

# Folk Hero or Legal Pariah? A Comment on the Legal Ethics of Edgar Schmidt and *Schmidt v Canada* (*Attorney General*)

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ANDREW FLAVELLE MARTIN \*

## ABSTRACT

In *Schmidt v Canada (Attorney General)*, government lawyer Edgar Schmidt sought a declaration that the Department of Justice and the Minister of Justice were misinterpreting legislation requiring the Minister to inform the House of Commons if government bills are inconsistent with the *Canadian Charter of Rights and Freedoms*. Schmidt was one of the lawyers who made recommendations under that legislation. *Schmidt* thus presents an unusual case study in legal ethics: what should, or can, a lawyer do when a client rejects the lawyer's advice? What if the client is the government, and the advice is about fundamental rights? This comment considers Schmidt's conduct in three respects: as a lawyer, as a delegate of the Attorney General, and as a public servant. While Schmidt violated his duty as a lawyer, this comment explains why he can nonetheless be seen as a folk hero in pursuit of the public interest, perhaps as a delegate of the Attorney General (from a legal perspective) or as a whistleblowing public servant (from the perspective of the public and the media).

**Keywords:** Legal Ethics; Attorney General; Government Lawyers; Manitoba; *Canadian Charter of Rights and Freedoms*.

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\* Of the Ontario Bar; Assistant Professor, Schulich School of Law, Dalhousie University. Thanks to Alexander Corley for research assistance and to John Gregory, Adam Dodek, John Twohig, and Candice Telfer for comments on a draft.

## I. INTRODUCTION

Suppose you believe that the Minister of Justice is misleading the House of Commons about whether government bills are inconsistent with the *Canadian Charter of Rights and Freedoms*.<sup>1</sup> As a Department of Justice lawyer who specializes in these matters, you have repeatedly pressed the point but to no avail. What should you do?

While there are differing accounts of what makes an ethical lawyer, the case study method is one way of approaching this question.<sup>2</sup> *Schmidt v Canada (Attorney General)* provides an excellent and indeed unique case study.<sup>3</sup> What should, or can, a lawyer do when a client rejects the lawyer's advice? What if the client is the government, and the advice is about fundamental rights? In *Schmidt*, the plaintiff, Edgar Schmidt argued that the Department of Justice, including the Minister of Justice, had improperly interpreted statutory provisions requiring the Minister to report to the House of Commons if government bills were "inconsistent with the purposes and provisions of" the *Canadian Bill of Rights* or the *Charter*.<sup>4</sup> Schmidt argued that the correct interpretation was that a report was required if a bill was "more likely than not inconsistent," whereas the Department and Minister's approach was whether there was in favour of constitutionality "[a]n argument that is credible, *bona fide*, and capable of

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<sup>1</sup> *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].

<sup>2</sup> See e.g. Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) [Dodek & Woolley].

<sup>3</sup> *Schmidt v Canada (Attorney General)*, 2018 FCA 55, aff'g 2016 FC 269 [Schmidt FC]; leave to appeal to SCC refused, 38179 (4 April 2019); See e.g. John Mark Keyes, "Loyalty, Legality and Public Sector Lawyers" (2019) 97:1 Can Bar Rev 129 [Keyes]. (A previous working version was posted on SSRN: John Mark Keyes, "Loyalty, Legality and Public Sector Lawyers" (29 June 2018) (last visited 21 February 2019) [unpublished, archived at Ottawa Faculty of Law Working Paper No 2018-18] online: SSRN <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3200076](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3200076)> [perma.cc/HW2M-RCHB] [Keyes SSRN]). I approach this comment partly as a response to Keyes.

<sup>4</sup> *Charter*, *supra* note 1; *Canadian Bill of Rights*, SC 1960, c 44, s 3, reprinted in RSC 1985, Appendix III, No 6; *Department of Justice Act*, RSC 1985, c J-2, s 4.1 [DOJ Act]. These provisions, and s 3 of the *Statutory Instruments Act*, RSC 1985, c S-22, also require the examination of draft regulations.

being successfully argued before the courts”.<sup>5</sup> Schmidt was ultimately unsuccessful in both the Federal Court and the Federal Court of Appeal, and was denied leave to appeal to the Supreme Court of Canada.

What makes this litigation noteworthy, and potentially problematic, is that Schmidt had a personal stake in the matter: he was one of the Department of Justice lawyers whose role was to make these determinations and recommendations to the Minister.<sup>6</sup>

Media coverage was largely sympathetic to Schmidt, portraying him as a brave whistleblower.<sup>7</sup> A *Toronto Star* editorial began, “Even at the risk of his reputation and livelihood, Edgar Schmidt couldn't stay quiet any longer.”<sup>8</sup> Kirk Makin of the *Globe and Mail* referred to the court proceeding as Schmidt’s “crusade” – and not just any crusade, but “a crusade to sustain the rule of law”.<sup>9</sup> The legal media took a similar approach, with *Canadian Lawyer* selecting him as one of its Top 25 Most Influential of 2014, observing that “[c]ourage to stand by your convictions is the hallmark of every public servant and lawyer.”<sup>10</sup>

Indeed, Schmidt understood his actions as a matter of conscience: “he felt uneasy about the way he was told to do his job, believing that officials in his own department – and the Justice Minister himself – were involving him in breaking the law.”<sup>11</sup> As a further indication of how he viewed his actions, Schmidt named his website “Charter Defence”.<sup>12</sup>

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<sup>5</sup> Schmidt FC, *supra* note 3 at para 5.

<sup>6</sup> *Ibid* at para 14.

