

[60] See *ibid* at paras 1–3.

[61] *Ibid* at para 23.

This proposition that the Attorney General is legal advisor to the legislature, though largely absent elsewhere in the case law,[62] is supported in the academic literature. Consider, for example, then-Professor Grant Huscroft (now Huscroft JA of the Ontario Court of Appeal):

> [T]he Attorney General is also the Legislature's lawyer, and is responsible for the drafting of private members' Bills. Similarly, the Attorney General provides advice to the Cabinet, but is also responsible for the provision of advice to the Legislature and legislative committees about proposed legislation. In these and other regards, it is clear that the Attorney General's duties as Chief Law Officer of the Crown extend beyond the government to the legislature as a whole . . . .[63]

Indeed, Roy McMurtry confirmed this role while he was Attorney General for Ontario: "This responsibility to give legal advise to the legislature remains part of my role in Ontario even today."[64]

The leading analysis of the Attorney General's role as legal advisor to the UK Parliament is by John Ll. J. Edwards.[65] He describes this role as one "that ha[s] experienced difficulty in taking root in other

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62 This phrase is quoted in *Picha v British Columbia (Presiding Coroner)*, 2008 BCSC 818 at para 21 and in *British Columbia (Attorney General) v British Columbia (Police Complaints Commissioner)*, 2008 BCSC 817 at para 21, but as part of longer quoted excerpts from *Krieger*, *supra* note 14, about different issues.

63 Grant Huscroft, "The Attorney General and *Charter* Challenges to Legislation: Advocate or Adjudicator?" (1995) 5 NJCL 125 at 128, as quoted in Martin, "Attorney General", *supra* note 51 at 161, n 64.

64 The Honourable R Roy McMurtry, "The Office of the Attorney General" in Derek Mendes da Costa, ed, *The Cambridge Lectures: Selected Papers Based upon Lectures Delivered at the Cambridge Conference of the Canadian Institute for Advanced Legal Studies, 1979* (Toronto: Butterworths, 1981) 1 at 1, as quoted in Martin, "Attorney General", *supra* note 51 at 161, n 64.

65 See John Ll J Edwards, *The Attorney General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984) at 207–35. Edwards notes, without explaining, that this role has not applied to the House of Lords since 1742 (*ibid* at 207). It is unnecessary for me to determine whether this role applies in the Canadian context to the Senate, as for practical purposes a report to the House of Commons functions as a report to both Houses of Parliament.

Commonwealth countries".[66] As Edwards demonstrates, the scope of this role is contested even in the UK itself—"an elaboration of its exact parameters has never been the subject of public debate in Parliament or elsewhere."[67] The core, which Edwards describes as "enjoy[ing] universal support", is providing "impartial advice . . . on the meaning and effect of . . . proposed legislation" to the House of Commons or committees of the House."[68] This role has also been described as "advising the House on the meaning and effect in domestic law of proposed legislative provisions."[69] Edwards emphasizes that, even within this scope, the Attorney General cannot share with the House the legal opinions she has given the executive.[70] The contested part of the role is "giv[ing] legal advice to the House of Commons on the question whether a proposed legislative measure would occasion a breach of the country's international obligations."[71] Edwards rejects this part of the role,[72] which is not relevant for my purposes.

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66 *Ibid* at 207. Edwards does not elaborate on why this is the case.

67 *Ibid* at 217.

68 *Ibid* at 222. See also *ibid* ("[t]he general outlines of this advisory role as an independent, impartial servant of the House of Commons have been reiterated sufficiently to brook no further doubts as to its validity" at 217); *ibid* ("[t]hat duty, according to the present Attorney General, does not extend beyond the giving of legal advice in relation to (a) the constitution of, and conduct of proceedings in, the House of Commons, (b) the conduct and discipline of members, and (c) the meaning and effect of proposed legislation" at 223).

69 *Ibid* at 225.

70 See *ibid* at 223:

> [D]isclosure [of legal opinions from the Attorney General] is discretionary at the behest of the responsible minister or government . . . [i]t is not within the purview of the Attorney General . . . on [their] own initiative and in the exercise of [their] personal judgement, to make public the contents of legal opinions prepared in their capacity as the government's chief legal advisers.

71 *Ibid* at 224.

72 See *ibid*.

I do acknowledge here the issue of confidentiality, which Edwards does not discuss.[73] It may seem odd that the role in the UK, which the Canadian Parliament has adopted in the *Department of Justice Act*, accepts that the legal advice of the Attorney General will be given in the House or in committee, and thus become part of the public record. However, the confidentiality belongs to Parliament as the client, and Parliament is free to waive it, for example through legislation. This oddity merely reflects that the role of the Attorney General as legal advisor to the legislature is *sui generis*.

