The Canadian Charter of Rights and the minister of justice: Weak-form review within a constitutional Charter of Rights

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In a series of influential works, Mark Tushnet has questioned whether the "parliamentary" approach to bills of rights that exist in Canada, New Zealand, and the United Kingdom can strike a middle ground between constitutional supremacy and judicial supremacy. In the case of Canada, Tushnet argues that the failure to employ the notwithstanding clause and the reluctance of parliamentarians to confront the judiciary account for the instability of weak-form review and Canada's transition to strong-form review. Although the notwithstanding clause has not been a significant aspect of weak-form review in Canada, the Charter has not transitioned to strong-form review. Four variables explain this: first, legislative reversal of judicial decisions through simple statutory amendment, a practice we label as "notwithstanding-by-stealth" to distinguish this practice from the formal use of section 33; second, the structure of the Justice portfolio and its fusion of justice and attorney general within a single department and parliamentarian; third, the lack of transparency in the reporting duty of the minister of justice that significantly reduces the need to employ the formal instruments of weak-form review; and finally, the Supreme Court of Canada's acceptance of legislative reversal of its Charter jurisprudence as evidence of dialogue with Parliament.

The emergence of the "parliamentary" approach to bill of rights in Westminster systems such as Canada has sparked interest in whether this model can strike a middle ground between constitutional supremacy and parliamentary supremacy.[1] Mark Tushnet has considered the stability of the parliamentary model and introduced the

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1 Janet L. Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69 Mod. L. Rev. 7–28 (2006).

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useful distinction between strong-form and weak-form systems of judicial review to understand its emergence as a possible alternative to the American approach. For Tushnet,

> [s]trong form review is a system in which judicial interpretations of the Constitution are final and unrevisable by ordinary legislative majorities. They are not permanently embedded in the law, though. Judicial interpretation can be rejected by special majorities required for constitutional amendment, and they can be repudiated by courts themselves, either after new judges join the highest court or after original judges rethink their position.[2]

In contrast, weak-form systems allow legislatures to "displace judicial interpretations of the constitution in the relatively short run"[3] and thus, "strong-form and weak-form review fit onto a time continuum: Strong-form systems allow the political branches to revise judicial interpretations in the longish run, weak-form ones in the short run."[4]

In the case of Canada, the inclusion of an explicit legislative override clause, section 33 of the Charter of Rights and Freedoms is, according to Tushnet, the distinctive feature of Canada's weak-form Charter. Section 33, or the "notwithstanding clause" allows legislatures, for a renewable five-year period, to override a decision by a court that a statute is inconsistent with section 2 (fundamental freedoms), sections 7–14 (legal rights), and section 15 (equality rights) of the Canadian Charter.[5] While the potential for parliamentary supremacy in weak-form systems is acknowledged, Tushnet indicates that the likely outcome is strong-form review because of the general reluctance of parliamentarians to overrule or ignore judicial decisions in the short term: "a natural inference is that political-legal cultures in nations with weak-form review have come to treat judicial interpretations as authoritative and final."[6]

Although Tushnet introduces a valuable framework, we argue that the supposed instability of weak-form review in Canada is problematic because it rests too extensively on the general reluctance of parliamentarians to use section 33 of the Charter. We argue that a number of factors account for the endurance of weak-form judicial review in Canada: first, legislative reversal of judicial decisions through simple statutory amendment—a practice we label "notwithstanding-by-stealth" to differentiate this practice from the formal use of section 33 required by weak-form review; second, the structure of the Justice portfolio and its fusion of the minister of justice and attorney general within a single parliamentarian and department; third, the lack of transparency in how the minister of justice discharges his/her statutory duty under the Department of Justice Act to report to Parliament when proposed legislation may be inconsistent with judicial interpretation of the Charter, which has obscured the constitutional basis on which certification is determined; and, fourth, the Supreme Court's (SCC) acceptance of legislative reversal of its Charter jurisprudence in key

[2] Mark Tushnet, Weak Courts, Strong Rights 33–34 (2008) [hereinafter Weak Courts].

[3] Mark Tushnet, *Alternative Forms of Judicial Review*, 101 Mich. L. Rev. 2786 (2003).

[4] Tushnet, Weak Courts, *supra* note 2, at 34.

[5] Section 28, however, prohibits the use of s. 33 to override the right to sexual equality.

[6] Tushnet, Weak Courts, *supra* note 2, at 47–48.

areas of criminal law as evidence of a dialogue with Parliament—a practice that occurred in key legislative responses in cases such as *Darrach*, *Mills*, and *Hall*.[7]

While this article does not explore why the SCC accepts legislative reversal of its decisions, judicial quiescence is an important dimension that has allowed weak-form review to take root in Canada. As such, weak-form review without the notwithstanding clause has succeeded because of parliamentary and judicial acceptance of this legislative strategy. However, unlike the cabinet which has been united in its use, this legislative strategy has resulted in deep divisions within the Court on what constitutes an appropriate statutory response to a previous ruling of unconstitutionality. The profound disagreement between Chief Justice McLachlin and Justice Iacobucci in *Hall* illustrates judicial unease with weak-form review without the notwithstanding clause. Indeed, the Chief Justice viewed parliamentary attempts to re-establish the denial of bail as an "excellent example" of dialogic constitutionalism,[8] whereas Justice Iacobucci viewed the Court's acceptance of legislative reversal without recourse to the instruments of weak-form review as judicial abdication of its role under the Charter of Rights.[9]

In this article we argue for the separation of the minister of justice and attorney general into distinct offices headed by separate parliamentarians to address the functional limitation of Canada's weak-form Charter. This issue will be explored in the context of the two statutory responsibilities of the minster of justice's fused portfolio: *litigation* and the attorney general's responsibility for virtually all court proceedings involving the Crown; and the provision of *constitutional advice*, specifically the minister of justice's responsibility for assessing the compatibility of all proposed statutes with the Charter of Rights under section 4.1.1 of the Department of Justice Act—a function, this article will argue, that should be the responsibility of a separate attorney general to facilitate a parliamentary debate on the merits of legislation. Legislative reversal through statutory amendment, we believe, would be more appropriate and on sounder footing if it is the result of an informed parliamentary debate authorizing the cabinet's decision to challenge judicial approaches to the Charter. The ability to legislate at odds with a judicial decision but without invoking section 33 of the Charter is, in large part, related to the fusion of minister of justice and attorney general, and the complexity of constitutionalism that rests on section 1, the reasonable limits clause. Because the minister of justice is not required to disclose on what basis a proposed statute is constitutional, or whether it departs from Charter precedent, Canada functions as a weak-form system without formal reliance on prescribed mechanisms such as the notwithstanding clause.

Although the Canadian Charter institutionalizes weak-form judicial review, we believe that it is these four factors which, in practice, can prevent strong-form review. While we disagree with Tushnet's characterization of Canada functioning as a strong-form system, we are concerned with the manner in which the cabinet can displace

[7] R. v. Mills, [1999] 3 S.C.R. 668; R. v. Darrach, [2000] 2 S.R.C. 443; R. v. Hall, [2002] 3 S.C.R. 309.
[8] R. v. Hall, *supra* note 5, ¶ 43.
[9] *Id.* ¶ 127.

judicial and parliamentary scrutiny without recourse to the recognized weak-form mechanisms within the Canadian legal system. Though the cabinet may legitimately displace the meaning of the Charter as interpreted by the judiciary—either through legislative responses that challenge judicial approaches to reasonable limits or the formal use of section 33—the structure of the justice portfolio and the reporting duty of the minister of justice, significantly reduce the cabinet's need to publicly challenge the Court and to inform Parliament of this Charter disagreement. This is particularly significant, as the minister of justice's reporting duty is broken—a report of incompatibility has never been issued, even when bills have expressly reversed a recent SCC ruling—and this prevents Parliament from effectively scrutinizing the government's legislative agenda for its relationship to the Charter. Without a transparent and fulsome parliamentary debate on legislative responses that challenge judicial interpretation, Canada has weak-form review without judicial or parliamentary limitations on the cabinet's interpretation of the Charter. Instead, Canada has weak-form review, but in ways not contemplated by its drafters.

To explore this issue, this article will be divided into the following sections. The first section considers the ability of Parliament to reverse Charter decisions through statutory means, and considers the following legislative-judicial interactions as examples of "notwithstanding-by-stealth": *Seaboyer-Darrach*, *O'Connor-Mills*, and *Pearson/Morales-Hall*. The second section examines why Canada departed from the Commonwealth practice of a separate Attorney General and minister of justice by establishing a fused office in 1868 and presents the case for separating this portfolio. Section three reflects on the contemporary debate in the United Kingdom involving the Attorney General and whether this experience may provide some useful insights for reconciling the roles and duties of the minister of justice as attorney general as individual parliamentarians in Canada. Section four considers the attorney general's litigation function, arguing that separating this role from the minister of justice does not require an apolitical or independent AG. In section five, we canvass key issues involved in the establishment of an independent attorney general within cabinet but outside of collective responsibility.