<sup>7</sup> See e.g. Sean Fine, “Lawyer takes on Justice Department”, *The Globe and Mail* (21 September 2015) A4 [Fine].

<sup>8</sup> “Blowing the whistle”, Editorial, *The Toronto Star* (20 January 2013) A14 [Star editorial].

<sup>9</sup> Kirk Makin, “Justice Department Whistleblower on a crusade to sustain the rule of law”, *The Globe and Mail* (23 February 2013) A16.

<sup>10</sup> Gail J Cohen, “The Top 25 Most Influential 2014” *Canadian Lawyer Magazine* (4 August 2014), online: *Canadian Lawyer Magazine*, <<https://www.canadianlawyermag.com/author/gail-j-cohen/the-top-25-most-influential-2014-2558/>> [https://perma.cc/FT9U-VBGG] [Cohen].

<sup>11</sup> Fine, *supra* note 7.

<sup>12</sup> Edgar Schmidt, “Home” *Charter Defence* (accessed 24 February 2014), online: <<https://www.charterdefence.ca/index.html>> [https://perma.cc/E3TW-8EY7].

The trial judge, who would go on to reject Schmidt's argument, nonetheless chastised in strong language the government for suspending Schmidt:

The day after the filing of this statement [by Mr. Schmidt], bang: 'You're suspended,' .... It's unbelievable ... Your client has done everything it can to kill this thing. The court doesn't like that ... We see that in different countries and we don't like it ... Canada is still a democracy.<sup>13</sup>

While Schmidt was ultimately allowed to retire,<sup>14</sup> the court's reaction to his suspension is striking.

In recent years, debate over the obligations of government lawyers has focused on the John Yoo archetype: a lawyer bending law into pretzels to irresponsibly give the advice desired by the client.<sup>15</sup> *Schmidt* is the opposite situation, i.e. the government lawyer persisting in giving advice that his government client had rejected. But Schmidt went further: he publicly disclosed that his government client acted contrary to his advice as to the interpretation of the reporting provisions (which at least from Schmidt's view was the correct advice) and went to court to stop it.

Is Schmidt a folk hero or an unethically disloyal lawyer? As framed by John Mark Keyes, former Chief Legislative Counsel for Canada,<sup>16</sup> "Did the lawyer breach his duty of loyalty, or did he act properly in the interest of ensuring respect for the law and the protection of fundamental rights and freedoms?"<sup>17</sup>

Keyes argues that Schmidt's conduct would be acceptable only in "the clearest circumstances of illegality", because of his duties of loyalty as both a lawyer and a public servant, and concludes that there was no illegality in

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<sup>13</sup> Bill Curry, "Judge raps Justice officials for treatment of whistle-blower", *The Globe and Mail* (16 January 2013) A1.

<sup>14</sup> Fine, *supra* note 7.

<sup>15</sup> See e.g. David D Cole, "The Sacrificial Yoo: Accounting for Torture in the OPR Report" (2010) 4 J Nat'l Security L & Pol'y 455.

<sup>16</sup> *Schmidt FC*, *supra* note 3 at para 11.

<sup>17</sup> Keyes, *supra* note 3 at 131. Keyes oddly does not provide an explicit answer to this question, but it is implicit from his analysis. See especially 156: "public sector lawyers must respect and support choices made by the government officials they advise in all but the clearest circumstances of illegality".

the circumstances of *Schmidt*.<sup>18</sup> One could argue, however, that Keyes is too generous – i.e., that what Schmidt did would be wrong even if there were clear illegality by the government. On the other hand, perhaps Keyes’ threshold of clear illegality is too stringent.

In this comment, I focus not on the substantive law at issue in *Schmidt*,<sup>19</sup> but instead on whether it was appropriate for Schmidt to bring this litigation as a lawyer whose legal advice had been rejected by his government client. As I will explain, Schmidt breached his duty of loyalty as a lawyer. Thus we should critically examine, if not resist, any impulse to canonize him. Nonetheless, I argue that his duty as a delegate of the Attorney General perhaps justified his actions.

I organize my analysis around Elizabeth Sanderson’s articulation that government lawyers have three “layers” of duties. The first layer, “professional duties”, applies to them as lawyers. The second layer, “public law” duties, applies to them as delegates of the Attorney General. The third layer, “public service” duties, applies to them as public servants.<sup>20</sup>

While Sanderson does not argue that any of these layers take priority over the others, they do interact in complex ways. For example, I have argued elsewhere that the role of the Attorney General as “guardian of the public interest” modifies the professional obligation of confidentiality on resignation such that the Attorney General can publicly announce her reasons for resignation in a narrow set of circumstances (where Cabinet has interfered with prosecutorial independence or declined advice that

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<sup>18</sup> *Ibid* at 156 (surprisingly, Keyes does not explicitly conclude that Schmidt violated his duties of loyalty, but it seems inescapable from his analysis (that Schmidt’s actions would have been appropriate only if there were clear illegality; and there was no illegality) that Schmidt acted wrongly – and part of how one knows there was no illegality was that the Court rejected his interpretation of the relevant legislation. This conclusion was more explicit in Keyes SSRN, *supra* note 3 at 20: “The decisions of the Federal Court and the Federal Court of Appeal demonstrate that there was no illegality here”).

<sup>19</sup> I do not mean to suggest that the substantive questions of law in *Schmidt* are unimportant. See e.g. Andrew Flavelle Martin, “The Attorney General’s Forgotten Role as Legal Advisor to the Legislature: A Comment on *Schmidt v Canada (Attorney General)*” (2019) 52:1 UBC L Rev 201; Alice Woolley, “The Lawyer as Advisor and the Practice of the Rule of Law” (2014) 47:2 UBC L Rev 743.