One might argue that the incorporation of the powers and duties of the Attorney General of England, in subsection 5(a) of the *Department of Justice Act*, is qualified in a way that may conceivably exclude the role of legal advisor to the House of Commons. Recall that the provision refers to the powers and duties "that belong to the office of the Attorney General of England by law or usage, *in so far as those powers and duties are applicable to Canada*".[74] Unlike the Attorney General in Canada, the Attorney General in the English model is not a member of the cabinet,[75] and perhaps cabinet membership makes the role as legal advisor to the legislature inapplicable.[76] However, this qualification in the *Department of Justice Act* appears to merely adapt the English model of the Attorney General to a federal system—that is, the federal Attorney General is the Attorney General for the Queen in right of Canada and has the federal component of the powers of the Attorney General of England. This interpretation is bolstered by the language of the provincial statutes on the Attorney General, which similarly indicate that the provincial Attorney General has the provincial component of the powers of the Attorney General of England. Consider, for example, the Ontario *Ministry of the Attorney General Act*, which provides that "[t]he Attorney

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73 Thanks to Candice Telfer for raising this confidentiality point. See similarly Sanderson, *supra* note 58 at 35–36.

74 *DOJ Act*, *supra* note 1, s 5(a) [emphasis added].

75 See Edwards, *supra* note 65 at 73–74.

76 Thank you to a reviewer for flagging this point.

General . . . shall perform the duties and have the powers that belong to the Attorney General and Solicitor General of England by law or usage, *so far as those duties and powers are applicable to Ontario*".[77] Thus, these apparent qualifications merely divide the powers and duties of the Attorney General between the federal and provincial levels of government, instead of changing those powers and duties. This interpretation is also consistent with *Krieger* and the literature that I have cited.

So does the limited role of the Attorney General as legal advisor to the legislatures, including the House of Commons, extend to the *Charter* compatibility of government bills? On its face, "the meaning and effect of proposed legislation"[78] would seem to include *Charter* compliance, and indeed compliance with the Constitution more broadly—particularly because unconstitutional legislation will, once a court has ruled that it is unconstitutional, have no force or effect.

The constitutionality of proposed legislation, and thus its vulnerability to challenge, goes to the heart of domestic law. Indeed, this role of the Attorney General would presumably extend to constitutionality more broadly.

Given this role, the interpretation of the reporting provisions by Noël J and Stratas JA becomes problematic because a key part of their contextual analysis falls away. The Attorney General *is* a legal advisor to Parliament on matters that include *Charter* compliance. Thus, the question becomes not, as Noël J puts it, whether the reporting obligation

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[77] *Ministry of the Attorney General Act*, *supra* note 4, s 5(d) [emphasis added]. See also BC *Attorney General Act*, *supra* note 4, s 2(e):

> The Attorney General is entrusted with the powers and charged with the duties which belong to the office of the Attorney General and Solicitor General of England by law or usage, so far as those powers and duties are applicable to British Columbia, and also with the powers and duties which, by the laws of Canada and of British Columbia to be administered and carried into effect by the government of British Columbia, belong to the office of the Attorney General and Solicitor General[.].

[78] Edwards, *supra* note 65 at 222.

makes the Minister of Justice a legal advisor,[79] but instead what the Attorney General's role as a legal advisor means for the character of the report. Other ministers are required to make reports to Parliament, and this neither makes such reports legal advice, nor makes those ministers legal advisors to Parliament.[80] However, it seems unreasonable that Parliament, in requiring a report from its legal advisor on a question of law as important as *Charter* compliance, would not consider that report to constitute legal advice.

If the report about inconsistency is legal advice, then the courts' interpretation of a binary determination alone makes the report very narrow—and indeed inadequate—legal advice. Parliament as the client is entitled to the Minister's candid and complete legal advice about the constitutionality of government bills,[81] not merely a binary

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79 See *Schmidt* FC, *supra* note 5 ("[i]t is true that the Minister of Justice reports an inconsistency to Parliament, but *this duty does not make her a legal advisor to the House of Commons*" at para 276 [emphasis added]).

80 See e.g. *Financial Administration Act*, RSC 1985, c F-11, s 162(2):

> The Minister [of Finance] shall table in the House of Commons, on or before the fifth day on which the House of Commons is sitting after October 31 of a particular fiscal year, a list of the specific legislative proposals to amend listed tax laws
>
> (a) that the Government publicly announced before April 1 of the fiscal year preceding the particular fiscal year; and
>
> (b) that have not been enacted or made before the date of tabling in substantially the same form as the proposal or in a form that reflects consultations and deliberations relating to the proposal.

See also *Tax-Back Guarantee Act*, s 6, being Part 5 of the *Budget Implementation Act, 2007*, SC 2007, c 29:

> At least once every fiscal year, the Minister of Finance shall report, by way of a statement tabled in the House of Commons or other public announcement,
>
> (a) the finalized determination of the imputed interest savings in respect of the previous fiscal year; and
>
> (b) an accounting of the measures to which those savings have been applied in accordance with section 2.