1. Weak-form review without the notwithstanding clause

Legislative reversal of judicial decisions by statutory amendment and not the formal use of the notwithstanding clause directly challenge Tushnet's conclusion that Canada has transitioned into strong-form review. Indeed, the judicial-legislative interactions considered—*Seaboyer-Darrach*, *O'Connor-Mills*, and *Pearson/Morales-Hall*—all involve what Hogg, Bushell Thorton, and Wright refer to as "second-look cases" (judicial review of legislative attempts to reestablish constitutionality of statutes previously declared unconstitutional).[10] Further, these judicial-legislative interactions all represent legislative reversal (weak-form review) without recourse to the instruments of

[10] Peter W. Hogg, Allison A. Bushell Thorton, & Wayne K. Wright, Charter *Dialogue Revisited: Or "Much Ado About Metaphors"*, 45 Osgoode Hall L. J. 19 (2007).

weak-form constitutionalism such as the Charter's notwithstanding clause. Because these "second-look reversals" represent examples of legislative override without the formal use of section 33, we characterize these episodes as "notwithstanding-by-stealth" to distinguish from the formal use of the notwithstanding clause: a parliamentary resolution requiring passage that explicitly indicates that a statute continues notwithstanding a judicial declaration of unconstitutionality.

1.1. *Seaboyer-Darrach*

The case of *Seaboyer* (1991) is an excellent illustration of notwithstanding-by-stealth and the endurance of weak-form review despite the ability of the courts to invalidate legislation as inconsistent with the Charter. The constitutionality of sections 276 and 277 of the Criminal Code was challenged as a violation of the principles of fundamental justice because it was argued the "rape-shield" provision of the Criminal Code—as the two sections were known—undermined the accused's right to a fair trial through the interference with the right to full answer and defense.[11] Section 277 categorically prohibited the defense's use of the complainant's sexual reputation, whereas section 276 significantly narrowed the circumstances under which the sexual history of the complainant and the third party could be used as evidence by the defense.[12]

In a majority decision (seven to two) authored by then Justice McLachlin, the Court upheld the constitutionality of section 277 but invalidated section 276.[13] In particular, the majority were concerned that the blanket exclusion of third-party sexual history with three exceptions—rebuttal evidence, evidence establishing identity, and evidence relating to consensual sexual relations during the reported incident—denied the accused the ability to a fair trial by prohibiting the defense of honest but mistaken belief in consent and, further, excluded evidence that may demonstrate consent.[14] To remedy the constitutional defect, the majority decision provided common law guidelines for the use of sexual conduct evidence.[15]

The minister of justice moved almost immediately to introduce Bill C-49 An Act to Amend the Criminal Code (Sexual Assault) that revisited the issue of sexual conduct evidence.[16] Bill C-49 departed from *Seaboyer* in a number of important ways. While *Seaboyer* focused on the right to a fair trial, Bill C-49 focused on the issues of sexual violence and the need to balance the rights of the accused with the equality rights of the victim.[17] The legislative response to *Seaboyer* is an illustration of notwithstanding-by-stealth

[11] R. v. Seaboyer, [1991] 2 S.C.R. 577, ¶ 29, *available at* http://scc.lexum.org/en/1991/1991scr2-577/1991scr2-577.pdf.

[12] Kent Roach, Due Process and Victims' Rights 167 (1999).

[13] R. v. Seaboyer, *supra* note 11, ¶ 56.

[14] *Id.* ¶¶ 48–49.

[15] *Id.* ¶ 71.

[16] Christopher Manfredi, Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education Action Fund 136 (2004).

[17] Bill C-49 An Act to Amend the Criminal Code (Sexual Assault), House of Commons, 34th Parl., 3d Sess. (1992) at 9504 (Can.) [hereinafter Bill C-49].

by way of three substantive aspects of Bill C-49: a significant narrowing of the legally relevant sexual history between two parties and how it may be used by the defense; the codification of guidelines for consensual sexual relations that rendered it almost completely inaccessible for the purposes of a defense; and, finally, the inclusion of criteria for the defense of honest but mistaken that makes its invocation extremely difficult (if not impossible).

The Criminal Code was amended by section 273.1 to define consent as "the voluntary agreement to engage in the sexual activity in question," and four grounds under which consent could not be granted were outlined: the agreement is expressed by a person other than the complainant; the complainant is intoxicated or incapable of providing consent; consent is granted because the accused abused a position of trust; and, finally, "the complainant expresses, by words or conduct, a revocation of agreement to engage in the activity."[18] The last qualification is important, as it undermined the defense of "honest but mistaken belief" despite the majority invalidating section 276 precisely for prohibiting such a defense.[19] The legislative response to *Seaboyer* prohibited the use of past sexual history between the accused and the complainant as the basis of consent and, therefore, narrowed sexual conduct evidence simply to the incident in question. This represents an important parliamentary reinterpretation of a critical aspect of the majority decision in *Seaboyer* because it eliminated sexual history between the parties except for the challenged incident.

Finally, Bill C-49 codified an approach to the admissibility of sexual conduct evidence that departed markedly from *Seaboyer*. The guidelines issued by Justice McLachlin stated that sexual conduct evidence may be admitted by the trial judge "where it possesses probative value" and further "where that probative value is not substantially outweighed by the danger of unfair prejudice flowing from the evidence."[20] Under Bill C-49, the relevancy of sexual conduct evidence required "significant probative value" before it could be included in the proceedings by the trial judge. In a further departure from *Seaboyer*, Bill C-49's preamble stated that "the complainant's sexual history is rarely relevant" and section 276(3) introduced 8 factors that must be considered before the trial judge admitted evidence of *significant* probative value.[21] While section 276(3) acknowledged the right of the accused to make a full answer and defense, it required the trial judge to balance this against "society's interest in encouraging the reporting of sexual assault offences" as well as "the potential prejudice to the complainant's personal dignity and right of privacy," and finally "the right of the complainant and of every individual to personal security and to the full protection and benefit of the law."[22]

Although the SCC upheld the revised approach to the "rape-shield" provision in *Darrach* (2000), arguing that "[t]he mere fact that the wording differs between the

[18] *Id.* at 9506–9507.
[19] R. v. Seaboyer, *supra* note 11, ¶ 48.
[20] *Id.* ¶ 73.
[21] Bill C-49, *supra* note 17.
[22] *Id.*

Court's guidelines and Parliament's enactment is itself immaterial,"[23] we respectfully disagree. Section 33 has been described by Jamie Cameron as a "figment of the constitutional imagination" more than a feat of constitutional design.[24] What *Seaboyer* suggests, however, is that the figment of our constitutional imagination is the assumption that only the notwithstanding clause can reverse a statutory-based Charter decision by the SCC. Perhaps more importantly, the legislative response to *Seaboyer*—and the Court's acceptance of notwithstanding-by-stealth in *Darrach*—demonstrates the inaccuracy of the conclusion that Canada has transitioned into a system of strong-form review.

1.2. *O'Connor-Mills*

The second example of notwithstanding-by-stealth concerned the issue of disclosure and production of therapeutic records held by third parties in sexual assault cases, following the SCC's decision in *O'Connor*—a 1995 case involving a Roman Catholic Bishop charged with rape and sexual assault.[25] While *O'Connor* is not a Charter case, the parliamentary response to *O'Connor* (Bill C-46) would be the centre of a 1999 Charter challenge in *Mills*. *O'Connor* is a significant victory for the accused because it resulted in the production and disclosure of private records in the possession of third parties if determined "likely relevant" by a trial judge for the purposes of a fair trial.

Similar to *Daviault*, a narrow majority of the Court (five to four) established common-law rules concerning the use of evidence that favored the accused, and the government introduced legislation which aimed to reverse the decision. The minister of justice introduced Bill C-46 An Act to amend the Criminal Code (production of records in sexual offence proceedings) that reversed *O'Connor* through statutory amendment. Specifically, Bill C-46 codified critical aspects of the minority opinion, expanded the factors considered by the trial judged when deciding whether to order production of records and finally, created an important exception to *Stinchcombe* regarding the disclosure of records in the Crown's possession.[26] First, Bill C-46 rejected what the cabinet considered a low threshold for the production of records and adopted the higher threshold advanced in Justice L'Heureux-Dubé's minority opinion in *O'Connor* as section 278.3, listing twelve grounds that constituted an insufficient basis on which to demonstrate the likely relevance of records in the possession of third parties and introduced the further requirement that production be in the interest of justice.[27]

This is a direct reversal of *O'Connor* as the majority decision stated that a low threshold was necessary to ensure that the accused was not placed in an impossible

[23] R. v. Darrach, *supra* note 7, ¶ 34.

[24] Jamie Cameron, *The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination?*, 23 Sup. Ct. L. Rev. (Can.) 135 (2004).

[25] Janet L. Hiebert, Charter Conflicts: What is Parliament's Role? 108 (2002).

[26] Jamie Cameron, *Dialogue and Hierarchy in Charter Interpretation: A Comment on* R. v. Mills, 38 Alberta. L. Rev. 1056 (2001).

