

# Does the Attorney General have a duty to defend her legislature's statutes? A comment on the *Reference Re Genetic Non-Discrimination Act*

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A N D R E W F L A V E L L E M A R T I N \*

## ABSTRACT

The *Reference Re Genetic Non-Discrimination Act* was unusual because the Attorney General for Canada argued that federal legislation was unconstitutional. In this comment, I explore the implications of this choice for the role of the Attorney General and her relationship with Parliament. I argue that the Attorney General has a duty not to defend legislation, including legislation that began as a private member's bill, that she reasonably believes to be unconstitutional – and that if Parliament wants to defend such legislation, it should do so itself instead of relying on the Attorney General. If Parliament does not do so, the Attorney General should support the appointment of amicus. However, where the Attorney General advises Parliament during the legislative process that a bill is unconstitutional, Parliament's rejection of that advice is legally irrelevant and not wrongful. That rejection should nonetheless prompt the Attorney General to resign, if indeed she is the lawyer to the legislature.

**Keywords:** Attorney General; Legislation; Parliament; Legislatures; Federalism

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## INTRODUCTION

Does the Attorney General have a duty to defend legislation passed by her respective legislature? For example, does the Attorney General for Canada have a duty to defend Parliament's legislation? To put it another way, is it ever appropriate for the Attorney General for Canada to concede or actively argue that federal legislation is unconstitutional?

The Attorney General has a unique and multifaceted role, but some facets are underdeveloped in the case law and literature. One undisputed facet is that the Attorney General is the chief law officer of the Crown, i.e. the government's lawyer,<sup>1</sup> meaning that one of her functions is to represent the government in litigation.<sup>2</sup> At a minimum, this function would appear to entail a presumptive duty to defend government legislation against legal challenges.<sup>3</sup> There is debate in the literature, however, over whether the Attorney General has a duty to defend *all* legislation passed by her respective legislature – for example, whether the Attorney General for Canada has a duty to defend *all* of Parliament's legislation. That literature focuses on defending challenges to legislation under the *Canadian Charter of Rights and Freedoms* and appears to specifically contemplate only government legislation.<sup>4</sup> What about constitutional challenges outside of the *Charter*, such as the law of

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<sup>1</sup> See e.g. *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para 5.

<sup>2</sup> See e.g. *Department of Justice Act*, RSC 1985, c J-2, s 5(d) [DOJA]: "The Attorney General of Canada... shall have the regulation and conduct of all litigation for or against the Crown".

<sup>3</sup> See e.g. Debra M McAllister, "The Attorney General's Role as Guardian of the Public Interest in *Charter* Litigation" (2002) 21 Windsor YB Access Just 47 at 50-51 [McAllister]; 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 610-611 [Roach, "Not Just"]; Grant Huscroft, "The Attorney General and *Charter* Challenge to Legislation: Advocate or Adjudicator?" (1995) 5 NJCL 125 at 129, 143 [Huscroft, "Advocate or Adjudicator?"]; Grant Huscroft, "Reconciling Duty and Discretion: The Attorney General in the *Charter* Era" (2009) 34:2 Queen's LJ 773 at 795-796 [Huscroft, "Duty and Discretion"] (Huscroft is now Justice Huscroft of the Court of Appeal for Ontario).

<sup>4</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.

federalism? And what about legislation that begins life as a private member's bill?

In this comment, I consider the implications of the *Reference Re Genetic Non-Discrimination Act* for the role of the Attorney General.<sup>5</sup> While my focus is on the federal Attorney General and Parliament's legislation, the same analysis applies to the provincial Attorney General and provincial legislation. The *GNDA Reference* was, in some respects, a typical federalism reference. The Attorney General for Quebec argued that federal legislation was *ultra vires* Parliament, and the matter turned on the contest between the provincial trade and commerce power and the federal criminal law power. What was surprising, and perhaps even unique, was that the Attorney General for Canada *also* argued that the federal legislation in question was *ultra vires*. Indeed, the Minister of Justice had made the same argument to legislators during debate on the private member's bill that became the *GNDA*.

This comment is organized in three parts. In Part 1, I provide the necessary background about the *GNDA* and the *GNDA Reference*. In Part 2, I canvass and critique the two predominant views in the literature of the role of the Attorney General and assess their implications for the questions I have posed. The first view, represented primarily by Grant Huscroft, argues that the Attorney General has an absolute duty to defend Parliament's legislation.<sup>6</sup> The second view, represented primarily by Kent Roach, argues that the Attorney General should take a position on constitutionality that is consistent with the Attorney General's duty to see that public affairs are conducted in accordance with the law – which will sometimes mean conceding or even arguing against the constitutionality of a law.<sup>7</sup> While these views address concessions or arguments of unconstitutionality by the Attorney General, they do so only in the

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<sup>5</sup> *Genetic Non-Discrimination Act*, SC 2017, c 3 [*GNDA*]; *Reference Re: Genetic Non-Discrimination Act*, 2020 SCC 17 [*GNDA Reference Appeal*], rev'g 2018 QCCA 2193 [*GNDA Reference*].

<sup>6</sup> Huscroft, "Advocate or Adjudicator?", *supra* note 3; Huscroft, "Duty and Discretion", *supra* note 3.

<sup>7</sup> Roach, "Not Just", *supra* note 3; McAllister, *supra* note 3. See also *DOJA*, *supra* note 2, s 4(a): "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 ... see that the administration of public affairs is in accordance with law".

context of the *Charter*, not under federalism (or other constitutional grounds, such as section 35 of the *Constitution Act, 1982*). Thus, in Part 2 I also consider the implications of these views in the context of the *GNDA Reference* – a context in which legislation challenged on federalism grounds began as a private member’s bill that the Attorney General characterized as unconstitutional during the legislative process. Then, in Part 3 I consider some deeper questions posed by the *GNDA* and the *GNDA Reference* for the role of the Attorney General and her relationship with Parliament, questions that appear to be unasked in the existing literature.

## **PART I: THE *GENETIC NON-DISCRIMINATION ACT* AND THE REFERENCE**

The *GNDA* has three main parts. One part, section 9, amended the *Canadian Human Rights Act* to recognize “genetic characteristics”, including “refusal of a request to undergo a genetic test or to disclose, or authorize the disclosure of, the results of a genetic test,” as a prohibited ground of discrimination.<sup>8</sup> Another part, section 8, amended the *Canada Labour Code* to grant employees the right to refuse a genetic test or the disclosure of the results of such a test.<sup>9</sup> The remainder, sections 1 to 7, prohibits (“criminalizes”) requiring a genetic test, or the disclosure of the results of a genetic test, as a condition of a contract or the provision of goods and services.<sup>10</sup> It is these seven sections that Quebec challenged in the *GNDA Reference*.

