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## Convergence of Law and Policy and the Role of the Attorney General

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# CONVERGENCE OF LAW AND POLICY AND THE ROLE OF THE ATTORNEY GENERAL

Mark J. Freiman<sup>\*</sup>

If it is correct to say that there is increasingly a convergence of law and policy in the decisions of the Supreme Court of Canada, then I think the long-term consequences will be especially challenging for the Attorney General in his or her position as the Chief Law Officer of the Crown.

I say “if” that is correct because I do not want to make any special claim to expertise in the analysis of current Supreme Court of Canada jurisprudential tendencies. I am content to defer to the real experts for a reliable analysis in that area, so my remarks are based on an amateur’s superficial overview that may or may not be accurate. It goes without saying, as well, that the opinions expressed in these remarks are those of that amateur in his personal capacity and should not be imputed to the Ministry, the Attorney General or the government of Ontario.<sup>1</sup>

## I. LAW AND POLICY

On one level, it is of course clear that law and policy cannot occupy watertight compartments in the context of a *Charter of Rights and Freedoms* that appears to require at least some consideration of policy issues in even the most rigorous legal analysis. Section 1, as interpreted through the *Oakes* test,<sup>2</sup> appears to require at a minimum a judicial assessment of what the policy goal of any *prima facie* Charter violation is, the importance of this policy goal, and the effectiveness of the means used to achieve that goal.

Moving beyond that, a number of tendencies in recent decisions may indicate further movement toward a convergence of law and policy. The recent interest in the concept of “unwritten principles” in the Constitution, which began with the *Judges Remuneration Reference*<sup>3</sup> and continued through the

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<sup>1</sup> While no responsibility for any errors should be attributed to them, I would like to note the benefit I have derived in discussing some of these observations and ideas with the members of the Constitutional Law Branch of the Ministry of the Attorney General, and in particular with Elizabeth Goldberg, Chief Constitutional Counsel in that branch.

<sup>2</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103

<sup>3</sup> *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3.

*Secession Reference*<sup>4</sup> (and is now trickling down to lower courts and provincial appellate courts in cases like *Montfort Hospital*),<sup>5</sup> is a move in that direction or at least appears to support judicial interest in the policy consequences of legal principles. Other possible indications of such a movement might be seen in what seems to me to be an increasing number of multiple concurring decisions. This development may indicate greater consensus as to the policy rationale for a given decision than as to its legal foundation. Somewhat similarly — and I am probably mostly simply demonstrating my own analytical deficits in saying this — but a number of recent decisions seem to pose serious challenges to those trying to abstract a consistent line of legal reasoning. Some of the discussions that I have heard recently may indicate that I am not the only person having difficulty in that regard, and certainly the discussions of such cases as *Law v. Canada*,<sup>6</sup> that I have heard at conferences and seen in print from time to time in the academic journals, also appear to confirm that at times the final policy landing point is clearer than the legal road map used to get there.

The same trend may perhaps also be seen in the apparently increasing willingness of the Court to depart from precedent in order to achieve a given policy result. I am thinking of, for instance,

*M. v. H.*<sup>7</sup> in light of *Egan*,<sup>8</sup> *Mills*<sup>9</sup> in light of *O'Connor*,<sup>10</sup> and most recently *Dunmore*<sup>11</sup> in light of the labour trilogy.<sup>12</sup>

## II. ROLE OF THE ATTORNEY GENERAL

Now I said earlier that if it is in fact the case that law and policy are indeed converging in the jurisprudence of the Supreme Court of Canada, that poses significant challenges for the role of the Attorney General. Some of the challenges are pretty straightforward; others are more subtle. The consequences for the role of the Attorney General as Chief Law Officer of the Crown are at least

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<sup>4</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

<sup>5</sup> *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 208 D.L.R. (4th) 577 (Ont. C.A.).

<sup>6</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

<sup>7</sup> [1999] 2 S.C.R. 3.

<sup>8</sup> *Egan v. Canada*, [1995] 2 S.C.R. 513.

<sup>9</sup> *R. v. Mills*, [1999] 3 S.C.R. 668.

<sup>10</sup> *R. v. O'Connor*, [1995] 4 S.C.R. 411.