[27] Bill C-46: An Act to Amend the Criminal Code (Production of Records in Sexual Offence Proceedings), House of Commons 35th Parl., 2d Sess. (1997) at 7666 (Can.) [hereinafter Bill C-46].

situation—demonstrating the relevancy of records that the defense had never seen. Secondly, Bill C-46 rejected the majority position that the balancing of interests should only occur at the disclosure stage and extended this practice to the production of therapeutic records held by third parties. Finally, the balancing of interests employed when a judge considered whether to order the production of therapeutic records reflected the fuller criteria advocated by Justice L'Heureux-Dubé.[28]

Perhaps the most significant aspect of the cabinet reversal of the SCC involved *Stinchcombe* and the duty on the Crown to disclosure all information not protected by privilege in its possession to the defense. In *O'Connor*, the majority decision continued this practice and required the Crown to disclosure all non-privileged information in its possession, including medical and therapeutic records—the two-part test established for production and disclosure only applied to therapeutic records in the possession of third parties. Section 278.2(2) of the Criminal Code revised *Stinchombe* as it required therapeutic and counseling records in the possession of the Crown to be subject to the rules governing production and disclosure established in Bill C-46. In effect, records held by the Crown involving sexual assault were no longer governed by common law rules in *Stinchcombe* but by statutory rules and the *Criminal Code*.

In *Mills*, the SCC upheld the constitutionality of Bill C-46, effectively sanctioning a legislative response that, at worst, reversed its decision in *O'Connor* because "courts must presume that Parliament intended to enact constitutional legislation and strive, where possible, to give effect to this intention."[29] While *O'Connor* is a strong-form decision, the weak-form outcome in *Mills* is interesting, largely because the *O'Connor* approached endured for less than five years and was reversed by the cabinet through legislative amendment without recourse to section 33. Although the majority decision in *Mills* celebrated the legislative response as an example of dialogue,[30] it did so by downplaying (or perhaps ignoring) that Parliament reversed key aspects of the *O'Connor* decision. The demise of the nothwithstanding clause as an instrument of dialogue has been noted in the Canadian debate.[31] Thus, judicial acceptance of "notwithstanding-by-stealth"—in addition to parliamentary reluctance to employ the notwithstanding clause—has clearly contributed to the constitutional redundancy of section 33 of the Charter. For instance, judicial acceptance of this legislative strategy reduces the need to employ the notwithstanding clause, undermines the transparent and public characteristic of parliamentary reversal of judicial interpretation of the Charter (and the potential political cost of using section 33), and strengthens the acceptability of weak-form reversal without the need to employ weak-form instruments, as formally required by the Canadian Charter. Ultimately, this weakens judicial-legislative dialogue as institutionalized within the Charter of Rights, despite the majority's contestable conclusion in *Mills*.

[28] *Id.*

[29] R. v. Mills, *supra* note 7, ¶ 56.

[30] *Id.* ¶ 125.

[31] Christopher P. Manfredi, Judicial Power and the Charter 181–188 (2nd ed. 2001).

1.3. *Pearson/Morales-Hall*

Pearson and *Morales* are companion cases decided in 1992 in which the Supreme Court of Canada invalidated a provision of the Criminal Code—section 515(10)(b)—that denied an accused bail if it was "necessary in the public interest."[32] In *Morales*, a unanimous Court determined that section 515(10)(b) violated section 11(e) of the Charter (the right not to be denied bail without just cause) "because it authorizes detention in terms which are vague and imprecise."[33] Indeed, Chief Justice Lamer rejected the criterion of the "public interest" because it "gives the courts unrestricted latitude to define any circumstances as sufficient to justify pre-trial detention."[34] In *Pearson*, Lamer determined that "just cause" could only be established "(1) in a narrow set of circumstances, where (2) denial was necessary to promote the proper functioning of the bail system."[35]

The Court's decision in *Pearson* and *Morales* had the appearance of strong-form judicial review, as a five-year delay occurred before Parliament introduced a legislative response by amending section 515(10) of the Criminal Law Improvement Act in 1997. This amendment provided for the denial of bail "on any other just cause being shown and, without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice."[36] The legislative response, therefore, substituted the "public interest" criterion invalidated in *Pearson/Morales* with what Parliament considered a more precise approach, maintaining confidence in the administration of justice. In an effort to address the *Pearson/Morales* requirement that a narrow set of circumstances must be present to deny bail, the amendment to the Criminal Law Improvement Act introduced four criteria governing just cause: "the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment."[37]

The constitutionality of section 515(10)(c) was considered by the Court in *Hall*, a decision that was delivered ten years after *Pearson/Morales*. In this respect, it conforms to strong-form review as outlined by Tushnet where judicial interpretation of constitutionality may be reversed (if at all) by political actors in the long term.[38] In *Hall*, the Court was unanimous that the general phrase "on any other just cause" in section 515(10)(c) continued to offend section 11(e) of the Charter and severed this phrase from the Criminal Law Improvement Act. In this sense, *Hall* continues to be a strong-form decision, as the Court, in part, rejected the legislative response that attempted to re-establish the constitutionality of denying bail in more limited circumstances.

[32] R. v. Pearson, [1992] 3 S.C.R. 665; R. v. Morales, [1992] 3 S.C.R. 771.

[33] R. v. Morales, *supra* note 32, ¶ 21, *cited at* http://csc.lexum.org/en/1992/1992scr3-711/1992scr3-711.pdf at 21.

[34] *Id.* ¶ 28.

[35] R. v. Pearson, *supra* note 32, *cited at* http://scc.lexum.org/en/1992/1992scr3-665/1992scr3-665.pdf at 35.

[36] R. v. Hall, *supra* note 5, ¶ 64 (citing Criminal Law Improvement Act, s 515(10)(c)).

[37] *Id.* ¶ 64.

[38] Tushnet, Weak Courts, *supra* note 2, at 34.

However, the Court divided (five to four) whether the constitutional difficulties associated with the criterion "public interest" had been addressed with its substitution in section 515(10)(c) with "maintaining confidence in the administration of justice."

Speaking for the majority, Chief Justice McLachlin upheld the constitutionality of the challenged provision as consistent with section 11(e), arguing that "[w]ithout public confidence, the bail system and the justice system generally stand compromised."[39] What was central to the majority decision was the notion that the legislative response was an "excellent example" of dialogic constitutionalism. For instance, Parliament had the benefit of the constitutional parameters established by the Court in *Pearson* and *Morales*, and fashioned a legislative response that reflected on the judicial understanding of section 11(e) of the Charter.[40] Thus, the legislative response was constitutional because it conformed to the *process* of dialogue: judicial invalidation, followed by parliamentary reflection and amendment, that was subsequently upheld in a "second look" case.

In contrast, the minority decision authored by Justice Iacobucci considered whether the *substance* of the legislative response conformed to the *Pearson* and *Morales* guidelines. Instead, the minority decision rejected the factors listed in section 515(10)(c) as imprecise because "it is difficult to see how the listed factors contribute to a determination of whether confidence in the administration of justice would be promoted by denying bail." According to Justice Iacobucci, "these factors serve as little more than a façade of precision." In evaluating the legislative response, the minority decision concluded that Parliament had engaged in "notwithstanding-by-stealth" as "Parliament has essentially revived, albeit with more elaborate wording, the old 'public interest' ground that this Court struck down in *Morales*."[41] Suggesting that the majority decision had "transformed dialogue into abdication," Justice Iacobucci was unequivocal that "[t]he mere fact that Parliament has responded to a constitutional decision of this Court is no reason to defer to that response where it does not demonstrate a proper recognition of the constitutional requirements imposed by that decision."[42]

Although the majority decision upheld the constitutionality of Parliament's attempt to reestablish conditions for denying bail, this response is more accurately viewed as a "second-look reversal" by Parliament without employing the notwithstanding clause: a development endorsed by a narrow judicial majority that focused on the procedural and not the substantive dimensions of dialogue. In this respect, the more accurate interpretation of this legislative response is the reasoning by Iacobucci, the first Supreme Court justice to endorse dialogic constitutionalism in *Vriend v. Alberta* in 1997. Specifically, Parliament effectively reversed a judicial interpretation of the Charter without invoking the notwithstanding clause, illustrating the endurance of weak-form review without using section 33 and the constitutional redundancy of the notwithstanding clause that is the result of judicial and parliamentary responses.

[39] R. v. Hall, *supra* note 5, ¶ 31.
[40] *Id.* ¶ 43.
[41] *Id.* ¶ 104.
[42] *Id.* ¶ 127.

2. How did we get here? Why a fused minister of justice and attorney general?

For those unfamiliar with this aspect of Canadian political history, one might assume that Canada's fusion of the minister of justice and attorney general (AG) was inherited from Britain, a reflection of the statement in the preamble of the British North America Act 1867 (BNA Act 1867) that we were to have a "government similar in principle to that of the United Kingdom." As John Edwards details in his seminal studies of British and Commonwealth Attorneys General, however, the Canadian institutional structure deviated from that in England and Wales (but not, notably, Scotland and Ireland) from 1867 onwards.[43] Indeed, *none* of the former British colonies in the Commonwealth emulated the historical British model, in which the attorney general was a member of one of the Houses of Parliament but only attends cabinet by invitation, and there was no minister of justice, as responsibility for criminal law, administration of the justice system, judicial appointments, the police, and the penal system were spread across several ministries.