<sup>20</sup> Elizabeth Sanderson, *Government Lawyering: Duties and Ethical Challenges of Government Lawyers* (Toronto: LexisNexis Canada, 2018) at xxviii-48.

proposed action is certainly unconstitutional).<sup>21</sup> I have also argued that the duty of loyalty as lawyers precludes government lawyers from some political activity allowed to them under legislation on government employees.<sup>22</sup> Nonetheless, despite their complex interactions, these three layers provide a helpful organization.

This article is organized in five parts aside from this introduction. In Part II, I consider the duties of government lawyers *as lawyers*. I demonstrate that, under a traditional legal ethics approach, Schmidt violated his duties as a lawyer. Then in Part III, I consider whether there is something special about government lawyers *as delegates of the Attorney General* that permitted or required Schmidt's actions. I argue that his duty as a delegate of the Attorney General perhaps allowed his actions despite his duties as a lawyer. Next, in Part IV, I consider whether there is something special about government lawyers *as public servants* that permitted or required Schmidt's actions – specifically, the letter or spirit of whistleblowing legislation. I then reflect in Part V on the relative importance of the ultimate result in the case. I argue that, instead of a retroactive determination that Schmidt acted wrongly because his action was unsuccessful, he should be judged based on his objective and subjective belief at the time he launched the action. In Part VI, I consider the respective roles of the court and the law society in the face of actions like those by Schmidt. Finally, I conclude with reflections on the potential for dissonance between the perception of Schmidt among the media and the general public, on the one hand, and the perception of him among the legal profession, on the other. The best possible legal argument on Schmidt's behalf is that his duty as a delegate of the Attorney General overrides his duties as a lawyer. But for the public, he may best be understood as a whistleblower, in the spirit though not the letter of whistleblower legislation.

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<sup>21</sup> Andrew Flavelle Martin, "The Attorney General as Lawyer (?): Confidentiality upon Resignation from Cabinet" (2015) 38:1 Dal LJ 147.

<sup>22</sup> Andrew Flavelle Martin, "Legal Ethics and the Political Activity of Government Lawyers" (2018) 49:2 Ottawa L Rev 263.

## II. THE TRADITIONAL LEGAL ETHICS ACCOUNT: THE GOVERNMENT LAWYER AS A LAWYER

I start with a traditional legal ethics approach which relies on black-letter law and the rules of professional conduct. Under this approach, Schmidt is a disloyal lawyer.

The duty of loyalty includes four elements: confidentiality, (avoidance of) conflicts, commitment, and candour.<sup>23</sup> Indeed, commitment to the client's cause is now a principle of fundamental justice.<sup>24</sup> Schmidt unquestionably met his duty of candour, but he also violated his duties of confidentiality and commitment. For a lawyer in his situation, where his client had rejected his advice and was in the lawyer's opinion acting unlawfully by rejecting that advice, the proper route was not a court application, but withdrawal from the matter. As a government lawyer, withdrawal likely would have meant resigning.<sup>25</sup>

Was withdrawal obligatory for Schmidt, or simply discretionary? Withdrawal is discretionary “[i]f there has been a serious loss of confidence between the lawyer and the client.”<sup>26</sup> It is obligatory if “a client persists in instructing the lawyer to act contrary to professional ethics”.<sup>27</sup> Withdrawal is also obligatory where a lawyer is “employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally, or illegally”, and, after reporting up successively so far as the

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<sup>23</sup> *R v Neil*, 2002 SCC 70 at para 19; *Keyes*, *supra* note 3 at 132.

<sup>24</sup> *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7; See also *Keyes*, *supra* note 3 at 133.

<sup>25</sup> See *Keyes*, *supra* note 3 at 138 (as *Keyes* notes, “withdrawal of services by a public sector lawyer would amount to a refusal to continue working on an assigned file or with a particular government unit, which could have disciplinary consequences up to a termination of employment”).

<sup>26</sup> Federation of Law Societies of Canada, “Model Code of Professional Conduct” (last amended 19 October 2019) at r 3.7-2, online (pdf): *Federation of Law Societies of Canada* <<https://y8z9n4q5.stackpathcdn.com/wp-content/uploads/2019/11/Model-Code-October-2019.pdf>> [<https://perma.cc/ZXU2-YWMS>] [*FLSC Model Code*]. As *Keyes* notes, “the Code is aligned with case law on a lawyer’s duty of loyalty”: *Keyes*, *supra* note 3 at 133.

<sup>27</sup> *FLSC Model Code*, *supra* note 26 at r 3.7-7(b).

board of directors, the organization nonetheless persists.<sup>28</sup> On these facts, and in Schmidt's situation, reporting up would likely involve going as far as Cabinet itself.<sup>29</sup>

Keyes asserts that "fraud, dishonesty and criminality... are fairly straightforward", and discusses whether "illegality" is the same as unlawfulness.<sup>30</sup> He argues that the rules' standard of knowledge ("knows"), combined with the presumption of validity of government action, "excludes illegality that is merely doubtful or not clear" and thus "allow[s] public sector lawyers to work with their clients on matters involving a risk of illegality."<sup>31</sup> Keyes is likely correct that there was insufficient dishonesty or illegality in Schmidt's situation to invoke this rule. Rejecting one lawyer's advice in favour of another lawyer's advice is not necessarily or even likely dishonest. That is, a lawyer cannot necessarily infer dishonesty by a persistent refusal to follow the lawyer's advice on what is required by law. Moreover, instructing a lawyer to apply a legal standard that the lawyer determines is incorrect does not constitute "instructing the lawyer to act contrary to professional ethics."<sup>32</sup>

Given the facts of *Schmidt*, withdrawal was certainly available to, but likely not required of, Schmidt under the rules of professional conduct. While it is clear from the record that Schmidt did not resign prior to bringing the application, it is not clear on the record whether Schmidt nonetheless had by that time withdrawn from the particular matter or function (or had been removed from the matter or function), i.e. the analysis of government bills for inconsistency with the *Charter* and the *Bill of Rights*.