### **Parliament**

The *GNDA* began life as Bill S-201 in December of 2015.<sup>11</sup> Questions about the bill’s constitutionality were raised almost immediately in the Senate during the first debates. The bill’s sponsor, Senator James Cowan, acknowledged that previous iterations of the bill had raised constitutional concerns in purporting to regulate the insurance industry, but argued that

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<sup>8</sup> *GNDA*, *supra* note 5 s 9.

<sup>9</sup> *Ibid*, s 8.

<sup>10</sup> *Ibid*, ss 1-7; *GNDA Reference*, *supra* note 5 at para 3.

<sup>11</sup> *An Act to Prohibit and Prevent Genetic Discrimination*, S-201 (42-1), introduced 8 December 2015.

this version was squarely within Parliament's criminal law power.<sup>12</sup> Opposition leader Senator Claude Carignan questioned whether the bill intruded on the provinces' powers over property and civil rights.<sup>13</sup> These questions persisted throughout the legislative process. At committee, the evidence from three of the four constitutional law experts – including Peter Hogg – was that the law would be constitutional.<sup>14</sup>

In late 2016, the Minister of Justice and Attorney General for Canada publicly stated that the Government could not support bill S-201 on, among other grounds, federalism. Invoking the *Assisted Human Reproduction Act Reference*,<sup>15</sup> she explained that “the scope of the criminal law power should not be extended in ways that potentially undermine the constitutional division of powers.”<sup>16</sup> More specifically, she noted that “[t]he regulation of contracts and the provision of goods and services are subject matters that ordinarily fall within provincial legislative jurisdiction”.<sup>17</sup>

On the same day, an assistant deputy minister from the Department of Justice made some intriguing comments about how and whether the Attorney General would defend the bill, if passed without amendment, against a constitutional challenge. In response to a question about how such a defence would be made, the ADM stated that the decision about how to defend that law would be up to the Attorney General “in

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<sup>12</sup> *Senate Debates*, 42-1, vol 150, No 8, (27 January 2016) at 149 (Hon James Cowan) [Cowan, 27 January 2016].

<sup>13</sup> *Senate Debates*, 42-1, vol 150, No 8, (27 January 2016) at 151 (Hon Claude Carignan).

<sup>14</sup> Professors Bruce Ryder, Peter Hogg, and Pierre Thibault testified that the law was constitutional. Professor Hugo Cyr testified that it was unconstitutional. See Senate, Standing Committee on Human Rights, *Evidence*, 42-1, (24 February 2016) at 2:56-2:61 (Bruce Ryder); House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 42-1, No 36 (22 November 2016) at 1-2 (Bruce Ryder), 2-3 (Peter Hogg), 3-4 (Hugo Cyr), 4-5 (Pierre Thibault).

<sup>15</sup> 2010 SCC 61.

<sup>16</sup> House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 42-1, No 35 (17 November 2016), (Minister of Justice, read by Alistair MacGregor) [on file with author].

<sup>17</sup> *Ibid.*

consultation with her cabinet colleagues.”<sup>18</sup> One legislator explicitly assumed that the Attorney General would indeed defend the law against such a challenge and noted that “the Department of Justice will be in the uncomfortable situation of appearing in court to defend a bill that it doesn’t support”.<sup>19</sup> The ADM did not explicitly accept the premise that the Attorney General would defend the law.<sup>20</sup> She nonetheless stated that “[i]t is an important fundamental principle that a sovereign Parliament that has enacted a law is due its day in court” and that “[i]t is thus not unusual for the department and the Attorney General to be in a situation of defending those laws in court.”<sup>21</sup> However, she did not actually state that it is the Attorney General’s responsibility to make that defence, as opposed for example to amicus. In hindsight, it appears that that the ADM chose her words carefully.

In a second statement in early 2017, the Minister noted that “[a]s Minister of Justice, I have a duty to ensure that legislation complies with the Constitution, irrespective of policy or political preferences.”<sup>22</sup>

During the legislative process, there were several suggestions that Parliament itself had a duty to ensure its laws were constitutional. When proposing amendments to remove what would become sections 1 to 7 from Bill S-201, the Parliamentary Secretary to the Attorney General and Minister of Justice invoked a duty to adopt constitutional laws, and

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<sup>18</sup> House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 42-1, No 35 (17 November 2016) at 3 (Laurie Wright, Assistant Deputy Minister, Department of Justice) [Wright].

<sup>19</sup> House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 42-1, No 35 (17 November 2016) at 5 (Sean Casey).

<sup>20</sup> “Certainly it is within the discretion of the minister and the Attorney General to make her decisions and instructions to counsel with respect to moving forward” Wright, *supra* note 18 at 5.

<sup>21</sup> *Ibid* at 5.

<sup>22</sup> “Government Position Regarding Bill S-201, *An Act to prohibit and prevent genetic discrimination*” Statement by the Minister of Justice (undated) [on file with author].

specifically laws that were compliant with the division of powers.<sup>23</sup> Bruce Ryder, who testified that the legislation was constitutional, put it most strongly:

it is extremely important for Parliament to exercise care and not pass unconstitutional statutes because of the costs that imposes on all of us, really. We shouldn't put people to the burden of litigating to challenge unconstitutional law.... it is one of your most important responsibilities to ensure that the legislation you vote in favour of is constitutional.<sup>24</sup>

Similarly, one senator noted that “[w]e have a duty here to ensure that whatever we pass, for whatever motives ~ and they are all good in this case ~ can meet a constitutional test.”<sup>25</sup>

While it is risky to attribute a single view to the legislature by extrapolating from the views of individual legislators, it seems clear from the record that legislators – and particularly Senator Cowan, who had introduced the bill – were satisfied that Bill S-201 was constitutional and

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<sup>23</sup> *House of Commons Debates*, 42-1, vol 148, No 140 (14 February 2017) at 8945 (Randy Boissonnault): “As all members of this House are aware, it is our duty as parliamentarians to ensure that we fundamentally respect the Constitution before passing any laws. Part of that duty means that we must remain vigilant of the constitutional division of powers between the federal Parliament and our provincial counterparts”.

<sup>24</sup> Senate, Standing Committee on Human Rights, *Evidence*, 42-1, (24 February 2016) at 2:69 (Bruce Ryder).

<sup>25</sup> *Senate Debates*, 42-1, vol 150, No 27 (14 April 2016) at 477 (Sen A Raynell Andreychuk).

that they had a reasonable basis for doing so.<sup>26</sup> Indeed, legislators noted that the Attorney General's view was contrary to the majority of evidence at both committees,<sup>27</sup> with one legislator voicing confusion: "How could it [the government] have reached such a different conclusion than those of our colleagues on the justice committee?"<sup>28</sup> The same legislator suggested that by passing the bill, "[t]he Senate has deemed, indeed, that we do have the federal power to enact this sort of legislation to ensure that Canadians are protected."<sup>29</sup>

Despite the Attorney General's opposition to the bill, it passed both the Senate and the House of Commons, receiving royal assent to become the GNDAs.