In England and Wales, the attorney general (and his deputy, the solicitor general) emerged during the late medieval period[44] as officials appointed by the Crown with the responsibility of advancing the King's interests in the courts. Over time, the office acquired the related task of providing legal advice to the Crown and, with the rise of constitutional monarchy and parliamentary government, of providing legal advice to the cabinet. However, it was not until the 1870s that the attorney general was made a member of the Privy Council, albeit sitting outside of the cabinet. In 1912 the Attorney General of England and Wales was made a sitting member of the cabinet for the first time, although the practice was not followed consistently in subsequent appointments. Attorneys general have not held a cabinet post since 1928, however, following a scandal involving political interference in a prosecution. This episode seems to have persuaded political elites and the general public that the AG's need to exercise non-partisan discretion over criminal prosecutions was incompatible with membership in the political executive. Nonetheless, since 1928 the AG has usually attended cabinet deliberations "by invitation," to proffer legal advice, and remains a minister without portfolio (notably, the solicitor general has never held a ministerial post nor served in cabinet). As Edwards wrote in 1964, and as we discuss in more detail below, this institutional arrangement is almost entirely designed to underline the AG's "independence in the enforcement of criminal law," that is, that "the subject of criminal prosecutions is outside the purview of the Cabinet's decision-making functions."[45] That said, the separation of the AG from the cabinet is largely a fiction, for as a political minister of the government the AG is still subject to the dictates of

[43] John Ll. J. Edwards, The Law Officers of the Crown (1964); John Ll. J. Edwards, The Attorney General, Politics, and the Public Interest (1984) [hereinafter The Attorney General].

[44] Edwards, The Law Officers of the Crown, *supra* note 43, at 3. The offices were established in 1461 and 1515 respectively.

[45] *Id.* at 175.

collective responsibility, and does not "confine himself [*sic*] to giving legal advice to his government colleagues."[46]

The AG's historical status in England and Wales stands in sharp contrast with that in Scotland and Ireland, where their attorneys general ("Lord Advocates" in Scotland) had long been not only full officials in the executive branch of government, but were typically among the most influential members.[47] Colonial executives in the British Empire, including those in pre-Confederation British North America, functioned in much the same mold as in Scotland and Ireland, with AGs that were openly political, and usually leading, members of executive councils. Writing in 1872, Justice Boothby of the Supreme Court of South Australia contended that this was due to the fact that colonial executives did not have the formal authority to govern, but were only advisors to Imperial authorities.[48] The questionable accuracy of Boothby's statement notwithstanding—far-flung colonial executives in British North America and the Antipodes *did*, as a practical matter, have the ability to implement the "advice" they offered to the Imperial government—it may well explain why the British authorities tolerated institutional arrangements in the colonies so at odds with those in London.

Whatever the reason, the arrangement was continued in the provinces and the Dominion government after Confederation, albeit with some differences between the two levels of government. At the provincial level, sections 63 and 64 of the BNA Act 1867 expressly mandated continuity with colonial practices, which had involved an attorney general in the cabinet but (like the UK) no "Minister of Justice." Indeed, section 63 names the attorney general first among members to be appointed to the first Ontario cabinet (and the analogous post of solicitor general in Quebec); no reference is made to a minister of justice. There is no similar provision regarding the new Dominion (federal) government, the composition of which is left under section 11 entirely to the discretion of the governor-general. Rather, the legal foundation of the federal Law Officer is statutory, contained in the Ministry of Justice Act 1868, and this document clearly indicates that it is the minister of justice who heads the department and belongs to the cabinet, and who is "*ex officio*" Her Majesty's attorney general of Canada. Thus, Edwards is correct to observe that although the Act "gives every appearance of dual portfolios" this is not so, and the attorney general of Canada sits in cabinet, in strict legal terms, solely by virtue of being simultaneously the minister of justice.[49]

The inclusion of AGs in the cabinet was made even more profound in Canada by the practice of first ministers serving as their own attorneys general and ministers of justice. This was the case in both Upper and Lower Canada prior to Confederation, and Sir John A. Macdonald continued the practice as Canada's first prime minister. There was, however, much concern that this, and the AG's inclusion in the cabinet generally,

[46] *Id.*

[47] *Id.* at 162–163.

[48] *Cited in id.* at 167–168.

[49] John Ll. J. Edwards, Ministerial Responsibility for National Security as it Relates to the Offices of Prime Minister, Attorney General and Solicitor General of Canada [study published for the McDonald Commission of Inquiry] 6 (Minister of Supply and Services Canada, 1980) [hereinafter Ministerial Responsibility].

made it impossible for the AG to provide "apolitical legal advice," and "on at least five occasions between 1850 and 1878, the attorney general's political character was subjected to public scrutiny and debate."[50] Macdonald's immediate successor, Liberal Prime Minister Alexander Mackenzie, chose not to be his own minister of justice. It was already becoming evident that the practical demands on a first minister's time precluded holding another major portfolio simultaneously, and doing so—especially after the Pacific Scandal[51]—severely strained the perception that the AG was the government's apolitical legal advisor. Macdonald did not resume the practice after his return to power in 1878, and only two subsequent prime ministers have been their own ministers of justice (John Sparrow David Thompson (1892–4) and Pierre Trudeau (briefly in 1968)), both of whom had been serving as minister of justice immediately before becoming leader.

In addition to ending the practice of prime ministers serving as their own ministers of justice, the Mackenzie government introduced legislation in 1878 (Bill 51) which would have formally separated the attorney general from the minister of justice. The Liberal government contended that an institutional separation would help alleviate the increasing workload on the minister of justice/attorney general, but as Swainger argues, the fact that the Liberals did not make this change until they were on the eve of leaving office suggests another possible explanation: that the Liberals believed "that they alone could be trusted to respect the distinctions between the political minister of justice and the apolitical attorney general."[52] The debates in the House on the proposal focused on the claims regarding workload (with Macdonald arguing "one man could do it, with proper assistance"[53]), the desirability of adding another "legal shark" to the cabinet,[54] the financial cost of appointing an additional minister, and the potential problems of having two legal advisors in the cabinet. In particular, Macdonald argued that concerns about the minister's workload could be addressed by following the lead of England and Wales, and appointing a solicitor general, sitting outside cabinet, to aid the attorney general with conducting cases in court.[55] Absent from the debate, Swainger observes, were any doubts that the AG's proper role, and legal advice, should be "apolitical," and such advice was unanimously seen as advantageous to sound policy making.[56] More remarkably, despite the fact that the proposed reform was almost certainly prompted by the events of the Pacific Scandal, there was no explicit discussion of the inherent tensions of having an apolitical legal advisor serve not only in cabinet but also as the minister of justice. Bill 51 passed in the House despite opposition from Conservatives, but it was delayed by a Senate packed with Macdonald's

[50] *Id.* at 22.

[51] The "Pacific Scandal" concerned bribes paid by prospective contractors of the Pacific railway (the Canadian Pacific Railway Company) to fund the Conservative party campaign in the 1872 national election.

[52] Jonathan Swainger, The Canadian Department of Justice and the Completion of Confederation, 1867–78 33 (2000).

[53] Debates, House of Commons, 5th Sess., vol. 5 ¶ 1591 (2 Apr. 1878).

[54] *Id.* ¶ 1585 (citing Mr. Mitchell).

[55] *Id.* ¶ 1590.

[56] Swainger, *supra* note 52, at 35.

appointments, who characterized the proposal as "an unnecessary and most unwise move,"[57] and the bill died when Parliament was dissolved in 1878. This incident was the last serious threat to the fused minister of justice and attorney general at the federal level, and so this arrangement has remained essentially unchanged since 1868.

To sum up, the Canadian system of a fused minister of justice and attorney general is rooted in its colonial history, as distinct from the example provided by the United Kingdom. This system has persisted despite the fairly obvious conflicts of interest it creates, including high-profile episodes that have toppled the government itself. It should be noted, though, that there were strong pressures in favor of fusion (and with it, inclusion of the AG in the cabinet) in Canada's early history. Two are worth mentioning here. The first is the pressure many new states face to consolidate power and establish their authority. This may help explain, for example, why Canada opted to codify its criminal law in 1892, around the same time that the UK opted against doing so. It hardly seems coincidental that most colonial governments in the British Empire, as well as Scotland and Ireland, concluded both that the individual responsible for providing legal advice to the government should also represent it in litigation, and that this individual should be at the centre of government. The second pressure is a variation on the first, and relates to the federal dynamic created by Confederation. It is what Swainger terms the "completion of Confederation," or, from the federal perspective, the need to "breath[e] life into the act of union" by advancing its preferred interpretations of the constitution though a variety of techniques: litigation in the courts; intergovernmental negotiations; the exercise of constitutional powers which permit the national government to override provincial Legislatures; and daily governance.[58] This meant that law and politics had to be married overtly, for efficient and effective governance in the context of ongoing disputes about jurisdiction and the interpretation of other constitutional provisions. As Swainger writes, "[i]f the completion of Confederation was to be accomplished by building political understandings within the broad contours of the constitution, it was crucial that a political minister of justice be able to round the edges of strict interpretation."[59] This implies that the new government needed a single Law Officer to coordinate these activities, including legal policymaking, legal advice to other cabinet ministers, and the conduct of litigation to advance the government's objectives.