<sup>11</sup> *Dunmore v. Ontario (Attorney General)*, [2001] S.C.C. 94.

<sup>12</sup> *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313; *P.S.A.C. v. Canada*, [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460.

interesting, somewhat paradoxical, and, from some points of view, potentially quite unsettling.

The immediate difficulty is pretty straightforward and is quite similar to the difficulty that lawyers in general would have in the face of such a convergence. Like any other lawyer, the Attorney General would have difficulty in giving useful, practical legal advice to its clients in an environment that blurred the distinctions between law and policy, and therefore minimized predictability in terms of applicable legal principles.

I say “like any lawyer”, but the reality is that the Attorney General is *not* like any other lawyer, and it is the uniqueness of the role of the Attorney General as Chief Law Officer of the Crown that for me is the focus of the implications of any convergence of law and policy.

Over a decade ago, Ian Scott gave a remarkable lecture on the role of the Attorney General.<sup>13</sup> Before that, Roy McMurtry had similarly important things to say in public about this role.<sup>14</sup> And of course, the late professor John Edwards has written copiously and authoritatively about the uniqueness of the role of Chief Law Officer of the Crown.<sup>15</sup> I commend these resources to you and do not mean to repeat their analyses here. I do, however, think that it is worth repeating a few observations that spotlight this uniqueness, because I think there is significant confusion which I glean both at large — in the form of the cocktail party conversation — and perhaps more surprisingly, in academic or quasi-academic writing and even, perhaps, in judicial decisions.

I think that I can safely say that there does appear to be in these various *fora* some lack of appreciation of the role of the Attorney General, and specifically of the difference between, on the one hand, the role of the political Attorney General, who is an elected member of the legislature sitting in Cabinet as a member of the Executive Council of the government of the day and, on the other hand, the role of the Attorney General as Chief Law Officer of the Crown.

I do not intend to talk at any length about the role of the political Attorney General. He or she is the person who receives letters and personal deputations with helpful suggestions as to how the law could or should be changed. He or

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<sup>13</sup> The Honourable Ian Scott, “The Role of the Attorney General and the *Charter of Rights*”, (1986-87) 29 Crim. L.Q. 187-199; “Law, Policy and the Role of the Attorney General: Constancy and Change in the 1980s”, (1989) 39 U.T.L.J. 109-126.

<sup>14</sup> The Honourable R. Roy McMurtry, “The Office of the Attorney General”, in D. Mendes da Costa, ed., *The Cambridge Lectures* (Toronto: Butterworths, 1981) at 1-7.

<sup>15</sup> J. L. J. Edwards, *The Law Officers of the Crown* (London: Sweet and Maxwell, 1964); *The Attorney General, Politics and Public Interest* (London: Sweet and Maxwell, 1984); “The Attorney General and the *Charter of Rights*”, in R.J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987).

she introduces legislation aimed at advancing the government's political agenda. He or she answers questions in Question Period from an appropriately partisan political point of view.

### III. CHIEF LAW OFFICER OF THE CROWN

I do want to speak at somewhat more length about the role of the Attorney General as Chief Law Officer of the Crown. The responsibilities of the Attorney General as Chief Law Officer of the Crown are codified in section 5 in the *Ministry of the Attorney General Act*.<sup>16</sup> In general, they pertain both to the provision of legal advice and to superintending litigation. Section 5 specifically requires that the Attorney General "see that the administration of public affairs is in accordance with law." In order to ensure that this happens, all legal advice to government comes from the Attorney General. The government is so organized that all lawyers have a direct relationship to the Attorney General, even though many of them are seconded to ministries and provide legal advice exclusively to those ministries. Governmental lawyers are aware of their responsibility to the Attorney General to provide advice that is thorough, balanced and independent of partisan political consideration. Even on the rare occasions where legal advice comes from the private sector, it is always filtered through a lawyer of the Attorney General. Constitutional advice is always provided internally.

The role of the Attorney General goes beyond simply providing legal advice. Section 5 of the *Ministry of the Attorney General Act* also requires that the Attorney General "conduct and regulate" all litigation both for and against the Crown. With a few exceptions, the Attorney General has a client (the Crown) who, like clients in the private sector, gives instructions. However, the relationship between the Chief Law Officer of the Crown and this client is in many ways quite unlike any in the private sector.