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<sup>26</sup> See e.g. Cowan, 27 January 2016, *supra* note 12 at 151: "I'm satisfied that those provisions are constitutional and that they are a valid exercise of the federal criminal power.... I believe, based upon the advice that I've received, that this is entirely appropriate.... I am satisfied, based upon the advice that I've received, that it is within our power to legislate in this way"; Senate, Standing Committee on Human Rights, *Evidence*, 42-1, (17 February 2016) at 2:19 (Sen James Cowan): "I'm not saying there would not be a challenge. It's a free country and anybody can challenge anything they want. But I'm satisfied that this is a legitimate exercise of the power that we have as federal parliamentarians to legislate in this area"; *Senate Debates*, 42-1, vol 150, No 22 (22 March 2016) at 382 (Sen James Cowan): "I am quite confident that the bill, if challenged, will be upheld as a valid exercise of the federal criminal law power."; House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 42-1, No 34 (15 November 2016) at 3 (Sen James Cowan): "I take issues of constitutionality very seriously. I'm satisfied, based upon discussions I've had with eminent constitutional authorities in this country, as well as our own Senate Law Clerk and Parliamentary Counsel, that Bill S-201, including the proposed genetic non-discrimination act, is constitutional as a valid exercise of the federal criminal law power and it, therefore, falls well within the legislative authority of our Parliament" [Emphasis added].

<sup>27</sup> *House of Commons Debates*, 42-1, vol 148, No 149 (7 March 2017) at 9501 (Don Davies). See also *House of Commons Debates*, 42-1, vol 148, No 140 (14 February 2017) at 8952 (Anthony Housefather): "When there is a dispute or debate about constitutionality related to criminal law in Canada, I would prefer to cite Peter Hogg over anyone else".

<sup>28</sup> *House of Commons Debates*, 42-1, vol 148, No 140 (14 February 2017) at 8949 (Robert Oliphant).

<sup>29</sup> *House of Commons Debates*, 42-1, vol 148, No 77 (20 September 2016) at 4887 (Robert Oliphant).

## Quebec Court of Appeal

In the *GND* Reference, a five-judge panel of the Quebec Court of Appeal unanimously held – in relatively brief reasons – that the challenged core of the *GND*, sections 1 to 7, was *ultra vires* Parliament’s jurisdiction over criminal law.

Given that the Attorney General for Canada intended not to defend the constitutionality of the *GND*, Hesler CJQ appointed amicus “afin que la Cour bénéficie d’un éclairage complet sur les questions et arguments soulevés dans ce dossier”.<sup>30</sup> The Attorney General for Canada supported the appointment of amicus on the basis that no participating Attorney General intended to argue for the constitutionality of the Act.<sup>31</sup>

The panel emphasized that “[d]espite the title of the Act, the pith and substance of its sections 1 to 7 is not to prohibit genetic discrimination” – that is the role of section 9 alone.<sup>32</sup> Instead, sections 1 to 7 “encourage the use of genetic tests in order to improve the health of Canadians by suppressing the fear of some that this information could eventually serve discriminatory purposes in the entering of agreements of in the provision of goods and services, particularly insurance and employment contracts.”<sup>33</sup> In the view of the panel, this is not a criminal law object, and specifically the Act is not aimed at a “real public health evil” like tobacco.<sup>34</sup> Particularly noteworthy for my purposes is the panel’s choice to also “emphasiz[e] that Parliament adopted sections 1 to 7 of the Act against the advice of the Minister of Justice of Canada and notwithstanding the

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<sup>30</sup> Letter from Hon Nicole Duval Hesler, Chief Justice of Quebec, to counsel (6 February 2018) [on file with author]. Unofficial translation: “so that the Court has a full explanation of the issues and arguments raised in this case”.

<sup>31</sup> Letter from Alexander Pless to Hon Nicole Duval Hesler, Chief Justice of Quebec (12 December 2017) [on file with author]: “Vu cette situation particulière, aucun Procureur General participant au Renvoi ne présentera les arguments en faveur de la constitutionnalité de la Loi”.

<sup>32</sup> *GND* Reference, *supra* note 5 at para 10.

<sup>33</sup> *Ibid* at para 11.

<sup>34</sup> *Ibid* at para 24.

opinion of her department concluding that the provisions were unconstitutional”.<sup>35</sup>

### **Supreme Court of Canada**

On the appeal of the *GND* Reference to the Supreme Court of Canada, Wagner CJC likewise appointed amicus.<sup>36</sup> Unlike at the Court of Appeal, where the assigned role of amicus had been to argue that the *GND* was constitutional, the Supreme Court of Canada “directs you [amicus] to exercise your independent judgment in responding to the legal issues raised by the appellant.”<sup>37</sup> As at the Court of Appeal, the Attorney General for Canada supported the appointment of amicus.<sup>38</sup>

### **In Sum: Unusual History and Circumstances**

Thus, the *GND* Reference is unusual, if not unique, as a federalism challenge in which the Attorney General for Canada argued against the constitutionality of federal legislation. Moreover, the *GND* was unusual because it was a private member’s bill passed by Parliament against the constitutional advice of the Attorney General.

## **PART II: THE ROLE OF THE ATTORNEY GENERAL: THE TWO PREDOMINANT VIEWS AND THEIR IMPLICATIONS**

Given their unusual history and circumstances, the *GND* and the *GND* Reference provide some unique insights into the role of the Attorney General. In this Part, I consider and critique the two predominant views in the literature about the responsibilities of the Attorney General when the constitutionality of legislation is challenged. As these views focus on *Charter* challenges, I particularly consider their

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<sup>35</sup> *Ibid* at para 13. In the *GND* Reference Appeal, *supra* note 5 at para 161, Kasirer J, dissenting, likewise noted that “[s]ections 1 to 7 were enacted against the advice of the then federal Minister of Justice”.

<sup>36</sup> Order (3 July 2019), Wagner CJC [on file with author].

<sup>37</sup> Letter from Roger Bilodeau QC, Registrar to Douglas Mitchell (5 July 2019) [on file with author]. See also *GND* Reference Appeal, *supra* note 5 at para 19.

<sup>38</sup> Letter from Alexander Pless to Roger Bilodeau QC, Registrar (23 April 2019) [on file with author].

implications for legislation challenged on federalism grounds as well as for legislation that began life as a private member's bill.

