The *Schmidt* Case and *Charter* Risk Analysis: A Commentary

By Heather MacIvor

I. Introduction

 In March 2016, Justice Simon Noël of the Federal Court of Canada dismissed Edgar Schmidt’s case against the Attorney General of Canada (“AGC”).[[1]](#endnote-1) Mr. Schmidt, a former lawyer in the federal Department of Justice (“DOJ”), argued that the Government was failing in its reporting duties under section 4.1 of the *Department of Justice Act* (“the *Act*”)[[2]](#endnote-2). That provision requires the federal Minister of Justice to “ascertain” whether a Government Bill tabled in the Commons is “inconsistent with the purposes and provisions” of the *Charter*, and to “report any such inconsistency to the House of Commons at the first convenient opportunity.” Mr. Schmidt claimed that the standard used to determine inconsistency with the *Charter* – whether the Government could make a “credible argument” for the Bill’s constitutionality in the event of a court challenge – is too low. He submitted that the Government should be obliged to declare an inconsistency whenever it is “more likely than not” that a court would find the Bill partially or wholly inconsistent with the *Charter*. Mr. Schmidt has appealed the dismissal of his application to the Federal Court of Appeal, which, at the time of this writing, has yet to hear the case.

 In September 2016, the Canadian Civil Liberties Association (CCLA) released “Charter First: A Blueprint for Prioritizing Rights in Canadian Lawmaking”.[[3]](#endnote-3) The report recommends a revamped procedure for crafting Government Bills, and changes to the legislative process in the House of Commons and Senate. The stated goal of these recommendations is to ensure that future federal laws conform to the *Canadian Charter of Rights and Freedoms.*[[4]](#endnote-4)The CCLA intervened in *Schmidt* and argued in support of the higher standard; it has been granted leave to intervene at the Federal Court of Appeal.

 Among other recommendations in “*Charter* First”, the CCLA calls for two amendments to s. 4.1 of the *Act*:

* to require the Minister of Justice to apply the “balance of probabilities” standard, which Justice Noël rejected in *Schmidt*; and

* to oblige the Minister to attach “a detailed statement of *Charter* compatibility” to every Government bill – not just those that failed the “balance of probabilities” test. This statement would “include an acknowledgement of which rights, if any, are engaged by the bill; the government’s justification for any potential infringements under section 1 of the *Charter*; the ‘tests’, factors, or reasonable alternatives considered to reach the conclusion; reference to jurisprudence and relevant judicial precedents; and an acknowledgement if the bill contradicts existing norms or precedents.”[[5]](#endnote-5) In effect, the amended s. 4.1 would require the Government to disclose the DOJ’s legal advice to Cabinet concerning *Charter* compliance. Under the present system, such advice is not disclosed to anyone outside the executive branch of government – including legislators. (DOJ lawyers can and do attend Committee meetings to assist MPs and Senators with the detailed scrutiny of bills, but they cannot divulge privileged advice.) While the CCLA does not expressly state that the proposed “statements of *Charter* compatibility” would be widely published, it is reasonable to assume that such statements would become public as soon as they were tabled in the House of Commons. The CCLA Report refers approvingly to New Zealand, where (as described below) reports to the legislature on rights compliance are posted on the Justice Ministry’s website.

 In principle, both amendments could enhance transparency and accountability in federal law-making. The recent experience with Bill C-14, the “medical assistance in dying” (“MAID”) legislation, suggests that publishing the Government’s *Charter* analyses can enhance public and parliamentary debate.[[6]](#endnote-6) In practice, enforced disclosure of the DOJ’s *Charter* advice could undermine the separation of powers, solicitor-client privilege and Cabinet confidentiality.

II. *Schmidt v Canada*

 The *Schmidt* case opened a window into the secretive *Charter* vetting process in the federal DOJ. In his reasons, Justice Noël summarized the Government’s extensive evidence about the involvement of its legal advisors at every stage of policy development. Of particular interest are the discussions of “Legal Risk Management” (LRM), Memoranda to Cabinet, and the evolution of the “credible argument” standard. His Honour emphasized “the role of the Department of Justice as a ‘law firm’-type entity: principles such as solicitor-client relationship apply”.[[7]](#endnote-7)

 Justice Noël found that the Government’s current approach to *Charter* risk analysis respects the separation of powers among our legislative, executive and judicial branches of government. The *Charter* did more than just entrench rights and freedoms. It also endowed the courts with broad remedial powers. When a law is found to violate a *Charter* guarantee, and the violation cannot be justified under s. 1, the offending provision may be nullified or modified pursuant to s. 52(1) of the *Constitution Act, 1982*. As the Government argued in *Schmidt*, this strong form of post-legislative rights scrutiny has no equivalent in comparable Commonwealth jurisdictions.