3. The case for separating the attorney general and minister of justice

The contemporary debate regarding the attorney general is presently unfolding in the United Kingdom in a Green Paper entitled *The Governance of Britain*.[60] This Green

[57] *In id.* at 34.

[58] *Id.* at 35.

[59] *Id.* at 29.

[60] The Governance of Britain [Presented to Parliament by the Secretary of State for Justice and Lord Chancellor By Command of Her Majesty] 1–63 (July 2007).

Paper has resulted in separate reports by the Houses of Commons[61] and the Lords[62] on the contemporary role of the attorney general altered by constitutional changes implemented by the former Labour government such as devolution, the introduction of the Human Rights Act 1998, the demise of the Lord Chancellor's department and the creation of the ministry of justice in 2007. While these changes necessitated a rethinking of the attorney general, the context of the Green Paper's release involved three political scandals concerning the former attorney general, Lord Goldsmith, during 2003–8: the attorney general's advice regarding the legality of the Iraq invasion by the Blair government in 2003; the decision by Lord Goldsmith to drop an investigation into whether a British defense company paid bribes to Saudi Arabian officials to secure a defense contract in 2006 because of the implications for Britain's relationship with this Kingdom; and finally, the attorney general's participation in the "cash for honours" investigation involving prominent members of the Labour party, of which Lord Goldsmith is a member and where no charges were brought forward.[63]

Although the attorney general's responsibility for legal advice and decisions regarding prosecution are non-ministerial in the United Kingdom, as "he or she is not subject to collective responsibility and must act independently of the Government"[64] at the root of this rethinking is whether the attorney general's unique responsibility can be compromised by partisan considerations as a member of government. In the discussion below we present a case for separating the attorney general with respect to litigation and for the reallocation of legal advice relating to the Charter of Rights from the minster of justice to the attorney general. While there are no compelling reasons to separate the offices vis-à-vis civil litigation, there are compelling reasons to question the provision of constitutional advice by the minister of justice. The New Zealand and United Kingdom examples demonstrate that, even when the attorney general has a unique relationship with the cabinet, the tension between law and politics remains and can undermine the credibility of this parliamentarian in relation to the provision of legal advice. However, this tension is more acute in Canada because of a single parliamentarian serving as both minister of justice and attorney general and the absence of conventions and practices meant to ensure independent legal advice by the attorney general. While we do not suggest that this fusion has undermined prosecutorial independence on the part of the minister of justice, the provision of advice as it relates to the Charter of Rights is problematic because of the combination of legal tests and political tests within the Charter, such as section 1, for determining the constitutionality of the government's legislative agenda.

Following the examples of the United Kingdom and New Zealand, we argue that the attorney general should be principally responsible for the provision of legal advice

[61] Constitutional Role of the Attorney General, House of Commons–Constitutional Affairs Committee, 5th Sess. Rep. 2006–7 (July 17, 2007).

[62] Reform of the Office of Attorney General—Report with Evidence, House of Lords–Select Committee on the Constitution, 7th Sess. Rep. 2007–8 (Apr. 18, 2008).

[63] *Id.* at 7–9.

[64] *Id.* at 7.

and litigation on behalf of the Crown. Further, the attorney general should remain privy to the cabinet discussions but not subject to collective responsibility to guard against cabinet solidarity undermining the independent execution of his/her duties as attorney general. While the attorney general should remain a minister and fully engaged in cabinet deliberations, we believe that this parliamentarian should not be subject to collective responsibility to allow the attorney general to function simultaneously as legal advisor to cabinet and parliament, as well as to reinforce the established principle of prosecutorial independence. In civil litigation, however, the AG should adhere to the wishes of the government and client departments, except where it would conflict with the AG's responsibility to parliament. In effect, we argue that the attorney general, as the Crown's legal advisor and litigator, should have a unique relationship to cabinet to allow for the provision of independent legal advice to both cabinet and parliament.

This can best be accomplished, we contend, by following the practices in the United Kingdom and New Zealand and separating the minister of justice and the attorney general into distinct offices. Under this scenario, the minister of justice would head the Department of Justice and be responsible for the creation and advocacy of *legal policy* within the cabinet, and the administration of core programs and institutions related to the justice system. The attorney general would lead the attorney general's office and be responsible for providing the cabinet with *legal advice* and *litigating* on behalf of the Crown, thus, continuing his/her role as the government's lawyer. In relation to Parliament and the Charter of Rights, the attorney general would be tasked with issuing statements of compatibility/incompatibility that consider whether the government's legislative agenda is consistent with enumerated rights or freedoms when introduced into the House of Commons. In situations where the attorney general determined that proposed legislation interfered with an enumerated right or freedom and issued a statement of incompatibility, the sponsoring minister would be responsible for presenting the government's justification for proceeding with the proposed statute under section 1 of the Charter of Rights.

We believe this would create a more defensible and transparent approach to the assessment of constitutionality of legislation, where the attorney general would present a legal analysis of compatibility independent of the principle of cabinet solidarity and the sponsoring minister, when required, would present a policy/partisan defense of the government's legislative agenda as demonstrably justified in a free and democratic society independent of the attorney general's legal analysis of compatibility. Indeed, the Charter of Rights fuses law and politics within its structure by the inclusion of section 1, the limitations clause, and the notwithstanding clause in section 33. However, while law and politics will continue to be fused within the cabinet, given the requirements for determining constitutionality under the Charter of Rights and the reasonable limits test, we contend that they should not be fused within a single parliamentarian, as it relates to constitutional advice, because of the different pressures and principles that structure the *separate* offices of attorney general and minister of justice.

4. The case for transferring the reporting duty to the attorney general

The minister of justice is required under section 4.1.1 of the Department of Justice Act to examine all bills for their consistency with the Charter of Rights and to "report any such inconsistency to the House of Commons at the first convenient opportunity."[65] This reporting function demonstrates that the minister of justice is more than the government's lawyer and has a responsibility to provide constitutional advice to Parliament regarding the government's legislative agenda and whether it is consistent with the Charter of Rights. This reporting duty, however, has never been used because the minister of justice is bound by the principle of cabinet solidarity, as well as the reality that assessments of constitutionality, under the Charter of Rights, are ultimately political judgments about justified limitations. A similar responsibility under section 7 of the New Zealand Bill of Rights Act (NZBORA) has resulted in the attorney general reporting fifty-three instances of incompatibility since 1990, of which twenty-seven involve government bills. Although the attorney general is a member of cabinet, a convention exists that the attorney general is not bound by cabinet solidarity when tendering legal advice to Parliament.[66]

The first important discussion of the attorney general and the Charter was undertaken by John Edwards who argued that this cabinet minister had the unique responsibility to guard the public interest.[67] For Edwards, this required the attorney general to defend the rule of law within cabinet by advising his or her colleagues on the boundaries of political action established by the Charter and to contemplate resignation if the attorney general's views were rejected by the cabinet.[68] Former Ontario attorney general Ian Scott similarly argued that the role of the attorney general "is precisely to ensure that democratic decision-making in our community takes into account questions of human rights and constitutionalism."[69] Roach argues that this role is also advanced when the Department of Justice, on behalf of the minister of justice, engages in pre-introduction scrutiny of legislation to ensure that it is consistent with the Charter before it is passed into law.[70]

While we agree with Roach and his call for greater independence in the reporting function modeled on the practices in New Zealand under section 7 of the NZBORA and the disclosure of legal advice relating to the rights consistency of all legislation,[71]

[65] Department of Justice Act, R.S., c. J-2, s. 4.1(1) 1985.

[66] James B. Kelly, *Legislative Activism and Parliamentary Bills of Rights: Institutional Lessons for Canada, in* Contested Constitutionalism: Reflections on the Charter of Rights and Freedoms 86, 100–101 (James B. Kelly & Christopher P. Manfredi eds., 2009).

[67] John Ll. J. Edwards, *The Attorney General and the Charter of Rights, in* Charter Litigation 45, 46–48 (Robert J. Sharpe ed., 1987).

[68] *Id.* at 53.

[69] Ian Scott, *Law, Policy, and the Role of the Attorney General: Constancy and Change in the 1980s*, 39 U. Toronto L. J. 109, 112 (1989) [hereinafter *Law, Policy, and the Role of the Attorney General*].

[70] Kent Roach, *Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law*, 31 Queen's L. J. 601 (2006).

[71] Andrew S. Butler, *Strengthening the Bill of Rights*, 31 Vict. U. Wellington L. Rev. 130 (2000).

there are several problems with this prescription for Canada at the present time. Like Edwards, Hogg, and Huscroft, Roach uses the minister of justice *and* the attorney general interchangeably and this implies that the portfolios are synonymous and respond to the same constitutional principles and pressures. Perhaps more problematically, Roach presumes like Edwards that the responsibilities assigned under the Department of Justice Act can be effective through a principled approach to the attorney general functions by the minister of justice.