81 See *FLSC Model Code*, *supra* note 49 ("[w]hen advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter" r 3.2-2). See also *ibid*, r 3.2-1, commentary 2:

determination of whether or not they are virtually certainly inconsistent with the *Charter* or the *Bill of Rights*.

Instead, the fact that the Attorney General is a legal advisor to Parliament on the *Charter* compliance of bills supports a more meaningful interpretation of the provisions at issue in *Schmidt*, one that recognizes a lower threshold for the making of a report. It is unclear how this change in the contextual analysis would have affected the result in *Schmidt*, given the role of the textual analysis of the provisions themselves.

However, none of this changes the fact that this role of the Attorney General as legal advisor to the legislature is inherently problematic. I turn to this problem in the next part.

III. THE PROBLEM WITH THIS ROLE AND POSSIBLE SOLUTIONS

As a matter of Canadian law, the Attorney General is, for at least some purposes, legal advisor to both the executive and the legislature at the same time. This dual role poses a serious problem as a matter of legal ethics.[82] As I have argued elsewhere, the Attorney General in such matters should be understood as having a joint retainer.[83] A joint retainer has several consequences for the clients and the lawyer-client

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> A lawyer's duty to a client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise. The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results."

I note that if this binary conclusion could constitute a limited scope retainer (perhaps as summary advice), it would be an odd retainer. See *ibid*, r 3.2-1A.

82 Edwards adopts a description of this as "a dual, or at least a hybrid, role": Edwards, *supra* note 65 at 224. See also *ibid* (describing this as a "fundamental problem" at 213); *ibid* ("[t]his fundamental restriction [on disclosing to the legislature the opinion given to the executive], by its very definition, engenders a potential conflict of interest whenever the House or its committees seek to draw upon the advisory services of the Law Officers" at 223).

83 See Martin, "Attorney General", *supra* note 51 at 162.

relationship. First, and most important, is that confidentiality does not apply as between the clients.[84] Second, both clients must provide informed and explicit consent to the joint retainer.[85] Third, "if a contentious issue arises between clients",[86] the lawyer cannot continue to represent them both.[87] Given Edwards' assertion that the Attorney General cannot give the House of Commons the legal opinion she gave to the executive,[88] the Attorney General cannot meet the requirements of a joint retainer.

As a strict legal matter, the legislatures—at least the provincial legislatures—can require the Attorney General to act contrary to her professional obligations as a lawyer.[89] As a practical matter, no law society would investigate an Attorney General for violating the rules on joint retainers in these legislated circumstances. But the problem remains that the Attorney General is giving advice on the same matter to two different clients, and one client (the executive) may wish to withhold relevant information from the other (the legislature). Indeed, the executive may well wish the Attorney General to advise the legislature that a bill or provision is *Charter*-compliant even if she has advised the executive that it is not. This tension poses a real challenge for the Attorney General. Indeed, one of the advantages of the approach of Noël J and Stratas JA is that the Attorney General's loyalties remain undivided.[90]

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84 See *FLSC Model Code*, *supra* note 49, r 3.4-5(b), cited in Martin, "Attorney General", *supra* note 51 at 162.

85 See *FLSC Model Code*, *supra* note 49, rr 3.4-5, 3.4-7.

86 *Ibid*, r 3.4-8.

87 See *ibid*, rr 3.4-8, 3.4-9.

88 See the text accompanying note 70.

89 Whether Parliament can do so is a matter of federalism that is beyond the scope of this paper.

90 See e.g. *Schmidt* FC, *supra* note 5 ("[i]t is true that the Minister of Justice reports an inconsistency to Parliament, but this duty does not make her a legal advisor to the House of Commons; others assume this role. *Her loyalties remain to the Executive*" at para 276 [emphasis added]).

Given this problem, what solutions exist? Arguably the best, or at least the cleanest, is to eliminate the Attorney General's role as legal advisor to the legislature. This could be done by amending section 5 of the *Department of Justice Act*.[91] This solution is consistent with the decisions in *Schmidt*, though it, like those decisions, relies on the assumption that the legislatures have adequate resources to marshal comparable legal expertise as the executive. It would also be most consistent with our contemporary understanding of legal ethics and professionalism.

Another reasonable approach is to do nothing—that is, to accept this tension as a consequence of this unique arrangement that does not outweigh the benefits to the legislature, and to embrace this curious role. To retain the status quo would be essentially to grandparent a *sui generis* role of the Attorney General, a role which clashes with our contemporary understanding of legal ethics and professionalism.