 For example, the New Zealand *Bill of Rights Act, 1990* (“BORA”) explicitly prohibits courts from invalidating or declining to apply a statutory provision because of its incompatibility with a protected right (s. 4). Like s. 4.1 of the DOJ Act, s. 7 of the BORA requires the Attorney General to “bring to the attention of the House of Representatives any provision in [a newly tabled Bill] that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.” The Attorney General may also, if he or she chooses, disclose a report advising that a Bill raises no rights issues, or that it infringes a protected right or freedom but is justified under s. 5 (the equivalent to Canada’ s. 1). As of March 2016, 77 “section 7 reports” had been tabled in New Zealand’s Parliament. This is a far cry from Canada: according to the CCLA, “not a single report relaying concerns about *Charter* compliance under section 4.1 has ever been made to Parliament”.[[8]](#endnote-8)

 In New Zealand, as Justice Noël pointed out, “pre-legislative processes are commonly the only place where human rights will formally be considered”.[[9]](#endnote-9) In Canada, by contrast, “our constitutionally mandated separation [of powers] allows more flexibility to the Executive in regards to guaranteed rights because the Courts are mandated with a larger safeguarding role than in other jurisdictions.”[[10]](#endnote-10) In other words, strong post-legislative scrutiny renders strict pre-legislative scrutiny less important – and perhaps less appropriate – than it would be in the absence of s. 52(1). Given this institutional context, His Honour found that s. 4.1 does not require the Attorney General to report an incompatibility to Parliament so long as the DOJ can devise “an argument that [is] reasonable, *bona fide*, and capable of being raised before and accepted by the Courts”.[[11]](#endnote-11) Put another way, a credible argument for *Charter* compatibility “is an argument of a quality such that the Courts could potentially justify the inconsistency pursuant to section 1 of the *Charter*.”[[12]](#endnote-12)

 His Honour concluded that the “credible argument” standard adequately protects rights and freedoms. In reaching this conclusion, he relied in part on a statistical analysis of *Charter* jurisprudence submitted by the Attorney General and appended to the reasons for judgment. The DOJ tabulated the judicial treatment of 34 federal laws subjected to *Charter* challenges between 2006 and 2015. In 12 of those 34 cases, the Supreme Court found unjustified infringements of one or more *Charter* guarantees. Eight of those 12 rulings were unanimous. In five of the eight cases, every judge – at the Superior Court, the Court of Appeal, and the Supreme Court – agreed that the law violated the *Charter* and could not be justified under s. 1.

 According to the Government, these statistics show that “in the majority of cases, a credible argument in favour of consistency was seriously considered by the Court, whether that be in a dissent or in the majority’s analysis.” Even in some cases where the Supreme Court of Canada ultimately, and unanimously, found the law to be inconsistent with the *Charter*, “lower Courts either retained or seriously considered the Defendant’s credible argument”.[[13]](#endnote-13) Justice Noël accepted this claim:

In the majority of cases where federal legislation was challenged on *Charter* grounds there were credible arguments in support of the legislation regardless of how those arguments were ultimately treated by the Supreme Court. What matters is that the arguments were taken seriously by the courts and not simply dismissed as frivolous; in other words, they were credible.[[14]](#endnote-14)

 In my view, the Government’s statistical analysis is too flawed to be reliable. Here are two specific examples to illustrate the broader problems.

* *Carter*[[15]](#endnote-15) and *Bedford*[[16]](#endnote-16) are listed among the 12 defeats for the federal government at the Supreme Court. In both cases the Court declared that certain provisions of the *Criminal Code* conflicted with s. 7 of the *Charter* and could not be justified under s. 1. Those provisions were enacted long before the *Charter* or s. 4.1 of the *Act*, so their judicial treatment tells us nothing about *Charter* risk analysis. Yet the Government lumped *Carter* and *Bedford* together with successful challenges to laws that were adopted post-*Charter* and, presumably, subjected to the internal vetting process adopted by the DOJ in the early 1980s.[[17]](#endnote-17) This is an obvious apples-and-oranges mistake, which raises doubts about the entire analysis.[[18]](#endnote-18)
* The assumption that every difference of opinion between two judges, or two levels of court, tells us something about *Charter* compatibility is dubious. The majority at the BC Court of Appeal reversed the trial judge in *Carter* on the basis of *Rodriguez*[[19]](#endnote-19) and *stare decisis*, not the merits of the Government’s s. 7 defense.[[20]](#endnote-20) The Supreme Court dissent in *Nur* reflected disagreements over the judicial use of hypotheticals in s. 12 cases and the proper degree of deference to Parliament: “it is not for this Court to frustrate the policy goals of our elected representatives based on questionable assumptions or loose conjecture.”[[21]](#endnote-21) While the *Nur* minority may have considered the Government’s submissions on the impugned law to be “credible”, or at least non-frivolous, this does not appear to have prompted their dissent.