The portfolios of justice and attorney general are distinct and should be treated as such, both conceptually and functionally. The minister of justice is the parliamentarian within government responsible for *advocating legal policy* and its development within the machinery of government. The attorney general is responsible for litigating on behalf of the government and should, in relation to the Charter, have responsibility for the *provision of legal advice* that assesses the constitutionality of the government's legislative agenda and reports this to Parliament and the cabinet.

The suggestion that the attorney general can act independently of the cabinet seriously underestimates the principle of collective responsibility that is at the root of parliamentary democracy and how this constitutional principle prevents the minister of justice from acting independently from cabinet and by extension, the attorney general. Although it is well established that the minister of justice/attorney general has prosecutorial independence and is free from political interference in advancing this function, it is unclear how the minister of justice under section 4.1.1 of the Department of Justice Act could tender constitutional advice to Parliament indicating that legislation proposed by the cabinet infringes the Charter of Rights. While it is not yet a widespread practice, the emergence of notwithstanding-by-stealth demonstrates the problematic approach to Charter certification by the minister of justice. Specifically, the legislative responses reversing the Court's decisions in *Seaboyer*, *O'Connor*, and *Pearson/Morales* were introduced by the member of the executive responsible for the Criminal Code, the minister of justice. These reversals occurred with full knowledge that the amendments to the Criminal Code were contrary to the Court's decisions and without the minister of justice indicating that the amendments were clear departures from the constitutional parameters established by the Court.

The ability to engage in weak-form review without recourse to section 33 is directly related to the deficiencies of the minister of justice's reporting duty. Indeed, the minister is not required to disclose on what basis a bill introduced into Parliament is compatible with the Charter. This is problematic because Charter compatibility can have one of three meanings: first, a bill is considered by the Department of Justice and the cabinet to be constitutional because it does not engage any protected right or freedom; secondly, a bill engages a right or freedom, but the limitation is considered reasonable under section 1 of the Charter by the Department of Justice and the cabinet; finally, the limitation is only considered reasonable by the cabinet despite advice from the Department of Justice to the contrary.

What this suggests is that the determination of constitutionality—and the duty to disclose—is a highly discretionary decision by the cabinet. Indeed, a government with a very different approach to reasonable limits under section 1 of the Charter will result

in legislation with a very different constitutional architecture to one with a deferential approach to the advice provided by the Department of Justice. An example of the deficiencies in the reporting duty resulting in legislative approaches to the Charter that depart from previous judicial principles is Bill C-2, An Act to amend the Criminal Code and to make consequential amendments to other acts, passed into law in February 2008. In particular, Bill C-2 changes the process for determining who is designated as a dangerous offender. First, the Bill provides that the Crown must seek dangerous offender status for an individual who has previously been convicted of two serious personal injury offences. Secondly, the Bill removes the judiciary's discretion to refuse to order such an assessment of the proposed designation. Finally, the Bill creates a reverse-onus provision on the accused to demonstrate that a lesser designation is unwarranted.[72]

By its introduction, Bill C-2 is considered by the Conservative government to be constitutional. It is debatable whether this bill is in fact constitutional because it will be decided by section 1 of the Charter: it limits judicial discretion and is a violation of section 11(d) (judicial independence), it infringes the right to be presumed innocent and it brings in a reverse-onus provision which the Supreme Court has been reluctant to accept as consistent with the Charter's legal rights guarantees. This bill can only be viewed as constitutional because the government considers it a reasonable limitation on protected rights. If this is the case, it should be required to provide a comprehensive assessment for concluding that an extensive number of infringements are considered reasonable in a free and democratic society.

The ability of the Conservative government in Canada (or any government) to preserve weak-form review through strong legislative responses that rest on section 1 of the Charter has recently been reported by Kirk Makin at the *Globe and Mail*. Based on anonymous interviews with senior members of the Department of Justice, Makin reports that "[r]ecently, though, some legislation has been pushed through despite stern internal warnings that it would likely violate Charter provisions."[73] Senior officials stated that the Conservative government's approach to the minister of justice's reporting duty has been to view certification as a procedural hurdle that is not a serious constraint on the ability of a government to advance its policy objectives in the short term: "[t]he prevailing attitude was: We'll sign the certification saying that this is Charter-proof—and let the judiciary fix it later. . . . There is a real fix-it-later attitude."[74]

This approach to Charter certification illustrates a central weakness in Tushnet's conclusion regarding Canada and the suggested transition to strong-form review. His position is based on the reluctance of parliamentarians to formally challenge judicial interpretation through the notwithstanding mechanism. However, as the legislative responses considered in *Darrach*, *Mills*, and *Hall* suggest, governments are not reluctant

[72] Bill C-2 (An Act to Amend the Criminal Code and to Make Consequential Amendments to Other Act), Legislative Summary, *cited at* http://www2.parl.gc.ca/Content/LOP/LegislativeSummaries/39/2/c2-e.pdf [hereinafter Bill C-2].

[73] Kirk Makin, *Canadian Crime and American Punishment*, Globe & Mail (Quebec ed.), Nov. 27, 2009, at F7.

[74] *Id.*

to challenge judicial interpretation through statutory revision, or through an aggressive approach that certifies the compatibility of bills where there is reasonable disagreement. Indeed, as very few statutes are reviewed by the judiciary, strong-form review may only characterize a small number of statutes passed by the Parliament of Canada, as a large majority of statutes may never be reviewed by a court for their relationship to the Charter. As a result, weak-form review is the dominant paradigm of Canada's constitutional Charter, despite the general reluctance of parliamentarians to employ section 33. The discretion provided to the cabinet under section 1 to establish constitutionality, and the weaknesses of the reporting duty by the minister of justice, may explain, to a large degree, why the Parliament of Canada has never employed the notwithstanding clause and why the minister of justice has never made a report to Parliament under section 4.1.1 of the Department of Justice Act. It is more accurate, therefore, to suggest that the notwithstanding clause has been made redundant by these legislative strategies of noncompliance, and not, as it has been suggested, a constitutional instrument that has fallen into disuse.

5. Attorney general litigation: Separate, but not independent

There are thus compelling arguments for assigning the role of identifying potential Charter violations to a separate attorney general. But what of the AG's other, and primary, responsibility of conducting the government's litigation? This section discusses this issue, and makes the caveat that the separation of the attorney general from the minister of justice does not imply that the former should enjoy independence in the conduct of civil litigation involving the Charter. Although the Department of Justice Act divides the role of legal advisor between the minister of justice and the attorney general (a division Edwards characterizes as "wholly unrealistic"[75]), it is unequivocal that the representation of government in court and the conduct of government litigation lie with the attorney general. Other than having some intuitive appeal in light of this, why *should* the attorney general's litigation function be divorced from the minister of justice? This question has mainly been raised in the context of criminal prosecutions, as an outgrowth of (or, more often, due to a breach of[76]) the classic "Shawcross doctrine," which asserts that AGs should not be pressured or driven by partisan colleagues or considerations.

As noted earlier, the traditional explanation for excluding the attorney general of England and Wales from full cabinet membership was based on his prosecutorial role; that his need to make non-partisan prosecutorial decisions "in the public interest" was incompatible—both factually and perceptibly—with membership in the cabinet.

[75] Edwards, Ministerial Responsibility, *supra* note 49, at 8.

[76] *See, e.g.*, John Ll. J. Edwards, Walking the Tightrope of Justice: An Examination of the Office of the Attorney General, vol. 5, Royal Commission on the Donald Marshall, Jr., Prosecution (N.S.) (1989) [hereinafter Walking the Tightrope of Justice]. The Commission was launched to investigate the wrongful conviction of an aboriginal man by the Nova Scotia justice system, and it found evidence of racism and politicization in his arrest, trial and appeal.

Although Canada has not followed the British example of excluding the AG from full cabinet membership, the Shawcross doctrine is also well established in the Canadian legal system (despite some challengers[77]), at least in principle if not always in practice.[78] Many Commonwealth nations, and the UK since 1879, have opted for either a quasi- or fully independent Director of Public Prosecution (DPP) to further insulate prosecutions from political interference. The federal Conservative government followed suit in 2006, as part of its platform of enhancing government transparency and accountability.[79] But what about the AG's conduct of civil litigation, particularly in Charter cases? Is there a civil analog of Shawcross, or some other rationale, that supports an argument for AG independence in such cases?

The issue of AG independence in civil law has received far less attention than criminal prosecutions, but there has been some debate concerning the conduct of Charter litigation.[80] The opening salvo was John Edwards's now widely cited argument for AG independence based on his role as the guardian of the public interest:

> If he [*sic*] views his functions as restricted to that of ensuring that the government is represented by counsel in [Charter] litigation . . . it is my opinion that the Attorney General would be in serious dereliction of his larger constitutional duty to ensure that the wider public interest is adequately represented. . . . The door . . . must be left open, in my judgment, for the extraordinary demonstration of the Attorney General's independence status and independent responsibilities by way of active representation in the courts, in his own person if that is necessary, to argue the case on behalf of the public interest.[81]

[77] *See* the work of Philip Stenning, in particular his Appearing for the Crown: A Legal and Historical Review of Criminal Prosecutorial Authority in Canada (1986) [hereinafter Appearing for the Crown]. *See also* Gerard Carney, *Comment—The Role of the Attorney-General*, 9 Bond L. Rev. 1 (1997), and L.J. King, *The Attorney-General, Politics and the Judiciary*, 29 W. Austl. L. Rev. 155 (2000).