However, on a plain reading of the rules of professional conduct, no form of "noisy" withdrawal was required of or even open to Schmidt. As Keyes notes, the discretionary "future harm" exception to confidentiality applies only "when the lawyer believes on reasonable grounds that there is

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<sup>28</sup> *Ibid* at r 3.2-8.

<sup>29</sup> As the ultimate client is the Crown in right of Canada, and Cabinet is the equivalent of the board of Canada. See also Eric Pierre Boucher, "Civil Crown Counsel: Lore Masters of the Rule of Law" (2018) 12 JPPL 463 at 483.

<sup>30</sup> Keyes, *supra* note 3 at 137-138.

<sup>31</sup> *Ibid* at 138.

<sup>32</sup> *FLSC Model Code*, *supra* note 26 at r 3.7-7(b).

an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.”<sup>33</sup> Pervasive continued wrongdoing – if that is indeed what was occurring despite Schmidt’s efforts – is not the relevant kind of harm. (Despite Keyes’ argument, neither is clear illegality.) Thus, by bringing the application, Schmidt violated his duty of loyalty, including commitment and confidentiality.

A creative though likely unsuccessful argument could be made that, since almost all executive action is reviewable by courts, the courts have some supervisory role over the exercise of government power that makes them the equivalent of an external audit committee of the “board”. Under this view, Schmidt’s application was the correct final step before withdrawal. A major problem with this approach is that a court application is public and so does not maintain confidentiality within the organizational client. Thus, courts and law societies are unlikely to accept this argument.

Again, on this black-letter view, Schmidt violated his obligation of loyalty, specifically confidentiality and commitment, and was indeed an unethically disloyal lawyer. Why does this violation of the duty of loyalty matter? A traditional account tells us that clients will be able to effectively assert their legal rights only with the assistance of a lawyer, and that loyalty is necessary for the client to trust the lawyer with all relevant information.<sup>34</sup> As Keyes puts it, “the purpose of the duty of loyalty is to instill client trust in legal professionals in terms of both their present situation and for the future.”<sup>35</sup> Indeed, “[p]ublic criticism of a government decision by a lawyer who had provided advice on the decision would fundamentally undermine the trust and confidence of government clients in the lawyer, if not public sector lawyers generally.”<sup>36</sup> Keyes argues, correctly in my view, that this loyalty is equally important to government clients as it is to other clients. As he puts it, “[t]here is no room for the trust and confidence that characterize a lawyer-client relationship if there is any possibility that government legal advisors can take disagreements

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<sup>33</sup> Keyes, *supra* note 3 at 137; *FLSC Model Code*, *supra* note 26 at r 3.3-3.

<sup>34</sup> This argument is a core justification for solicitor-client privilege. See e.g. Adam M Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis, 2014) at paras 1.10 to 1.14.

<sup>35</sup> Keyes, *supra* note 3 at 134.

<sup>36</sup> *Ibid* at 148.

about their advice outside... and pursue legal action themselves to protect what they think are the interests of the state.”<sup>37</sup>

This traditional account of lawyers’ ethics, however, does not sufficiently incorporate the unique considerations facing government lawyers. It is to these considerations that I turn next.

### III. THE GOVERNMENT LAWYER AS A DELEGATE OF THE ATTORNEY GENERAL

In the previous part, I explained how, under the rules of professional conduct and associated case law, Schmidt was indeed an unethical lawyer because he violated his duty of loyalty to his client. In this part, I consider whether there is something special about the role of government lawyers as *delegates of the Attorney General* that permits or requires what Schmidt did. I conclude that the best argument possible on Schmidt’s behalf is that his duty as a delegate of the Attorney General overrides his duties as a lawyer.

The Attorney General is the chief law officer of the Crown.<sup>38</sup> She has a positive duty to “see that the administration of public affairs is in accordance with law”,<sup>39</sup> as well as a somewhat-defined role as “guardian of the public interest”.<sup>40</sup> However, it is settled law that “the Attorney General can only fulfill the duties of the office through delegation to his or her agents”.<sup>41</sup> Thus government lawyers are not just lawyers: they are also delegates of the Attorney General serving the Crown as client.

My conclusion in Part II – that the future harm exception to confidentiality did not apply, and so Schmidt inexcusably breached confidentiality – presumes that there is no as-yet-unarticulated exception to confidentiality that applies uniquely to government lawyers. I note that even the future harm exception to confidentiality and solicitor-client

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<sup>37</sup> *Ibid* at 136.

<sup>38</sup> See e.g. *Ontario v Criminal Lawyers’ Association of Ontario*, 2013 SCC 43 at para 5.

<sup>39</sup> *DOJ Act*, *supra* note 4, s 4(a); as discussed in 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 [Dodek, “At the Intersection”].

<sup>40</sup> See e.g. Dodek, “At the Intersection,” *supra* note 39 at 18.

<sup>41</sup> *Ibid* at 18-19 (discussing the *Carltona* doctrine (*Carltona Ltd v Commissioner of Works*, [1943] 2 All ER 560 (CA))).

privilege is, on the scale of the history of the legal profession, fairly recent.<sup>42</sup>

I consider three possible accounts: one proposed by Allan Hutchinson (weakened confidentiality), one proposed by Keyes (clear illegality), and one of my own (delegated positive duty). It is under these accounts that Schmidt may be the brave folk hero as a delegate of the Attorney General promoting the rule of law.