### **Grant Huscroft's Near-Absolute View: A Duty to the Legislature**

In what I characterize as a near-absolute view, Grant Huscroft argues that the Attorney General *must* defend laws passed by the corresponding legislature against *Charter* challenges.<sup>39</sup> Thus the Attorney General for Canada must defend all federal laws, just as each provincial Attorney General must defend that province's laws. This duty not only prevents the federal Attorney General from arguing that a federal law is unconstitutional, and from conceding that such a law is unconstitutional, but even requires her to appeal from any court decision holding such legislation unconstitutional.<sup>40</sup>

Huscroft anchors his view not in the proposition that the Attorney General has a duty to the executive as its lawyer, but instead in the proposition that the Attorney General has a "constitutional duty to the legislative branch".<sup>41</sup> It is on this basis that he argues the Attorney General has must defend not just the legislation of the government of the day, but also the legislation of past governments.<sup>42</sup> Indeed, Huscroft argues that the Attorney General must defend laws "regardless of their personal views or the views of their governments."<sup>43</sup> At least in the *Charter* context, this "requires the Attorney General to put duty to the law, and to the legislature more broadly, ahead of the government's interests and thus serves as an important check on executive power."<sup>44</sup> To do otherwise, even where the Attorney General had advised that the legislation would be unconstitutional, would violate "the right of the legislative branch to act in

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<sup>39</sup> Huscroft, "Advocate or Adjudicator?", *supra* note 3 at 143.

<sup>40</sup> *Ibid* at 155: "Even the election not to appeal may be viewed as a concession, insofar as it accepts the decision of a lower court."; See also Huscroft, "Duty and Discretion", *supra* note 3 at 803: "A decision not to appeal is as much a concession of unconstitutionality as a decision not to defend legislation at trial".

<sup>41</sup> Huscroft, "Advocate or Adjudicator?", *supra* note 3 at 143.

<sup>42</sup> *Ibid* at 143.

<sup>43</sup> *Ibid* at 161; See also Huscroft, "Duty and Discretion", *supra* note 3 at 804.

<sup>44</sup> Huscroft, "Duty and Discretion", *supra* note 3 at 804-05.

accordance with its own view of the *Charter*".<sup>45</sup> Under Huscroft's view, the Attorney General by conceding or arguing unconstitutionality – or even by declining to appeal such a ruling – is usurping and indeed "undermin[ing] the role of the Legislature and the democratic process."<sup>46</sup>

Huscroft makes no meaningful exception for legislation that is clearly unconstitutional: "there is constitutional value in the defence of legislation regardless of how obviously unconstitutional the legislation may seem, for it ensures that the determination as to constitutionality is made by the court on the basis of argument, rather than by the Attorney General on the basis of legal opinion."<sup>47</sup> While he recognizes a possible exception allowing a concession of unconstitutionality where there is "clear and compelling Supreme Court authority", he nonetheless also states that "it is difficult to imagine legislation so obviously unconstitutional that no arguments can be made in support of its constitutionality."<sup>48</sup>

Huscroft also cautions that the Attorney General might seek to concede or argue unconstitutionality not because of a genuine belief that legislation is unconstitutional but because it is a politically expedient alternative to a controversial amendment or repeal.<sup>49</sup> This point may be Huscroft's most valuable contribution, and I return to it below.

I note here that, while Huscroft characterizes the duty as being one to the legislature, he also emphasizes the problems that a failure to defend the law poses for the court.<sup>50</sup> However, instead of arguing that the duty to defend legislation may be a duty owed to the court as well as to the legislature, he merely notes that this "valuable assistance to the courts in the performance of their constitutional duty" is an additional benefit of his approach.<sup>51</sup>

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<sup>45</sup> Huscroft, "Advocate or Adjudicator?", *supra* note 3 at 142.

<sup>46</sup> *Ibid* at 161; See also 158-59.

<sup>47</sup> *Ibid* at 162.

<sup>48</sup> Huscroft, "Duty and Discretion", *supra* note 3 at 810.

<sup>49</sup> *Ibid* at 809-810 (where the government "may not have the votes required, as in a minority government situation, or they may be unwilling or unable to expend the political capital necessary to repeal or amend, even where they enjoy a majority in Parliament").

<sup>50</sup> See e.g. Huscroft, "Advocate or Adjudicator?", *supra* note 3 at 156-57.

<sup>51</sup> *Ibid* at 162.

The strength of Huscroft's view, and its applicability to legislation that originated as a private member's bill, turns on whether or not he is correct in his premise that the Attorney General is "the legislature's lawyer" for the purposes of litigation.<sup>52</sup> The Federal Court of Appeal in *Schmidt v Canada (Attorney General)* recently rejected this premise in concluding that "[n]either the Minister of Justice nor the Attorney General of Canada are legal advisors to Parliament."<sup>53</sup> In doing so, the Court emphasized the impact of the separation of powers on the role of the Attorney General:

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.<sup>54</sup>

I have argued elsewhere that this holding was incorrect, and even contrary to the reasons of the Supreme Court of Canada in *Krieger v Law Society of Alberta*,<sup>55</sup> insofar as the Attorney General has a long-recognized duty to advise the legislature about the meaning and impact of bills.<sup>56</sup> In my view, Huscroft is not incorrect in stating that "the Attorney General's duties as Chief Law Officer of the Crown extend beyond the government to the legislature as a whole".<sup>57</sup> However, there is little indication – beyond

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<sup>52</sup> *Ibid* at 128; McAllister, *supra* note 3 at 90 describes Huscroft's argument as being that "Parliament needs a lawyer and the Attorney General must stand up for the government".

<sup>53</sup> *Schmidt v Canada (Attorney General)*, 2018 FCA 55 at para 82, leave to appeal to SCC refused, 38179 (4 April 2019), aff'g 2016 FC 269 [*Schmidt FC*].

<sup>54</sup> *Ibid* at para 81, quoting with approval from *Schmidt FC* at paras 277-78.

<sup>55</sup> *Krieger v Law Society of Alberta*, 2002 SCC 65.

<sup>56</sup> 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 at 217. But for a zealous rejection of my analysis, see Steven Chaplin, "The Attorney General Is Not the Legislature's Legal Advisor" (2020) 14 JPPL 189; and for my reply see Andrew Flavelle Martin, "The Attorney General Is the Legislature's Legal Advisor (Though Not Its Only Legal Advisor), Although That Role Is Admittedly Problematic and Should Probably Be Abolished: A Response to Steven Chaplin" (2020) 14:3 JPPL 62.

<sup>57</sup> Huscroft, "Advocate or Adjudicator?", *supra* note 3 at 128.

Huscroft's bare assertion – that this limited role as the legislature's lawyer includes a duty to defend the legislature's legislation in court. Moreover, *Schmidt* remains law, for better or worse.

Huscroft is nonetheless in good company with this assertion that the Attorney General is Parliament's lawyer, as no less than Lamer CJ made it while hearing the appeal in *Miron v Trudel*: "I for one question whether it is possible for an Attorney General to make a concession that the House violated the *Charter*. I would not want to be a member of that House and see my lawyer make that concession."<sup>58</sup> However, this assertion is unsupported in the case law and literature. By parallel reasoning to that in *Schmidt*, if the legislature wants to defend its legislation in court, it should retain its own counsel to do so instead of relying on the Attorney General.