[78] *See, e.g.*, Edwards, Ministerial Responsibility, *supra* note 49, at ch. 10; Stenning, Appearing for the Crown, *supra* note 77; Ian Scott, *The Role of the Attorney General and the Charter*, 29 Crim. L.Q. (1986–7), 187–199; Law Reform Commission of Canada, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor*, Law Reform Working Paper 62 (1990); Don Stuart, *Prosecutorial Accountability in Canada, in* Accountability for Criminal Justice: Selected Essays (Philip Stenning ed., 1995); Susan Chapman & John McInnes, *The Role of the Attorney General in Constitutional Litigation: Re-Defining the Contours of the Public Interest in a* Charter *Era, in* The Charter's Impact on the Criminal Justice System (Jamie Cameron ed., 1996); Kent Roach, *The Attorney General and the Charter Revisited*, 50 U.T. L. J. 1 (2000); and Lori Sterling & Heather Mackay, *Constitutional Recognition of the Role of the Attorney General in Criminal Prosecutions*: Krieger v. Law Society of Alberta, 20 Sup. Ct. L. Rev. (2d) 169 (2003).

[79] Nova Scotia was the first Canadian jurisdiction to do so, in 1990, following the recommendation (proposed by John Edwards) of the Royal Commission into the wrongful conviction of Donald Marshall, Jr. The precise level of the federal DPP's independence remains to be seen, however, as the enabling statute, the Director of Public Prosecutions Act, states that the Director acts "under and on behalf of the Attorney General of Canada," and the AG retains the power to intervene in or assume control of a prosecution. Although Edwards warned against this type of arrangement in his submission to the Royal Commission on the Donald Marshall, Jr., Prosecution, the federal Act does contain one of his recommended safeguards, that all instructions to the DPP from the Attorney General must be in writing, and published in the *Canada Gazette*.

[80] Matthew A. Hennigar, *Conceptualizing Attorney General Conduct in Charter Litigation: From Independence to Central Agency*, 51 Can. Pub. Admin. 193 (2008).

[81] Edwards, *The Attorney General and the Charter of Rights, supra* note 67, at 53.

Furthermore, Edwards clarifies, "if the claim to the title of 'guardian of the public interest' is to be reinforced it must be shown that the Attorney General is totally committed to upholding the 'Supreme Law' as the embodiment of society's deepest convictions."[82]

A number of government lawyers, including (the late) former Ontario attorney general Ian Scott, Department of Justice Canada's Debra McAllister, and former Ontario deputy attorney general Mark Freiman have echoed Edwards's position.[83] While Scott urges AGs to preempt conflicts with the cabinet through consultation during the policy-making process, he invokes Edwards's admonition that the AG should make an extraordinary demonstration of his or her independent status when the cabinet refuses take his or her advice.[84]

Law professor Kent Roach has most recently endorsed Edwards's position, arguing that

> the government is not a regular client and the Attorney General not a regular lawyer. The idea that the government can simply instruct the Attorney General, as an individual or a corporation would instruct their lawyers, produces a danger of inadequate respect for the rule of law that in Canada imposes special constitutional obligations on government.[85]

Roach offers more conditional support for AG independence than Edwards, however, as he believes several "dialogic" mechanisms in the legislative process must be exhausted or rejected by the government before the AG advances a legal argument in court at odds with the government's wishes. He points to the possibility of drafting legislative preambles which set out extended section 1 "reasonable limits" for anticipated rights violations; referring draft legislation to the courts; the minister of justice reporting Charter conflicts to Parliament, as required by section 4.1 of the Department of Justice Act;[86] and the AG's insisting that the law should be enacted under the section 33 notwithstanding clause when possible.[87]

To summarize, these authors articulate a role for the attorney general in civil litigation that requires her to defend the public interest and the rule of law (including respect for the constitution), even when this means conceding in court—against her government's wishes—that laws are unconstitutional. Thus, "AG independence" in terms of civil litigation raises significantly different issues from prosecutorial independence in criminal law. The latter has historically focused on the AG's need to ensure that *individual* prosecutions (or, decisions not to prosecute) are not driven by

[82] *Id.*

[83] Scott, *Law, Policy, and the Role of the Attorney General, supra* note 69; Mark Freiman, *Convergence of Law and Policy and the Role of the Attorney General*, 16 Sup. Ct. L. Rev. (2d) 335 (2002); Debra M. McAllister, *The Attorney General's Role as Guardian of the Public Interest in Charter Litigation*, 21 Windsor Y.B. Access to Just. 47 (2002); Kent Roach, *The Attorney General and the Charter Revisited*, 50 U. Toronto L. J. 1 (2000); Roach, *Not Just the Government's Lawyer, supra* note 70.

[84] Scott, *Law, Policy, and the Role of the Attorney General, supra* note 69, at 126.

[85] Roach, *Not Just the Government's Lawyer, supra* note 70, at 620.

[86] *Department of Justice Act*, R.S., 1985, c. J-2, s. 4.1. Roach acknowledges, however, that this section is probably a "dead letter," since the AG Canada has never made such a report.

[87] Roach, *Not Just the Government's Lawyer, supra* note 70, at 642.

partisan considerations that would result in injustice. While civil litigation involving Charter challenges admittedly involves an actual individual affected by the law (usually, anyway), it is more analogous to those criminal law cases when the constitutionality of the law itself is in question, in which intervention by "political" authorities is accepted as legitimate. Accordingly, criminal law prosecutions, and the Shawcross doctrine, provide little support for AG independence in the conduct of civil litigation.

Moreover, it must be stressed that even the strongest proponents of AG independence stop short of calling for the AG's *institutional* independence from the minister of justice, or exclusion from the cabinet. Roach's argument for AG independence presumes that the AG enjoys a high level of access to the cabinet: recall that she would be privy to policy discussions so that she would be able to conclude whether rights were, in her view, considered sufficiently. But, Roach also sees the AG actively participating in such deliberations, especially on whether violations are "reasonable limits" under section 1, and urging the cabinet to invoke section 33 where a section 1 defense is, in her view, not viable. Scott makes a similar case, arguing that AGs should strive to prevent situations when their litigation strategy is at odds with another minister's policy preferences, by addressing potential conflicts through the AG's legal advisory role within the cabinet. Edwards went the furthest in the direction of institutional reform, calling for the creation of a public service appointment who would be the deputy of, and responsible to, the AG, and who would represent the Crown in all civil and criminal proceedings.[88] He further suggested calling this individual the solicitor general, thus restoring the nomenclature used elsewhere in the Commonwealth. The AG in Edwards's model remains, notably, in the cabinet and fused with the minister.

Even if we ignore this significant fact about the advocates of AG independence in civil law, others have vigorously disputed the argument for AG independence in civil litigation. The most direct criticisms challenge the characterization of the AG as *the* "guardian of the public interest."[89] Carney, for example, argues

> [t]hat responsibility is shared by all who are vested, directly or indirectly, with the sovereign power of the people: parliament, the executive and the judiciary. The guardianship role of Attorneys-General is simply the sum of their legal duties and responsibilities.[90]

If the AG has no legitimate claim to a monopoly on the public interest, then his or her statutory monopoly over the conduct of government litigation presents a problem when used to concede a law's unconstitutionality, over the objections of cabinet, on the basis of the public interest. As the government's sole legal representative before the court, the AG's assessment of the public interest becomes monopolistic vis-à-vis other parts of the government. That is, the AG's assessment and representation of the public interest becomes the *only* one the court hears on behalf of the government.

This leads to yet another criticism of the independence argument, even if we construe the "public interest" more narrowly in terms of upholding the rule or law

[88] Edwards, *The Attorney General and the Charter of Rights, supra* note 67, 56–57.

[89] Grant Huscroft, *The Attorney General and Charter Challenges to Legislation: Advocate or Adjudicator?*, 5 Nat'l J. Const. L. 125, 129–130 (1995).

[90] Carney, *supra* note 77, at 6.

and the constitution. "[T]here is considerable disagreement about what the Charter requires," Grant Huscroft writes, and this is due to the fact that the document is written using vague terms, such as "reasonable limits" (section 1), and "in accordance with the principles of fundamental justice" (section 7).[91] Huscroft notes, echoing Solum:[92]

> It is not that the *Charter* is radically indeterminate, such that *any* interpretation of its provisions can be justified. . . . Rather, the *Charter* is marked by "underdeterminacy"; its vague provisions do not apply with precision. The Attorney General can do no more than review a bill and make a reasoned judgment on the question of its consistency with the *Charter*.[93]

As such, there is room for reasonable disagreement, as illustrated by the fact that Supreme Court justices frequently disagree about the scope of rights, what justifies their violation, and what remedies should follow from unreasonable violations. "Guarding the public interest" by "upholding the rule of law," then, is rarely going to generate clear directions for an AG in the context of Charter litigation.