### A. Hutchinson's Weakened Confidentiality

One possibility is that the lawyer's duty of confidentiality applies differently in the government context, or that there is a confidentiality exception that is unique to government lawyers. While there is a rich literature on whether government lawyers have special obligations, and the precise nature of those obligations, little of it advocates a unique exception to confidentiality.<sup>43</sup> Thus, for example, Adam Dodek argues that government lawyers have special obligations as "custodians of the rule of law", but these obligations are largely inward-facing and do not contemplate an exception to confidentiality.<sup>44</sup> Allan Hutchinson is the leading Canadian proponent for a weakened duty of confidentiality for government lawyers.<sup>45</sup> He argues that the rationale for confidentiality is strongest where it "is meant to protect the relatively powerless citizen against the state by ensuring effective legal representation through open communication" and is lessened when "[t]he dignity and vulnerability of individuals is not at stake in the same way."<sup>46</sup> He also argues that confidentiality is contrary to "the basic democratic commitment to openness and transparency" that should characterize government.<sup>47</sup> Thus

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<sup>42</sup> *Smith v Jones*, [1999] 1 SCR 455, 169 DLR (4th) 385.

<sup>43</sup> For a synthesis, see Andrew Flavelle Martin & Candice Telfer, "The Impact of the Honour of the Crown on the Ethical Obligations of Government Lawyers: A Duty of Honourable Dealing" (2018) 41:2 Dal LJ 443 at 453-457.

<sup>44</sup> Dodek, "At the Intersection", *supra* note 39 at 20-31.

<sup>45</sup> Allan C Hutchinson, "'In the Public Interest': The Responsibilities and Rights of Government Lawyers" (2008) 46:1 Osgoode Hall LJ 105 [Hutchinson].

<sup>46</sup> *Ibid* at 125-26.

<sup>47</sup> *Ibid* at 126.

he argues, for example, that confidentiality should end with the government lawyer's employment.<sup>48</sup>

The test Hutchinson articulates might be described as a career gamble:

[I]t would be advisable if former or present government lawyers did not breach confidences unless they had made a good faith decision that the public disclosure of such communications was strongly in the public interest.... [I]t would only occur where lawyers were so concerned about public officials' mistaken or perverse reliance on the public interest that they were prepared to run the risk of relinquishing their positions as government lawyers.<sup>49</sup>

Thus, the requirements for Hutchinson's test are two-fold: a good faith belief that disclosure is in the public interest and a personal willingness to sacrifice one's career. This combines a relatively low threshold on the first element with a very high threshold on the second element. On the other hand, maybe the gamble is how we limit disclosures – if a government lawyer is willing to end her career then the exemption applies, with the understanding that if she is wrong, she loses her career as well. I do note that Hutchinson's career gamble test is unfair or at least unpredictable for the government client, insofar as the individual lawyer's particular tolerance for career risk determines whether confidentiality may be breached.

I acknowledge that Hutchinson's proposal seems more consistent with a whistleblowing ethic particular to public servants than with the attributes of government lawyers as lawyers or as delegates of the Attorney General. I will return to the whistleblowing motif in the next part.

There are some tonal similarities between Hutchinson's weakened confidentiality and Dodek's "proactive disclosure" argument that governments should more often waive solicitor-client privilege and disclose the legal advice supporting their actions.<sup>50</sup> Under Dodek's approach, however, the choice to disclose clearly remains with the government as client and not with the government lawyer – thus fitting more comfortably with the standard understanding of lawyers' duty of confidentiality.

While Hutchinson's approach is perhaps compelling from a policy perspective, it appears to lack a specific legal basis. For this reason, it is unlikely it would be successful.

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<sup>48</sup> *Ibid* at 127-28.

<sup>49</sup> *Ibid* at 128.

<sup>50</sup> Dodek, "At the Intersection", *supra* note 39 at 45-47.

## B. Keyes' Clear Illegality

Another possibility, as argued by Keyes, is an exception to loyalty where there is clear illegality. With respect to Keyes, it is not clear to me how he moves from an uncontroversial proposition – a duty of reporting up culminating in withdrawal – to a controversial proposition of a noisy withdrawal. That is, while he emphasizes that the test is clear illegality, it is unclear why illegality (absent a risk of future harm meeting the criteria mentioned above)<sup>51</sup> absolves a lawyer of his duties of confidentiality and commitment. While clear illegality relieves a government lawyer from her duty of loyalty as a public servant,<sup>52</sup> it does not relieve her from her duty of loyalty as a lawyer. It is also unclear whether Keyes' clear-illegality exception would apply to a private organizational client or only to government. It is in this sense that Keyes' test is perhaps incomplete. Thus, like Hutchinson's approach, Keyes' approach appears to lack a specific legal basis.

Another shortcoming of this approach is that clear illegality is a standard so high as to make this exception to confidentiality rare if not entirely theoretical and imaginary.

## C. My Approach: Delegated Positive Duty

A third possibility is that government lawyers can or must advance the Attorney General's positive duty when the Attorney General herself refuses to do so. Here I combine three propositions to advance a fourth. The first, which I mentioned above, is that the Attorney General has a positive duty to see that public affairs are conducted lawfully. The second proposition, also mentioned above, is that she carries out that duty through government lawyers as her delegates. The third proposition, albeit a controversial and untested one, is that the Attorney General could go to

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<sup>51</sup> See *supra* note 33 and accompanying text.