Leaving aside the statistical errors, the Government acknowledged that in nearly one in seven cases, it failed to convince a single judge that a law was more likely to be constitutionally valid than not. This is not a ringing endorsement of “*Charter* risk analysis” based on a “credible argument”.

 Justice Noël also seems to have accepted another questionable assumption: that “Governments, for political reasons, do not want to be seen as actively promoting breaches to guaranteed rights.”[[22]](#endnote-22) This is likely true of most Canadian governments, but not all. Depending on the nature of its electoral “base”, a federal Cabinet may have political reasons to ignore the DOJ’s advice and proceed with a draft Bill that cannot survive a *Charter* challenge. Justice Noël’s ultimately concludes: “The examination process, as it is set up, is such that prior to the reporting obligation step, any problematic issue relating to guaranteed rights will have been addressed.”[[23]](#endnote-23) Given that political pandering happens and *male fides* exists, this conclusion seems naïve.

III. Violating the Constitution to Defend the Constitution?

 As previously explained, the CCLA would require the Minister of Justice to attach “a detailed statement of *Charter* compatibility” to every Government Bill. The “Charter First” Report asserts, without substantiation, that “governments would maintain the ability to develop legislation confidentially, and benefit from legal advice subject to solicitor-client privilege”.[[24]](#endnote-24) This is a puzzling claim. By virtue of the separation of powers in our constitution, as reflected in sections 4 and 5 of the *Act*, the federal Cabinet is the client of the Minister of Justice and Attorney General. Parliament is not the client of the DOJ; each chamber has its own legal counsel, whose advice to MPs or Senators is also privileged. It follows that the Cabinet can choose to waive solicitor-client privilege in DOJ advice – as the Trudeau Government did when it disclosed its *Charter* analyses of Bill C-14. The Cabinet may also decide to waive the confidentiality of its own deliberations. But it should not be forced to do so every time it tables a bill in Parliament.

 As the Supreme Court has observed, “Cabinet confidentiality is essential to good government.”[[25]](#endnote-25) It further stated:

The British democratic tradition which informs the Canadian tradition has long affirmed the confidentiality of what is said in the Cabinet room, and documents and papers prepared for Cabinet discussions. The reasons are obvious. Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny . . . If Cabinet members’ statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from making comments that might be considered politically incorrect . . . .The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly.[[26]](#endnote-26)

 Similarly, “Solicitor-client privilege is fundamental to the proper functioning of our legal system.”[[27]](#endnote-27) Indeed, it is a “principle of fundamental justice” for the purposes of s. 7 of the *Charter*.[[28]](#endnote-28) The Supreme Court has also held that “solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance.“[[29]](#endnote-29) The absolute and indefinite protection of communications between lawyer and client encourages the latter to divulge all relevant facts and the former to provide honest assessments and advice. When government is the client, solicitor-client privilege allows policy options to be fully evaluated on legal grounds without fear of public disclosure. Together with Cabinet confidentiality, it promotes good governance.

 The importance of these principles is reflected in a variety of federal statutes, including the *Canada Evidence Act* (sections 38 and 39); the *Personal Information Protection and Electronic Documents Act* (section 9(3)); and the *Privacy Act* (s. 27). These laws provide that government information which would otherwise be subject to public disclosure may (or must) be withheld if it is subject to Cabinet confidentiality and/or solicitor-client privilege. For example, s. 23 of the *Access to Information Act* provides that “The head of a government institution **may** refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.” Section 69 prohibits **any** disclosure of “confidences of the Queen’s Privy Council for Canada,” unless their substance has already been made public or a stipulated number of years has elapsed. A similar Ontario provision survived a *Charter* challenge, the Supreme Court having concluded that the guarantee of expressive freedom in s. 2(b) cannot trump solicitor-client privilege or Cabinet confidentiality “where the public interest in confidentiality outweighs the interests served by disclosure.”[[30]](#endnote-30)