Note, however, that while Huscroft speaks of a duty to the legislature, and I follow his use of language, the legislature itself cannot instruct counsel to defend legislation. Instead, it would be the legislative assembly, presumably acting through the Speaker, that would do so. At the federal level, this raises the possibility that the House of Commons and the Senate, through their respective Speakers, could retain separate counsel and indeed might take different positions on the constitutionality of challenged legislation.

## Federalism, Private Member's Bills, and the *GNDA Reference*

Do Huscroft's arguments about the duty of the Attorney General where legislation is challenged on *Charter* grounds apply when legislation is challenged instead on federalism grounds? Huscroft himself paints a rosy and uncomplicated picture of the Attorney General's role pre-*Charter*:

Prior to the *Charter*, the role played by Attorneys General in constitutional litigation was largely uncontroversial, for constitutional litigation rarely raised the sort of political concerns which now routinely arise. Federalism was the stuff of constitutional law.... The role of Attorneys General was to advance the self-interest of their respective governments, and *this was done without apology*. Indeed, the division of power... was an issue on which the political parties in the relevant jurisdiction could often agree.<sup>59</sup>

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<sup>58</sup> *Ibid* at 160-161 [emphasis added], quoting from *The Law Times* (15-21 November 1993) 18; *Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693.

<sup>59</sup> Huscroft, "Advocate or Adjudicator?", *supra* note 3 at 126 [emphasis added].

Nonetheless, there is no apparent reason why the duty would apply differently in federalism challenges than in *Charter* challenges. Indeed, arguably a concession or argument of unconstitutionality on federalism grounds restrains Parliament more than a concession or argument of unconstitutionality on *Charter* grounds. After a law is struck down on *Charter* grounds, Parliament typically retains the right to respond by invoking the override in section 33. No such affirmative response is possible where a law is struck down on federalism grounds.

While Huscroft does not specifically consider laws that began life as private members' bills,<sup>60</sup> his concept of a constitutional duty to the legislature would appear to not distinguish between those laws and laws proposed by the government.

Under Huscroft's view, the Attorney General had a duty to defend the GNDAs in the *GNDAs Reference* and breached that duty. That the GNDAs were challenged on federalism grounds, and that they began life as private member's bills, have no impact on that duty or its breach.

Recall that the Attorney General had advised the House of Commons, during the legislative process, that bill S-201 was unconstitutional on federalism grounds. Indeed, in doing so, the Attorney General cited her duty "to ensure that legislation complies with the Constitution, irrespective of policy or political preferences."<sup>61</sup> On Huscroft's view, it would appear that this advice would not affect the duty of the Attorney General to defend the legislation in court. Indeed, this is really a traditional lawyer model under which there is no inconsistency: the lawyer, in her advisory role, provides a legal opinion on the client's preferred course of action, and then when the client proceeds despite that advice, the lawyer in her adversarial role provides the best possible defence of the client's chosen course. The major difference in this particular situation is that the advice was made public.

Huscroft's view is premised on the role of the Attorney General as lawyer to the legislature. That premise and thus Huscroft's view lack legal support, particularly after *Schmidt*. A different and more viable near-absolute view would be that the Attorney General has a duty to defend government legislation because of her duty to the government, regardless

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<sup>60</sup> Huscroft, "Duty and Discretion", *supra* note 3 at 809.

<sup>61</sup> See *supra* note 22 and accompanying text.

of her view as to its constitutionality. The continuing nature of the Crown means such a duty would apply not only to legislation of the government of the day, but also the legislation of previous governments. Under this view, the Attorney General has no duty to defend legislation that began as a private member's bill, such as the *GNDA*.

### **Kent Roach and Debra McAllister's Nuanced View: A Duty to the Rule of Law or the Public Interest (Or Both)**

I turn now to the more nuanced view - a view that, in Huscroft's words, "denie[s] the existence of any duty to defend the actions of the Legislature."<sup>62</sup> Under this view, supported by commentators such as Kent Roach and Debra McAllister, the Attorney General is the government's lawyer but "not *just* the government's lawyer".<sup>63</sup> She should defend challenged legislation only insofar as that defense is consistent with her duty to the public interest and the rule of law, i.e. her duty to see that laws are lawful and that the supreme law of the Constitution is upheld.<sup>64</sup> (Whereas Roach characterizes the duty as one to the rule of law, McAllister characterizes it as one to the public interest.<sup>65</sup>) This duty will not only allow, but require, the Attorney General to argue or concede the unconstitutionality of some legislation.<sup>66</sup> Roach is explicit that this decision is for the Attorney General herself to make, as opposed to Cabinet instructing the Attorney General: "In all cases, the Attorney

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<sup>62</sup> Huscroft, "Advocate or Adjudicator?", *supra* note 3 at 161.

<sup>63</sup> Roach, "Not Just", *supra* note 3 at 598 [emphasis added]. This view is emphasized in the title.

<sup>64</sup> See e.g. McAllister, *supra* note 3 at 49: "the Attorney General has discretion, in the discharge of this function [guardian of the public interest], to concede in a *Charter* challenge that legislation is unconstitutional"; See also Lori Sterling & Heather Mackay, "The Independence of the Attorney General in the Civil Law Sphere" (2009) 34:2 *Queen's LJ* 891 at 913 [Sterling & Mackay]: "courts should assume that the Attorney General has sought to uphold the rule of law and not act in a manner that is motivated by purely partisan interests".

<sup>65</sup> These characterizations are apparent in the titles of their articles: Roach, "Not Just", *supra* note 3; McAllister, *supra* note 3.

<sup>66</sup> See also Ian G Scott, "The Role of the Attorney General and the Charter of Rights" (1987) 29:2 *Crim LQ* 187 at 196-197, quoted in McAllister, *supra* note 3 at 66; J L J Edwards, "The Attorney General and the Charter of Rights" in Robert J Sharpe, ed, *Charter Litigation* (Toronto: Butterworths, 1987) 45 at 53.