<sup>52</sup> *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455 at 470, 23 DLR (4th) 122, quoted in Keyes, *supra* note 3 at 772 [emphasis added] (“...indeed, in some circumstances a public servant may actively and publicly express opposition to the policies of a government. This would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others, ...”).

court against her own government if necessary.<sup>53</sup> I rely on these to advance the fourth proposition: that government lawyers can and perhaps must fulfill the positive duty when the Attorney General refuses to do so. In other words, if the Attorney General is shirking her positive duty, it falls to government lawyers as her delegates to advance it in her place (if not in her name). In this sense, this approach bears echoes of an oppression remedy.<sup>54</sup> It is unquestionably in the interests of government to act lawfully, it is the Attorney General's duty to further that lawfulness, and that duty may be fulfilled by government lawyers against or despite the position of the Attorney General herself. Unlike the approaches of Hutchinson and Keyes, my approach has a specific and discrete – albeit creative and novel – legal basis.

Ultimately, none of these approaches provide a completely satisfying and convincing exception that allows what Schmidt did. Likewise, none are sure to be accepted by courts or law societies. Under my approach, the government lawyer is explicitly fulfilling his or her delegated statutory obligation. Moreover, the section of the *Department of Justice Act* that imposes this positive obligation on the Attorney General arguably prevails over mere rules made under provincial legislation on the legal profession.<sup>55</sup> In contrast, Hutchinson's approach and Keyes' approach allow compelling exceptions to duties that would otherwise apply, but these exceptions lack a clear legal basis. While Hutchinson is explicit that the lawyer is breaching confidentiality, he argues that the breach is in defence of the public interest: "Government lawyers might well better serve the public interest by breaking confidentiality than preserving it".<sup>56</sup>

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<sup>53</sup> See e.g. Ian G Scott, "The Role of the Attorney General and the Charter of Rights" (1987) 29:2 Crim LQ 187 at 197.

<sup>54</sup> The Attorney General (like the board of a corporation) is failing in her legal duty and so her delegates (like shareholders) must act in her stead.

<sup>55</sup> *DOJ Act*, *supra* note 4, s 4(a). This is in part a federalism argument, under which the federal legislation imposing the reporting duty on the Attorney General and Minister of Justice (and in turn on the individual lawyer) prevails over the provincial legislation on the legal profession via paramountcy and specifically the impossibility of dual compliance: the lawyer cannot fulfil her delegated duty under the federal legislation without breaching her duties as a lawyer under the provincial legislation; See e.g. Andrew Flavelle Martin, "The Implications of Federalism for the Regulation of Federal Government Lawyers" (2020) 43:1 Dal LJ [forthcoming].

<sup>56</sup> Hutchinson, *supra* note 45 at 128.

However, the public interest is not in itself a legal basis for a breach of confidentiality.

Admittedly, my approach faces the same threshold question that Hutchinson and Keyes wrestle with: what degree of shirking triggers the exception and who decides? The higher the threshold, the safer the lawyer will be. Is the test clear illegality, Hutchinson's career gamble, or something else? There are as yet no clear answers to these questions. However, Hutchinson's test can indeed be used as a threshold for my delegated positive duty approach – the lawyer should only breach confidentiality if she is willing to end her career if her interpretation of the law is wrong. I caution that while my approach is the most viable legally, it remains conjecture. A lawyer relying on it had better be ready to face the consequences if it is rejected.

#### IV. THE GOVERNMENT LAWYER AS A PUBLIC SERVANT

Based on my discussion in Parts II and III, it is possible that Schmidt's course of action is open to government lawyers as delegates of the Attorney General, but clear that it is not open to them as lawyers. But what about as public servants? In this part, I consider how whistleblowing – in letter and spirit – applies to government lawyers *as public servants*. It is under this account that Schmidt may be the brave folk hero as a public servant exposing government wrongdoing.

Does the letter or spirit of whistleblowing legislation for government employees allow Schmidt's actions where the rules of professional conduct do not? As Keyes describes, the federal whistleblowing regime under the *Public Servants Disclosure Protection Act* allows a government employee to disclose publicly, as opposed to internally, only in narrow circumstances of serious offences and imminent risks, circumstances that do not apply on the facts of *Schmidt*.<sup>57</sup> Moreover, such internal and public disclosures are discretionary, not mandatory.<sup>58</sup> As Dodek has observed, it is unclear how whistleblowing legislation in its application to government lawyers as public servants interacts with government lawyers' duties as lawyers.<sup>59</sup> It is

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<sup>57</sup> *Public Servants Disclosure Protection Act* SC 2005, c 46 [PSDPA]; Keyes, *supra* note 3 at 147.

<sup>58</sup> PSDPA, *supra* note 57, ss 12-14.

<sup>59</sup> Dodek, "At the Intersection", *supra* note 39 at 7-9.

clear that nothing in existing whistleblowing legislation *requires* government lawyers to breach confidentiality and privilege. However, to the extent that such legislation purports to *allow* government lawyers to do so, it is unclear whether it overrides their duties as lawyers. It is unnecessary for my purposes to resolve this point, since Schmidt can invoke only the spirit, not the letter, of whistleblowing legislation – and the spirit of the legislation cannot override his duties as a lawyer, at least as a matter of law.

However, public perception of whistleblowing and whistleblowers is, one expects, attuned to the spirit rather than the letter of whistleblowing legislation – in fact, the general public may be unaware that such legislation exists, or that the availability of whistleblowing legislation to lawyers is contested. It is the idea of whistleblowing that attracts public support. This view is reflected in the positive media coverage of Schmidt that I discussed above.

Nonetheless, in navigating and reconciling these three layers of duties, it is the public law duty as a delegate of the Attorney General that may prevail over the professional duties as a lawyer as a matter of law, as opposed to a matter of public judgment.