An undesirable approach is to characterize this role as a historical one that has atrophied through disuse to the point that it no longer exists. If this role should be eliminated, the appropriate method is for Parliament to amend the *Department of Justice Act* accordingly. This legislative approach would be deliberate action that promotes transparency.

In the alternative, Parliament could openly embrace the Attorney General's role as its legal advisor by amending the provisions challenged in *Schmidt* to more closely match the reporting threshold proposed by Schmidt. This approach is reflected in Bill C-51,[92] which would add section 4.2 to the *Department of Justice Act*:

> 4.2 (1) The Minister shall, for every Bill introduced in or presented to either House of Parliament by a minister or other representative of the Crown, cause to be tabled, in the House

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[91] For example, by adding a section 5.1, such as: "Despite subsection 5(a), the Attorney General is not a legal advisor to the House of Commons, the Senate, or their committees."

[92] Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, 1st Sess, 42nd Parl, 2017, discussed in *Schmidt* FCA, *supra* note 5 at para 43.

> in which the Bill originates, a statement that sets out potential effects of the Bill on the rights and freedoms that are guaranteed by the *Canadian Charter of Rights and Freedoms*. . . .
>
> (2) The purpose of the statement is to inform members of the Senate and the House of Commons as well as the public of those potential effects.[93]

As noted by Stratas JA, section 4.2 is broader than section 4.1.[94] Curiously, Bill C-51 does not repeal section 4.1—the new section 4.2 supplements, but does not replace, the existing section 4.1. Thus there would be two distinct obligations: one for a statement under subsection 4.2(1), which would always apply, and one for a report under section 4.1, which would apply only where there was inconsistency. A slightly different approach would be to amend section 4.1 to clarify the meaning of "inconsistency",[95] or to explicitly state that the report is legal advice.[96]

Parliament could go even further in embracing this role of the Attorney General by extending the reporting obligation to constitutionality more broadly, including federalism considerations under the *Constitution Act, 1867* and aboriginal rights under section 35 of the *Constitution Act, 1982*.[97] If Parliament desires and can benefit from the Attorney General's legal advice on compliance with the *Charter*, it can presumably benefit from advice as to constitutionality more broadly.

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93 Bill C-51, *supra* note 92, cl 73.

94 See *Schmidt* FCA, *supra* note 5 at para 43.

95 For example, adding a subsection 4.1(3) which would state: "For greater certainty, an "inconsistency" exists where a bill is more likely than not inconsistent with the purposes and provisions of the Charter."

96 For example, adding a subsection 4.1(3) which would state: "For greater certainty, the report in subsection 2 constitutes legal advice."

97 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

IV. CONCLUSION

In this comment, I have demonstrated that both Noël J and Stratas JA in *Schmidt* overlooked the Attorney General's role as legal advisor to the legislature. While this role is largely forgotten, it has been recognized by the Supreme Court of Canada and in the literature, and it remains in effect under section 5(a) of the *Department of Justice Act*. The scope of this role is somewhat narrow and includes only advice as to the "meaning" and "effect" of proposed legislation.[98] *Charter* compliance, and indeed constitutionality more broadly, seems to fit squarely within this scope.

At the same time, I have argued that this forgotten role is a problematic and perhaps unnecessary one. This role places the Attorney General in a joint retainer (providing legal services both to the executive and to Parliament) while simultaneously restricting her from meeting the requirements of a joint retainer (disclosing to her client Parliament the legal advice she has given to her other client the executive). Moreover, Parliament arguably has its own resources and sources of legal services—which, given the forgotten nature of this role, Parliament has presumably relied on for some time.

What are the implications of my analysis? While I cannot be certain, I expect that this oversight did not change the result in *Schmidt*. In particular, the textual analyses by Noël J and Stratas JA seems to stand on their own and support the result. From this perspective, the error was a harmless one. However, *Schmidt* still poses harm to the jurisprudence—and the understanding of the role of the Attorney General—in the long term.

Nonetheless, *Schmidt* and its shortcomings present an opportunity to re-examine the multifaceted and *sui generis* legal reality of the Attorney General. Her role as legal advisor to the legislature is a problematic and perhaps unnecessary one. Eliminating that role may well be the best solution. If so, that elimination should be done in a deliberate and transparent manner by amending the duties of the Attorney General in

[98] See above notes 68–69 and accompanying text.

section 5 of the *Department of Justice Act*. A viable alternative would be to re-embrace this role. One way to re-embrace it, which Parliament may adopt if it passes Bill C-51, would be to further clarify the role of the Attorney General by supplementing section 4.1 with a broader reporting provision. Section 4.1 and the proposed section 4.2 are limited to *Charter* considerations. However, if this role of the Attorney General is to be re-embraced, the legislated reporting obligation could and should also be extended to constitutionality more broadly, including federalism and Aboriginal rights.