General should independently, albeit after consulting his or her Cabinet colleagues, determine what legal stance in *Charter* litigation is consistent with the rule of law and the public interest.”<sup>67</sup> Indeed, Roach argues that Cabinet cannot instruct the Attorney General to defend a law that she considers unconstitutional, as such an approach “produces a danger of inadequate respect for the rule of law that in Canada imposes special constitutional obligations on governments.”<sup>68</sup> Recall here the ADM’s statement at committee that if the *GND*A were challenged, the Attorney General for Canada would make the decision “in consultation with” Cabinet – rejecting any suggestion that the ultimate decision was for Cabinet to make.<sup>69</sup>

Roach connects his approach squarely to “respect[ing] the substantive content of the rule of law as represented by the supreme law of the Constitution”.<sup>70</sup> Moreover, in his view, “[t]he Attorney General should not impose burdens on citizens by defending laws that are clearly unconstitutional.”<sup>71</sup> Justice Ian Binnie, writing extrajudicially, has similarly noted that a concession of unconstitutionality can be “motivated by a determination that the province must not only respect, but be *seen* to respect, its constitutional obligations.”<sup>72</sup> Roach responds to Huscroft’s “democratic objection” by arguing that an Attorney General who concedes or argues unconstitutionality must attempt to convince the legislature to amend or repeal the law.<sup>73</sup> (Graeme Mitchell, in contrast, argues that

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<sup>67</sup> Roach, “Not Just”, *supra* note 3 at 619. See also Sterling & Mackay, *supra* note 64 at 910: “Concessions should rarely be made, but if, after due consideration, the Attorney General is firmly of the legal view that a particular law violates the *Charter*, then it is appropriate to make the concession”.

<sup>68</sup> Roach, “Not Just”, *supra* note 3 at 620.

<sup>69</sup> Wright, *supra* note 18 at 3.

<sup>70</sup> Roach, “Not Just”, *supra* note 3 at 609.

<sup>71</sup> *Ibid* at 610.

<sup>72</sup> The Honourable Justice Ian Binnie, “Mr. Attorney Ian Scott and the Ghost of Sir Oliver Mowat” (2004) 22:4 *Advocates’ Society J* 4 at 10.

<sup>73</sup> Roach, “Not Just”, *supra* note 3 at 612.

where the Attorney General cannot commit to doing so, she should instruct counsel to argue both sides of the constitutional question.<sup>74</sup>)

For Roach and McAllister, the problems that the Attorney General's concession or argument of unconstitutionality poses for a court's deliberations can be cured by appointing amicus.<sup>75</sup> However, Huscroft "doubt[s] that advocacy from private parties is a substitute for submissions from the Attorney General, and wonder[s] why it should be considered appropriate for the burden of defending legislation to fall on private parties or court-appointed *amicus*".<sup>76</sup> Likewise, Mitchell argues that amicus cannot adequately replace the Attorney General, who "brings a unique perspective to the in-court debate, one that cannot be advanced by a private litigant, public interest intervener or *amicus curiae*."<sup>77</sup> Moreover, it is unclear what access amicus should or would have to relevant confidential government information.<sup>78</sup>

### Federalism, Private Member's Bills, and the *GND* Reference

Do Roach and McAllister's arguments about the duty of the Attorney General apply when Parliament's legislation is challenged not on *Charter* grounds but federalism ones? Like Huscroft, McAllister paints a rosy and uncomplicated picture of life for the Attorney General pre-*Charter*: "Before the *Charter*, there was little reason for the Attorney General to make concessions in most cases. Constitutional litigation focused on whether

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<sup>74</sup> Graeme Mitchell, "The Role of the Attorney General in Litigation under the *Canadian Charter of Rights and Freedoms*: Reflections on Where We Are After Twenty Years and Where We May Be Going" in 2002 *Isaac Pitblado Lectures: The Charter: Twenty Years and Beyond* (Winnipeg: Law Society of Manitoba, 2002) VI-1 at VI-18 [Mitchell].

<sup>75</sup> See e.g. McAllister, *supra* note 3 at 90. See also Kent Roach, "The Attorney General and the Charter Revisited" (2000) 50:1 UTLJ 1 at 25: "The courts' understandable desire to maintain an adversarial context and receive section 1 evidence should not, in my view, undermine the ability of the Attorney General to make independent determinations of the public interest. At the same time, the courts can and should take steps to ensure that others (an amicus, an intervener, or a government department) make plausible defences to Charter challenges".

<sup>76</sup> Huscroft, "Duty and Discretion", *supra* note 3 at 804.

<sup>77</sup> Mitchell, *supra* note 74 at VI-15.

<sup>78</sup> *Ibid* at VI-18.

the federal or provincial government had jurisdiction to pass a law.”<sup>79</sup> Similarly, Lori Sterling & Heather MacKay seem to suggest that conceding or arguing unconstitutionality was not necessary prior to the *Charter*.<sup>80</sup> Nonetheless, unconstitutionality on federalism grounds is unconstitutionality and is as problematic for the rule of law as unconstitutionality under the *Charter*.

Roach and McAllister do not explicitly address the implications of their view for legislation that began life as a private member’s bill. That is, they are not explicit about whether their starting point is a duty to the legislature or a duty to the government. On the one hand, it could follow from the role of the Attorney General as the lawyer to the executive that she does not have a presumptive duty to defend such legislation in the same way as she does government legislation. On the other hand, a duty to the rule of law suggests she should defend any legislation insofar as she considers it to be constitutional. That is, a duty to the rule of law or to the public interest would seem to apply whether the challenged legislation originated as a government bill or as a private member’s bill.

Under the Roach and McAllister view, it was completely appropriate for the Attorney General for Canada to argue against the *GND*, legislation that she had previously advised was unconstitutional. Indeed, the advice given to the legislature should, presuming no relevant facts or law had changed in the interim, be the position taken in litigation. Recall, moreover, Wilson-Raybould’s emphasis in her second statement about the constitutionality of the *GND* that “[a]s Minister of Justice, I have a duty to ensure that legislation complies with the Constitution, irrespective of policy or political preferences.”

### **On Balance: The Role of the Attorney General**

Neither Huscroft nor Roach’s view would appear to change where a law is challenged under federalism grounds instead of *Charter* grounds, or where a law began life as a private member’s bill instead of a government

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<sup>79</sup> McAllister, *supra* note 3 at 82.

<sup>80</sup> Sterling & Mackay, *supra* note 64 at 912 [emphasis added]: “[t]he role of the Attorney General has become far more complex under the *Charter*. Because of its role as independent guardian of the public interest and the rule of law, the Attorney General is *now less likely* to defend legislation as compliant with the *Charter* at any cost, and may go so far as to concede a violation”.

bill. On balance, the choice between Huscroft and Roach turns on the role of the Attorney General. Huscroft's view – a near-absolute duty to defend legislation, which would seemingly apply to legislation challenged on federalism grounds and to legislation that originated as a private member's bill – relies on a disputed characterization of the Attorney General as a lawyer to the legislature. Even if the Attorney General is a lawyer to Parliament in advising on bills during the legislative process, she ceases to perform this role once legislation is passed. In contrast, Roach's view is centred on the duty of the Attorney General to uphold the rule of law, a duty clearly recognized and confirmed in legislation. For this reason, Roach's view is stronger.