## V. WHETHER THE LAWYER IS CORRECT

In Parts II through IV, I considered the government lawyer as a lawyer, as a delegate of the Attorney General, and as a public servant. Hutchinson's approach and Keyes' approach to the government lawyer as delegate of the Attorney General appear to incorporate the end-point, i.e. whether the government lawyer was willing to end his career and whether the lawyer was successful in the litigation.

Does the question of whether the government lawyer acted ethically depend on whether his legal claim ultimately succeeds? Keyes – who uses the standard of clear illegality – appears to conclude that Schmidt acted unethically in part because Schmidt was unsuccessful; indeed, “the Federal Court of Appeal in *Schmidt* has now refuted the argument that there was any other reasonable interpretation in this case.”<sup>60</sup> But, with respect to

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<sup>60</sup> Keyes, *supra* note 3 at 149 (clear illegality), 140-141 (quotation); See also Keyes SSRN, *supra* note 3 at 20 (“The decisions of the Federal Court and the Federal Court of Appeal demonstrate that there was no illegality here”).

Keyes, the fact that the Department of Justice's interpretation was both reasonable and correct does not in itself determine that Schmidt's interpretation was unreasonable even though it was incorrect. The more relevant, though perhaps more difficult, determination is not whether the lawyer ultimately succeeds, but whether he acted ethically given his knowledge and judgment at the time. Under this view, a lawyer in Schmidt's situation could have acted properly even if he eventually failed, or improperly even if he eventually succeeded.

Again, Keyes' threshold for ethical action is clear illegality: "public sector lawyers must respect and support choices made by the government officials they advise in all but the clearest circumstances of illegality".<sup>61</sup> Presumably, this threshold has both subjective and objective elements, such that the lawyer must reasonably believe that there is clear illegality. Under an outcome-determinative approach, like the one Keyes appears to take, even if the lawyer is certain that there is illegality and certain he will succeed, and that certainty seems objectively reasonable, his failure means he has acted unethically.<sup>62</sup> A more measured approach, even if it requires certainty, would evaluate the likelihood of success prospectively and not retroactively.

Hutchinson's career gamble is, while imperfect, admittedly an understandable and perhaps even a viable test, although it appears to lack a specific legal basis. It relies not on the actual end result but on the lawyer's present willingness to live with the potential end result. Any government lawyer can breach loyalty so long as they are willing to end their career if they are wrong. The harsh penalty for failure will presumably be a disincentive to breach loyalty over mundane things. While, as I mentioned above, this test is unpredictable for the government client – because the individual lawyer's particular tolerance for career risk determines whether confidentiality may be breached – it is more realistic and meaningful than a clear illegality test that would virtually never be met. As I mentioned above, Hutchinson's test can indeed be used as a threshold for my delegated positive duty approach – the lawyer should

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<sup>61</sup> Keyes, *supra* note 3 at 156.

<sup>62</sup> Following the reasoning of Moldaver J in *Groia*, in which incorrect allegations of unprofessional conduct go to competence and not to civility, it may be that an incorrect argument of government misinterpretation goes to competence and not to loyalty. See *Groia v Law Society of Upper Canada*, 2018 SCC 27 at paras 95-96.

only breach confidentiality if she is willing to end her career if her interpretation of the law is wrong.

Perhaps most damaging to Schmidt's cause is that the interpretation that he opposed was no longer secret. Keyes notes that Schmidt's concerns "had been raised many times before by academics and Members of Parliament".<sup>63</sup> Thus, as Keyes also notes, the public nature of the situation meant that others – others unencumbered by the duty of loyalty of a government lawyer – could have brought the application instead of Schmidt.<sup>64</sup> Since the point has previously been raised in Parliament, presumably Parliament is content with the standard used.

## VI. THE RESPECTIVE ROLES OF THE COURT AND THE LAW SOCIETY

Where a lawyer like Schmidt takes actions like these, what are the appropriate roles and reactions for the court and the law society?

While I maintain that Keyes' test of "clear illegality" is not viable, he makes a solid argument that courts should regulate these kinds of actions by government lawyers through the power to grant or deny standing. Courts' inherent jurisdiction to control their own processes clearly allows them to deny an audience to particular counsel when required in the interests of justice.<sup>65</sup> A logical extension would be that they should deny standing to government lawyers as parties where required in the interests of justice. While I do not necessarily agree that courts should always or even often deny standing in these circumstances, it seems the most appropriate vehicle for courts to engage with these issues. Law societies should be invited to intervene on questions of standing so that the court has the benefit of the societies' views on the acceptability of a *Schmidt*-type action, i.e. government lawyers asking a court to become involved when a government client has rejected the lawyers' advice.

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<sup>63</sup> Keyes, *supra* note 3 at 155.

<sup>64</sup> *Ibid* at 155-156. Keyes explicitly identifies civil liberties association intervenors as those others. That is, instead of merely being interveners, these groups could have brought the application themselves.

<sup>65</sup> See e.g. *Everingham v Ontario* (1992), 8 OR (3d) 121 at 126-127, 88 DLR (4th) 755 (Div Ct).

Ultimately it is for the relevant law society as the lawyer's regulator, subject to oversight through judicial review, to determine whether disciplinary proceedings are warranted when a lawyer takes actions such as Schmidt's. Whether the protection of the public interest, and public respect for the profession of the administration of justice, requires discipline in these circumstances is unclear.