 As Justice Noël described at length in *Schmidt*, lawyers in various branches of the DOJ provide advice and analysis throughout the policy-making process. Their advice is incorporated into the Memorandum to Cabinet (“MC”) prepared for each proposed Government Bill. The MC is the most comprehensive of the “documents and papers prepared for Cabinet discussions”. It is fully protected by Cabinet confidentiality.[[31]](#endnote-31) Even if this were not the case, the advice and assessments provided to the Minister of Justice by DOJ lawyers, and conveyed to the rest of the Cabinet by the Minister, would still be subject to solicitor-client privilege.[[32]](#endnote-32)

 Where a privilege applies, only the holder can refuse it. A client can waive solicitor-client privilege; his or her lawyer cannot.[[33]](#endnote-33) Similarly, the Cabinet may waive confidentiality in a particular document.[[34]](#endnote-34) But there does not seem to be any legal basis for suggesting that Parliament, or anyone else, could force the federal Government to disclose confidential legal advice provided to Cabinet by DOJ lawyers. As Justice Noël observed in *Schmidt*, “Parliament … is not the client of the Minister of Justice.”[[35]](#endnote-35)

 In New Zealand, the “section 7 reports” are available to the public because successive Ministers of Justice (since 2003) have chosen to waive privilege.[[36]](#endnote-36) In all probability, political pressures forced the disclosure of confidential legal advice because there are no judicial remedies for rights violations in New Zealand. Even so, the website providing access to New Zealand compliance reports contains the following statement:

This advice was prepared to assist the Attorney-General to determine whether a report should be made to Parliament under s 7 of the New Zealand Bill of Rights Act 1990. It should not be used or acted upon for any other purpose. The advice does no more than assess whether the Bill complies with the minimum guarantees contained in the New Zealand Bill of Rights Act. The release of this advice should not be taken to indicate that the Attorney-General agrees with all aspects of it, nor does its release constitute a general waiver of legal professional privilege in respect of this or any other matter. [[37]](#endnote-37)

This kind of disclaimer could be used in Canada, if future Governments decided to disclose *Charter* risk analyses on a case-by-case basis.

 The key point is that Parliament cannot waive either privilege on behalf of the executive branch. Only the Cabinet can choose to divulge the legal advice that it receives from the Department of Justice, including advice on *Charter* compatibility. Amending s. 4.1 of the DOJ Act to enforce such disclosure on a reluctant executive branch would conflict with the separation of powers, solicitor-client privilege and Cabinet confidentiality. Given that the *Charter* cannot override other parts of the Constitution[[38]](#endnote-38), this particular recommendation to “put the *Charter* first” looks like a non-starter.

Heather MacIvor is a former Associate Professor of Political Science. Since receiving her JD in 2014 she has clerked at the Divisional Court and articled at the Constitutional Law Branch. While seeking a permanent legal position in Toronto, Heather is currently a freelance legal writer. Heather is also a Member at Large on two OBA Section Executives: Constitutional, Civil Liberties and Human Rights, and Administrative Law.