I conclude that the Attorney General for Canada does not have an overriding duty to defend legislation passed by Parliament, whether government legislation or legislation that began life as a private member's bill and whether the challenge is on *Charter* grounds or federalism grounds. The difference is that a government bill is unlikely to even be introduced if the Attorney General advises that it would be unconstitutional. Indeed, where legislation was passed in the face of the Attorney General's position that it would be unconstitutional, and where the legal landscape has not changed, the Attorney General should take that same position in litigation. At the same time, Huscroft's caution – that the Attorney General might be tempted to concede or argue unconstitutionality not because of a genuine belief that legislation is unconstitutional but because it is a politically expedient alternative to a controversial amendment or repeal – is an important one.<sup>81</sup> The Attorney General's solemn responsibility to the rule of law should not be abused or stretched for political expediency, as surely Roach would agree. As in other matters,<sup>82</sup> the best protection against such abuse is the personal integrity of the Attorney General.

If Parliament – in this context, more specifically the House or the Senate, or both – seeks to defend legislation such as the *GNDA*, it should rely on its own counsel, not the Attorney General, to do so. In contrast to the Attorney General, counsel retained by the legislative assembly do not have a special duty to the rule of law and are free to argue that legislation

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<sup>81</sup> See above note 49 and accompanying text.

<sup>82</sup> See e.g. John LJ Edwards, *The Attorney-General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984) at 67.

is constitutional – even if that legislation is unquestionably *not* constitutional. If the House and Senate decline to do so, the Court should appoint amicus to argue for the law’s constitutionality. Indeed, the Attorney General should support the appointment of amicus in that situation, as she did in the *GND Reference*. Among other things, this approach is the best way to make sense of Huscroft’s conclusion that “[t]he Constitution is best served when the Attorney General ensures that all relevant arguments – pro and con – are placed before the court.”<sup>83</sup> Although under Huscroft’s view the Attorney General fulfills this duty by arguing for the constitutionality of a challenged law, supporting the appointment of amicus is another route to a comparable result. Recall also the ADM’s statement that “[i]t is an important fundamental principle that a sovereign Parliament that has enacted a law is due its day in court.”<sup>84</sup>

### PART III: FURTHER ANALYSIS

In this part, I explore three deeper questions that appear to be unasked in the existing literature. First, I consider the legal relevance of Parliament’s decision to pass a law despite advice from the Attorney General of Canada that the law is unconstitutional. Then, I consider whether it is *wrongful* for Parliament to do so. Finally, I assess whether the Attorney General should resign when Parliament rejects her advice on constitutionality.

#### Question 1: Is Parliament’s Rejection of the Attorney General’s Advice Legally Relevant?

Recall that the panel at the Quebec Court of Appeal emphasized that the Act was adopted against the advice of the Attorney General for Canada.<sup>85</sup> Is this a relevant factor in the court’s analysis? As explained above, the Attorney General for Canada may be Parliament’s lawyer for the purpose of explaining the legal meaning and effect of proposed legislation, although that view is contested. It is unclear why or how it is

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<sup>83</sup> Huscroft, “Advocate or Adjudicator?”, *supra* note 3 at 162.

<sup>84</sup> Wright, *supra* note 18 at 5.

<sup>85</sup> See above note 35. As did Kasirer J dissenting in the *GND Reference Appeal*: see above note 35.

legally relevant that a client disregarded his lawyer's advice, and particularly that Parliament disregarded the Attorney General's advice. Perhaps the panel was assuming that Parliament, in disregarding this advice, was acting recklessly – although, given the legislative debates, such an assumption would be questionable. Perhaps the panel was assuming that Parliament should not, or cannot, disregard this advice – or the panel was privileging the advice of the Attorney General over the advice of an average lawyer. With respect to the panel, none of these possible interpretations seem both correct and relevant. The fact that a client proceeded despite his or her lawyer's advice is irrelevant to a legal analysis of that course of action. If *Schmidt* is correct that the Attorney General is not a lawyer to the legislature, then Parliament's rejection of the Attorney General's advice is even less relevant.

Parliament, in its narrow and particular lawyer-client relationship with the Attorney General (if it does indeed have such a relationship), has a unique disadvantage: the Attorney General's advice on the meaning and impact of bills, including their constitutionality, is traditionally made publicly. Legal advice is subject both to solicitor-client privilege and to the lawyer's duty of confidentiality. In most circumstances, it would not only be irrelevant that a client had rejected her lawyer's advice, it would be unknown to the court or to anyone else. The *GND* affair suggests that perhaps this facet of the Attorney General's advice to Parliament should in future be made confidentially, leaving it up to Parliament, not the Attorney General, to decide whether to make that advice public.

## **Question 2: Is Parliament's Rejection of the Attorney General's Advice Wrongful?**

A deeper question thus arises: Is it wrongful – unlawful or inappropriate – for Parliament to pass a bill that the Attorney General advises is unconstitutional? Recall the assertion by Ryder and some legislators that legislators and Parliament itself have a duty to ensure that the laws they pass are constitutional<sup>86</sup> – but constitutional according to whom? Huscroft argues that it is up to the legislature, not the Attorney General, to *decide for itself* whether a bill is constitutional: the Attorney

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<sup>86</sup> See text accompanying notes 23 to 29.

General merely advises, and that advice can be rejected.<sup>87</sup> As Huscroft puts it, “at the end of the day the Attorney General does not have a monopoly over the correct interpretation of the *Charter* in the legislative process.”<sup>88</sup> More controversially, legislators may support a bill they believe is unconstitutional – as Robin MacKay puts it, “[w]hile witnesses may testify that a [private member’s bill] is inconsistent with the *Charter*, its sponsor may decide to proceed with it anyway, judging that the political considerations of the bill outweigh the legal ones.”<sup>89</sup> Such an approach is admittedly troubling, but despite the comments of legislators and witnesses during the debates, there appears to be no duty – at least, no enforceable duty – on legislators to ensure that the legislation that they vote for is constitutional. More charitably, legislators may be willing to take the risk that a bill is unconstitutional, just as governments often do in introducing legislation. These comments apply as much to constitutionality under federalism as to constitutionality under the *Charter*. Roach and McAllister would seemingly conclude that the duty and appropriate role of the Attorney General would be to oppose the passage of such a bill and then to argue for, or concede, its unconstitutionality in resultant litigation. It is less clear, however, what position they would take on the lawfulness or appropriateness of the bill’s passage itself.

What basis, then, does a legislature need to make the decision that a bill is constitutional despite the Attorney General’s advice? Perhaps it is merely good faith – but does good faith in this context require an objectively reasonable belief or merely a subjective one? The existence of conflicting opinions or advice cannot in itself mean the bill is unconstitutional, assuming those opinions and advice are bone fide. Even in the absence of conflicting opinions, legislators can still in good faith disagree with the advice of the Attorney General. To demand that legislative decisions be supported by legal opinions would detract from the role and responsibility of legislators as argued by Huscroft. Likewise, it

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<sup>87</sup> See generally Huscroft, “Advocate or Adjudicator?”, *supra* note 3 at 140; See also Huscroft, “Duty and Discretion”, *supra* note 3.