The Law Society of Manitoba, as Schmidt's regulator,<sup>66</sup> could conceivably commence proceedings against him for professional misconduct or conduct unbecoming. While such proceedings might be successful as a matter of law, they would likely provoke significant backlash from the media and the general public, if not from the profession at large. However, to truly end Schmidt's career as a lawyer – if indeed that is the necessary and appropriate result – would require his disbarment, as mere retirement from the federal government does not preclude future practice as a lawyer for another client.<sup>67</sup> If such a drastic result were necessary, Schmidt's good faith would suggest that he should be permitted to resign his license instead of being disbarred. And if denunciation was necessary to protect public confidence in the legal profession, presumably a reprimand would suffice.

Government lawyers in Schmidt's position would be wise to seek advice from their colleagues and their law society on whether a court proceeding is an ethical step in the circumstances. The rules of professional conduct explicitly allow an exception to confidentiality to seek such advice.<sup>68</sup>

## VII. CONCLUSION

In this comment, I have discussed whether Edgar Schmidt's conduct was appropriate in three respects or three layers of government lawyers' roles: as a lawyer, as a delegate of the Attorney General, and as a public servant. Schmidt undeniably violated his duty of loyalty as a lawyer. I have

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<sup>66</sup> Keyes, *supra* note 3 at 149.

<sup>67</sup> See e.g. *Krieger v Law Society of Alberta*, 2002 SCC 65 at para 58 (“Only the Law Society can protect the public in this way”).

<sup>68</sup> *FLSC Model Code*, *supra* note 26 at r 3.3-6 (“A lawyer may disclose confidential information to another lawyer to secure legal or ethical advice about the lawyer's proposed conduct”).

considered arguments that Schmidt's status as a delegate of the Attorney General allowed or required him to do what he did, despite his duties as a lawyer. These include Hutchinson's approach of weakened confidentiality and my approach that Schmidt was fulfilling the delegated positive duty of the Attorney General to see that public affairs are conducted lawfully. Under both approaches, Schmidt's duties in his role as a delegate of the Attorney General potentially overrides his duties in his role as a lawyer. I argue that my approach is the strongest legally and that, under this approach, his duties as a delegate of the Attorney General could perhaps override his duties as a lawyer. However, the most compelling explanation for the public may instead be that Schmidt was acting to expose wrongdoing in the spirit, though not the letter, of federal whistleblowing legislation. It is clear, however, that compliance with merely the spirit of whistleblowing legislation lacks legal significance and cannot legitimately prevail over government lawyers' duties as lawyers.

At the end of the day, who judges Schmidt and how? As a matter of legal ethics, the ultimate judgment of Schmidt is for the profession, acting collectively through the law society in the public interest. There is room for disagreement within the profession. Indeed, any lawyer's opinion about the merits of Schmidt's conduct perhaps says as much about that lawyer as about Schmidt himself. While the perceptions of the public and the media are obviously not determinative, both respect for the administration of justice and the regulation of the profession in the public interest may legitimately consider those perceptions, or at least those of a reasonably informed member of the public.

I began my analysis by asking whether Schmidt is a folk hero or an unethically disloyal lawyer. It may be that he is both at the same time. The general public may prioritize the former whereas the legal profession may prioritize the latter. Indeed, perhaps there is a visceral point past which the dictates of legal ethics, and the role morality of a lawyer, are eclipsed by public interest considerations (although it is not beyond question that Schmidt's actions were in the public interest, as he appears to have himself believed).<sup>69</sup> Indeed, David Luban argues that "[w]hen serious moral obligation conflicts with professional obligation, the lawyer must become a

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<sup>69</sup> While I assume that Schmidt's motivation was honourable, I acknowledge that some may suspect that he was merely disgruntled because his advice was rejected.

civil disobedient to professional rules.”<sup>70</sup> Schmidt would presumably agree. Consider also David Asper’s reflection on his conduct in exonerating David Milgaard, and “the gong show” he instigated to succeed:

When we study and learn about the rule of law, it’s obvious how much everything depends on lawyers to make it work effectively. This, in turn, makes lawyers’ codes of conduct extremely important in establishing the framework within which we should operate. But what happens when the rule of law has failed? What, then, is the duty of the lawyer? Are the usual rules thrown out the window? I think that it depends, like all answers to legal questions, on the circumstances.<sup>71</sup>

Likewise, consider Dodek’s observations on the birth of the future harm exception to privilege: “a lawyer such as [this one] finds himself caught between his legal duty to his client and his moral responsibility to his society”.<sup>72</sup> Government lawyers are frequently caught in that space. Recall also the exhortation from *Canadian Lawyer Magazine* that “[c]ourage to stand by your convictions is the hallmark of every public servant and lawyer.”<sup>73</sup> While Hutchinson’s career gamble test would in practice preclude many government lawyers from following Schmidt’s example, Schmidt’s willingness to proceed despite the personal and professional risks may be commendable in itself. As the *Toronto Star* observed, he took this course “[e]ven at the risk of his reputation and livelihood”.<sup>74</sup> It did end his career as a lawyer for the federal government, though it remains to be seen if it will end his career as a Manitoba lawyer.

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<sup>70</sup> David Luban, *Legal Ethics and Human Dignity* (Cambridge: Cambridge University Press, 2007) at 63.

<sup>71</sup> David Asper, “‘No One’s Interested in Something You Didn’t Do’: Freeing David Milgaard the Ugly Way” in Dodek & Woolley, *supra* note 2, 55 at 78.

<sup>72</sup> Adam Dodek, “Keeping Secrets or Saving Lives: What is a Lawyer To Do?” in Dodek & Woolley, *supra* note 2, 15 at 22.

<sup>73</sup> Cohen, *supra* note 10.

<sup>74</sup> *Star* editorial, *supra* note 8.