The Attorney General must be mindful of the client's instructions and of the interests upon which they are based. But the Attorney General, as Chief Law Officer of the Crown, must also ensure that both the short-term interests of *this* government and the long-term interest of Government with a capital "G" are addressed. Without going into too much detail, challenging situations may arise where governments change and find themselves in the middle of ongoing litigation publicly defending legislation and policies of which they are not the author and which as a matter of policy they may not fully support. Similar difficulties can arise where a given position on the law would produce a desired policy

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<sup>16</sup> R.S.O. 1990, c. M.17.

result in one case, but that same legal position would produce a quite undesired policy result in another.

It is widely understood that in the sphere of criminal prosecutions, the Attorney General as Chief Law Officer of the Crown must not take instruction. Rather he or she — directly or through his or her agents — must exercise his or her independent discretion free from any partisan political consideration. It is also understood, although perhaps not quite as widely, that there are similar constraints when the Attorney General seeks an injunction in the public interest. It is also true, however, and certainly worth emphasizing, that the Attorney General as Chief Law Officer of the Crown must approach *all* litigation from the principled perspective that the Crown's legal position must be consistent and uniform. The Chief Law Officer of the Crown must ensure that no position is taken in court that is inconsistent with the law regardless of policy preferences.

#### IV. ATTORNEY GENERAL AS “TRANSLATOR”

Traditionally, though admittedly somewhat simplistically, the courts and the government have been seen as operating in different spheres. One might say, with apologies to Peter Hogg, that in the famous dialogue between government and the courts, government is from Venus, and the court is from Mars, to mix the metaphor, and the Attorney General as Chief Law Officer of the Crown is the translator.

It is this role, the role of go-between and translator, that I believe is put into question when law and policy converge. In my experience, government, including the political Attorney General, of whatever political affiliation, uniformly respects in both theory and practice the role of the Chief Law Officer of the Crown in its independence and in its dedication to the preservation of the rule of law. The legal analysis of the Chief Law Officer of the Crown may not necessarily always be welcomed by government, but it is uniformly accepted notwithstanding its potentially limiting effect on policy choices. With the convergence of law and policy, the main challenge in this sphere is to continue to provide reliable, accurate, impartial, balanced and non-partisan advice with regard to the law in an environment that is not always marked by predictability, consistency or coherence in the jurisprudence. It can also be a challenge to explain to other government ministries the need for lawyers to oversee so much policy development. At the same time, they find it hard to understand why we cannot be more definitive in our opinions as to whether proposals will or will not be found to be constitutional.

On the other side of the equation, I have heard suggestions emanating from sources close enough to the Supreme Court of Canada to understand its work-

ings and perspective, that when the Attorney General's lawyers appear before the Supreme Court of Canada they ought to consider the likely outcome of a case from a policy perspective and then tailor their submissions so as to help the court come to the right outcome — meaning “right” from the point of view of policy rather than the point of view of law. It is suggested that the Attorney General not come before the court with an extreme position no matter how well situated such a position might be in law.

While such suggestions are no doubt well-motivated and may indeed be intended to reflect useful, practical advice in the context of a convergence of law and policy, I wonder whether they properly take into account the role of the Chief Law Officer of the Crown both constitutionally and from the point of view of what the court should find useful. Just as government ought to expect from the Chief Law Officer of the Crown a balanced, impartial and accurate analysis of the law, it seems to me that the court should expect that government counsel will provide it with a tough-minded legal analysis that does, no doubt, reflect advocacy on behalf of the government client, but that is also firmly rooted in the law rather than in politics or even policy.

It is becoming trite to say (especially in this 20th anniversary year) that the Charter has had a profound effect on Canadian society. Its impact on the role of the court is discussed constantly. One consequence of its impact that is barely noticed is how the convergence of law and policy in Charter jurisprudence is changing the role of the Attorney General in government and before the court. While some convergence of law and policy is perhaps inevitable in the Charter era, its pace and extent are not predetermined. Observers may see an irony if the Attorney General were to be pushed along that path more forcefully by the Court than by the government. Right now, though, I believe our heels are pretty deeply dug in.

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