<sup>88</sup> Huscroft, “Advocate or Adjudicator?”, *supra* note 3 at 137.

<sup>89</sup> Robin MacKay, “Parliamentary Rules Concerning Private Members’ Bills” (2018) 41:3 *Can Parl Rev* 22 at 25-26.

would be problematic to privilege the views of those legislators who happen to be lawyers over those legislators who are not.

Again, if *Schmidt* is correct that the Attorney General is not a lawyer to the legislature, then Parliament's rejection of the Attorney General's advice is even less relevant.

However, I do note here that if the Attorney General's advice is to be given special weight by legislators – and perhaps even special weight by the courts, as suggested by the panel's reasons – the Attorney General may well attract special duties beyond those of a typical lawyer. Not only would the existing duties of competence and candour be essential, but the Attorney General in those circumstances would arguably have a special duty to consider the public interest.<sup>90</sup>

### **Question 3: Should the Attorney General Resign When Parliament Rejects Her Advice?**

There is a compelling argument that where Parliament passes a bill despite the Attorney General's advice that the bill is unconstitutional, the Attorney General should resign – or, at least, consider resigning. This argument, however, is premised on the fact that the Attorney General is legal advisor to the legislature. The consensus in the literature on the Attorney General is that where Cabinet proceeds with a bill or other course of action over the Attorney General's advice of clear unconstitutionality, the Attorney General should resign.<sup>91</sup> While the Attorney General is primarily the chief law officer of the Crown, she is arguably also the lawyer to the legislature for the relatively narrow purpose of advising on the meaning and effect of bills. Parliament's rejection of such advice, as with the *GND*, is a repudiation of the Attorney General as its lawyer and a declaration of non-confidence in her advice. Indeed, without addressing resignation specifically, Huscroft analogizes

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<sup>90</sup> This parallels the arguments of McAllister, *supra* note 3, and Roach, "Not Just", *supra* note 3 as to the special obligations of the Attorney General in litigation; See also Alice Woolley, "The Lawyer as Advisor and the Practice of the Rule of Law" (2014) 47:2 UBC L Rev 743, on the role of the lawyer in the advisory as opposed to litigation context.

<sup>91</sup> See e.g. Andrew Flavelle Martin, "The Attorney General as Lawyer: Confidentiality upon Resignation from Cabinet" (2015) 38:1 Dal LJ 147 at 152-154 [Martin, "Resignation"].

Parliament's rejection of the advice of the Attorney General to Cabinet's rejection of such advice.<sup>92</sup> Moreover, under the rules of professional conduct, such action by a client – “the client refuses to accept and act upon the lawyer's advice on a significant point” – indicates “a serious loss of confidence between the lawyer and the client” and thus permits withdrawal by the lawyer.<sup>93</sup> While the rules merely permit, and do not require, withdrawal in these circumstances, it is unclear how the Attorney General could be effective in this part of her multifaceted role going forward.<sup>94</sup> Since the Attorney General cannot remain the chief law officer of the Crown without simultaneously being the lawyer to the legislature for these narrow purposes, resignation seems not only appropriate but indeed necessary.

If I am wrong, and *Schmidt* is correct that the Attorney General is not a lawyer to the legislature, then Parliament's rejection of the Attorney General's advice does not require her resignation.

I have suggested above that, in future, the Attorney General's advice that a bill is unconstitutional should perhaps be delivered confidentially, leaving it to Parliament to decide whether or not to make that advice public. I have argued elsewhere that there should be a special public interest exception to privilege and confidentiality when an Attorney General resigns because Cabinet has rejected her advice that a bill or course of action is unconstitutional, in order to publicly defend the rule of law.<sup>95</sup> Such an exception should also apply where the Attorney General resigns because Parliament has rejected her advice that a bill is unconstitutional.

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<sup>92</sup> Huscroft, “Advocate or Adjudicator?”, *supra* note 3 at 140.

<sup>93</sup> Federation of Law Societies of Canada, “Model Code of Professional Conduct” (14 March 2017), online (pdf): *Federation of Law Societies of Canada* <<https://flsc.ca/wp-content/uploads/2018/03/Model-Code-as-amended-March-2017-Final.pdf>> [<https://perma.cc/96BS-AZNH>] at s 3.7-2.

<sup>94</sup> *Ibid* at s 3.2-8, passing a bill that is or may be unconstitutional does not qualify as “acting... dishonestly, fraudulently, criminally, or illegally” and so does not trigger reporting up and mandatory withdrawal under rule 3.2-8.

<sup>95</sup> Martin, “Resignation”, *supra* note 91 at 165.

## **A Wrinkle: The Attorney General's Previous Life as a Legislator**

I also note a peculiar wrinkle in this particular case: David Lametti, the Attorney General for Canada at the time the Supreme Court of Canada heard the appeal, had voted for the Act when merely a legislator. This situation is odd and perhaps even concerning at first glance. His apparent change in position might suggest that his initial support or later opposition - or both - were either incorrect or made in bad faith. However, any lawyer is free to change his opinion when changing clients or roles and especially in the face of new information. Indeed, the government itself can and has changed its position midway through litigation, typically on a change of government. As a legislator, Lametti was representing his constituents as he saw fit, (representing in the political not legal sense); as Attorney General, he is now representing in a legal sense the Government of Canada as chief law officer of the Crown. This change in roles permits and indeed justifies a change in position.

## **CONCLUSION**

It was appropriate for the Attorney General for Canada to argue against the federal *GND*A in the *GND*A Reference. Indeed, her duty to the rule of law arguably required her to do so. If "Parliament", i.e. its deliberative components the House of Commons and Senate, wish such legislation to be defended, they should retain counsel to do so. With great respect to Huscroft, his view that the Attorney General owes a duty to the legislature to defend its legislation was unsupported even before the decision of the Federal Court of Appeal in *Schmidt*. Even if *Schmidt* was incorrect and the Attorney General is the lawyer to the legislature, that is only with respect to the meaning and impact of bills. In litigation, she has no duty to the legislature. In contrast to Huscroft's view, Roach's view of a duty to the rule of law is better supported. Nonetheless, Huscroft is quite right to warn that concessions of unconstitutionality may be abused for political purposes. Where the Attorney General for Canada will not defend a federal law (or a provincial Attorney General will not defend a provincial law), the House or Senate (or the legislative assembly) is free to do so - and if it does not, the Attorney General should support the appointment of amicus.

At the same time, it is completely legitimate, and legally irrelevant in future litigation, for Parliament to reject the Attorney General's advice that a bill is unconstitutional. In doing so, however, it is declaring non-confidence in the Attorney General as its lawyer. That rejection should prompt the Attorney General to resign, if indeed she is its lawyer.