1. ENDNOTES

 *Schmidt v Canada (Attorney General)*, 2016 FC 269 [“*Schmidt*”]. [↑](#endnote-ref-1)
2. RSC 1985, c J-2, s 4.1(1). [↑](#endnote-ref-2)
3. Canadian Civil Liberties Association, “*Charter* First: A Blueprint for Prioritizing Rights in Canadian Lawmaking” (Toronto: CCLA, September 2016) [“*Charter* First”]. [↑](#endnote-ref-3)
4. *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. [↑](#endnote-ref-4)
5. “*Charter* First”, *supra* note 1 at iii. [↑](#endnote-ref-5)
6. Most unusually, the Trudeau Government waived privilege and appended a Charter analysis to the “Legislative Background” posted on its website after the Bill was tabled. See Her Majesty the Queen in Right of Canada, represented by the Minister of Justice and Attorney General of Canada, Department of Justice, “Legislative Background: Medical Assistance in Dying (Bill C-14, as Assented to on June 17, 2016)”, June 2016, at 20; accessed at <http://www.justice.gc.ca/eng/rp-pr/other-autre/adra-amsr/>, October 2016 [“Legislative Background”]. That initial *Charter* analysis was widely viewed as inadequate (see the critiques reproduced at 38-41 of “*Charter* First”, so the Government posted an “Addendum” defending the constitutionality of the requirement that “natural death” be “reasonably foreseeable”. See Canada, Department of Justice, “Legislative Background: Medical Assistance in Dying (Bill C-14) – Addendum: Bill C-14's requirement that natural death has become reasonably foreseeable (s. 241.2(2)(d))”, accessed at <http://www.justice.gc.ca/eng/rp-pr/other-autre/addend/index.html>, October 2016 [“Addendum”]. [↑](#endnote-ref-6)
7. *Schmidt*, *supra* note 3 at para 19. [↑](#endnote-ref-7)
8. “*Charter* First”, *supra* note 1 at ii. [↑](#endnote-ref-8)
9. *Schmidt*, *supra* note 3 at para 200. [↑](#endnote-ref-9)
10. *Schmidt*, *supra* note 3 at para 217. [↑](#endnote-ref-10)
11. *Schmidt*, *supra* note 3 at para 245. [↑](#endnote-ref-11)
12. *Schmidt*, *supra* note 3 at para 248. [↑](#endnote-ref-12)
13. *Schmidt*, *supra* note 3 at para 250. [↑](#endnote-ref-13)
14. *Schmidt*, *supra* note 3 at para 252. [↑](#endnote-ref-14)
15. *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331. [↑](#endnote-ref-15)
16. *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101. [↑](#endnote-ref-16)
17. The list includes *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 SCR 401; *R v Smith*, 2015 SCC 34, [2015] 2 SCR 602; *R v Nur*, 2015 SCC 15, 2015] 1 SCR 773 [“*Nur*”]; *Canada (Attorney General) v Whaling*, 2014 SCC 20, [2014] 1 SCR 392; *R v Tse*, 2012 SCC 16, [2012] 1 SCR 531; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350; and *Canada (Attorney General) v Hislop*, 2007 SCC 10, [2007] 1 SCR 429. [↑](#endnote-ref-17)
18. See “Hijinks with How Numbers are Reported” in Part I of Daniel J. Levitin, *A Field Guide to Lies: Critical Thinking in the Information Age* (Penguin, 2016). Please note: the reference to the book’s title should not be construed as an accusation of deliberate dishonesty against any person. [↑](#endnote-ref-18)
19. *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519. [↑](#endnote-ref-19)
20. *Carter v Canada (Attorney General)*, 2013 BCCA 435. [↑](#endnote-ref-20)
21. *Nur*, *supra* note 17 at para 132. [↑](#endnote-ref-21)
22. *Schmidt*, *supra* note 3 at para 261. [↑](#endnote-ref-22)
23. *Schmidt*, *supra* note 3 at para 262. [↑](#endnote-ref-23)
24. “*Charter* First”, *supra* note 1 at 47. [↑](#endnote-ref-24)
25. *Babcock v Canada (Attorney General)*, 2002 SCC 57, [2002] 3 SCR 3 at para 15 [“*Babcock*”]. [↑](#endnote-ref-25)
26. *Babcock*, *supra* note 25 at para 18 [citation omitted]. [↑](#endnote-ref-26)
27. *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 SCR 574 at para 9. [↑](#endnote-ref-27)
28. *R v McClure*, 2001 SCC 14, [2001] 1 SCR 445 at para 41 [“*McClure*”]; *Lavallee, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General); R v Fink*, 2002 SCC 61, [2002] 3 SCR 209 at para 21 [“*Lavallee*”]; *Canada (National Revenue) v Thompson*, 2016 SCC 21 at para 17 [“*Thompson*”]. [↑](#endnote-ref-28)
29. *Lavallee*, *supra* note 28 at para 36. [↑](#endnote-ref-29)
30. *Ontario (Public Safety and Security) v Criminal Lawyers’ Association*, 2010 SCC 23, [2010] 1 SCR 815 at para 39. [↑](#endnote-ref-30)
31. *Schmidt*, *supra* note 3 at paras 221-224. [↑](#endnote-ref-31)
32. *Schmidt*, *supra* note 3 at paras 229, 232 and 239. [↑](#endnote-ref-32)
33. *McClure*, *supra* note 28 at para 37; *Thompson*, *supra* note 28 at para 39. [↑](#endnote-ref-33)
34. *Babcock*, *supra* note 25 at para 31. Note that Cabinet can only waive confidentiality where this is permitted by statute. There is no common-law waiver of public interest immunity: *Babcock* at para 32. [↑](#endnote-ref-34)
35. *Schmidt*, *supra* note 3 at para 33. [↑](#endnote-ref-35)
36. Chris Finlayson, Attorney General of New Zealand, “Section 7 of the Bill of Rights” (speech to Transparency International New Zealand); accessed at <http://www.chrisfinlayson.co.nz/section-7-of-the-bill-of-rights/>, October 2016. [↑](#endnote-ref-36)
37. “Advice on consistency of Bills with the Bill of Rights Act”; accessed at <https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/advice/>, October 2016. [↑](#endnote-ref-37)
38. *Reference re Bill 30, An Act to Amend the Education Act (Ont)*, [1987] 1 SCR 1148 at para 62. [↑](#endnote-ref-38)