Huscroft further argues that even if the case law to date is clear, that does not mean that the AG is bound to follow it unquestioningly when making legal arguments before the court. New facts (especially "on the ground" evidence regarding policy implementation or the impact of precedent), changes in the composition of the bench, developments in legal philosophy, and major shifts in public values are all legitimate reasons for the government to challenge precedent. Supreme Court reversals of precedent, such as the Court's decision to accept legislative non-compliance in the *O'Connor–Mills* sequence (regarding the rules for disclosing third-party records in sexual assault cases), support this conclusion. In any case, the Charter cases that reach the highest appellate courts typically raise either new legal questions or new factual situations, with an accordingly high level of legal underdeterminacy (or even indeterminacy). There is room in such cases for what Hennigar terms "litigative dialogue," where "governments engage judges directly on issues of constitutional interpretation" through their legal arguments.[94] Conversely, an AG's refusal to present the government's preferred position or to defend legislation undermines the judiciary's interpretive role, by denying the court a valuable perspective. This explains why several Supreme Court Justices have publicly voiced their disapproval of governments' conceding Charter violations before the Court.[95] If, like Tushnet, Huscroft, and Waldron (among others), we go one step further and deny that the judiciary has a monopoly

[91] Grant Huscroft, *Reconciling Duty and Discretion: the Attorney General in the Charter Era*, Queens' L. J. 34 773, 797 (2009).

[92] Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. Chi. L. Rev. 462 (1987), *available at* http://ssrn.com/abstract=1156429.

[93] Huscroft, *Reconciling Duty and Discretion, supra* note 91, at 778–779.

[94] Matthew Hennigar, *Expanding the "Dialogue" Debate: Canadian Federal Government Responses to Lower Court Charter Decisions*, 37 Can. J. Pol. Sci. 17 (2004).

[95] *See, e.g.*, Chief Justice Lamer's ruling *in* Schachter v. Canada [1992] 2 S.C.R. 679 ¶¶ 10–11 , and Justices L'Heureux-Dubé, Gonthier, and Bastarache *in* R. v. Sharpe [2001] 1 S.C.R. 45 ¶¶ 151.

over the "correct" interpretation of the constitution, it is even more important that AGs faithfully represent their government's position.[96]

6. Establishing the attorney general's office

We can draw from the previous discussion regarding AG independence several issues raised by the idea of separating the attorney general from the minister of justice. The first is a common critique of the proposal to bifurcate the offices in *civil* law, as outlined by Sterling and MacKay: "there is neither political impetus to alter the current structure, nor sufficient empirical evidence to conclude that structural change would enhance the rule of law."[97] Even the strongest advocates of AG independence do not propose bifurcation, and consider AG access to the cabinet vital to the AG's ability to make informed litigation decisions. Notwithstanding Edwards's early concerns about the AG's need to "guard the public interest" in Charter litigation, there is little evidence to suggest that the AG's conduct in the past quarter-century is cause for alarm.

Having said this, the proponents of AG independence only stress AG access to and participation in cabinet deliberations—neither of which *requires* that the AG is also the minister of justice, nor that the AG even has a vote. In other words, their arguments do not preclude a British-style AG, who holds a ministerial rank but only attends cabinet as a non-voting member. And while there are certainly criticisms of the AG independence argument, would there be any harm in hiving off the litigation function to a "separate" AG? In other words, there may be no good reason (based on the civil litigation function) to separate the offices, but there may also be no good reason *not* to, thus permitting the creation of a separate AG on the grounds of his advisory function, who also happens to conduct the government's litigation. The most direct effect would be to put the minister of justice in the same position as all other ministers and agencies are now, where he would no longer control his own representation in court; other departments and agencies would see little change. This would also have the salutary effect of allowing the AG's litigation to benefit from being engaged in cabinet-level policy discussions, and conversely, to allow policy making to benefit from the legal advice of the AG. It is counter-intuitive to have one's legal representative completely divorced from one's legal advisor. At the very least, we would expect a very high level of collaboration between the two (as is common in Britain).[98]

What issues would separating the AG-*qua*-litigator from the minister of justice raise? In this final section, we canvass five interrelated themes—membership in cabinet,

[96] Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 Mich. L. Rev. 245 (1995); Huscroft, *The Attorney General and Charter Challenges to Legislation, supra* note 89; Huscroft, *Reconciling Duty and Discretion, supra* note 91; Jeremy Waldron, Rights and Disagreement (1999). *See also* Christopher P. Manfredi & James B. Kelly, *Six Degrees of Dialogue: A Response to Hogg and Bushell*, 37 Osgoode Hall L. J. 513 (1999).

[97] Lori Sterling & Heather Mackay, *The Independence of the Attorney General in the Civil Litigation Sphere*, 34 Queen's L. J. 927 (2009).

[98] Indeed, in England and Wales, the barrister is not an "attorney" at all, and does not "conduct" litigation, but takes direction *from* the solicitor—not at all what advocates of AG independence have in mind!

selection method and qualifications, government representation in court and the relationship between law and politics, accountability and collective responsibility, and the parliamentary reporting function. The first point that must be stressed, however—and this is usually underemphasized or ignored in discussions of AG litigation[99]—is that the modern AG of Canada does not personally appear in court. Rather, the task of representing the government of Canada in legal proceedings falls primarily to lawyers in the Public Prosecution Service of Canada (since 2006), Justice Department lawyers based in over a dozen regional offices across the country, or appointed "agents" (private lawyers appointed by the minister of justice who work under in-house counsel); less frequently, Justice Department counsel assigned to various line departments (in "Legal Services Units", or LSUs) or those in the Department's headquarters in Ottawa may appear in court.[100] Litigation strategy is recommended by a central committee in Ottawa and formally approved by the deputy AG and AG.[101] This has two important consequences. First, the AG of Canada personally is primarily a manager in regards to the conduct of government litigation. Second, when we speak of bifurcating the Department of Justice, this means segregating those public servants who appear in court on behalf of the government and who advise other departments from those who research and administer policies and programs within the policy mandate of the minister of justice (i.e., criminal law, some aspects of family law, administration of the judiciary, etc.).

6.1. Membership in cabinet

While we conclude, for the reasons cited above, that a separate AG must have access to cabinet deliberations, it remains an open question whether she should also be a full voting member of the cabinet if independent from the principle of cabinet solidarity. There is ample precedent in Canada for having ministers outside the cabinet, as every government since the early 1970s has had several ministers of state that occupy this position. The argument for exclusion in the UK, as noted earlier, is based on the AG's role in criminal prosecutions, but this seems somewhat unnecessary given the existence of the DPP, and ignores the AG's significant role in civil law. Impartiality in deciding whether and how to conduct criminal prosecutions is desirable, but this argument carries no weight in constitutional law matters, where "impartiality," based on a positivist conception of the law, is a fiction—a point we return to below.

[99] But, exceptions exist: *see* Matthew A. Hennigar, *Players and the Process: Charter Litigation and the Federal Government*, 21 Windsor Y.B. Access Just. 91 (2002); Matthew A. Hennigar, *Why Does the Federal Government Appeal to the Supreme Court of Canada in Charter of Rights Cases?: A Strategic Explanation*, 41 L. & Soc'y Rev. 225 (2007); and Hennigar, *Conceptualizing Attorney General Conduct in Charter Litigation, supra* note 80.

[100] Hennigar, *supra* note 80, at 201. A prominent example of the last category is Robert Frater, now Senior General Counsel, Criminal Law Section, who has appeared in many high-profile cases involving criminal law, including dozens before the Supreme Court of Canada. Before the creation of the PPSC in 2006, he was Senior General Counsel of the Federal Prosecution Service of Canada.

[101] Hennigar, *Players and the Process, supra* note 99; Hennigar, *Why Does the Federal Government Appeal to the Supreme Court of Canada in Charter of Rights Cases?, supra* note 99.

In the late nineteenth century, Justice Boothby of Australia argued vigorously against inclusion, on the grounds that if the AG could compel his advice be followed by having a vote in the cabinet, his wish "that a certain course should be pursued, would become 'father to the thought' that the law would permit it."[102] However, is it not just the ability to vote that creates the problem Boothby foresees, of AGs allowing their own preferences to shape their advice about what the law permits. Andrew Petter, former attorney general of British Columbia, recently lamented the heavy influence government lawyers have on their lay colleagues in the cabinet, admitting that he had used the fact that non-lawyers are risk-averse and deferential to lawyers with respect to litigation to his advantage when advancing his own policy preferences.[103] Petter's comments suggest that it is beneficial for the cabinet to have access to more than one legal expert during its deliberations, but they also carry the implication that whether or not the AG is a member of the cabinet probably makes little difference to how she discharges her duties, particularly with respect to how the AG's office conducts litigation. It is much more important how the AG is selected, and the terms under which she serves.

6.2. Selection method and qualifications

Several closely related issues are implicated here. The primary question is whether the AG would be a public service appointment, or a political appointment by the government of the day, or more accurately, the prime minister. It would thus be a highly unusual situation for a member of the government to not be a member of Parliament (House or Senate), and even more unusual to be appointed by anyone *other* than the prime minister. Indeed, such an office would be wholly foreign to the Westminster system of government. While there may be advantages to having a professional, tenured AG in the cabinet who can provide "institutional memory" on policy discussions when governments change, this is true for all departments, and is one of the signal advantages of having a permanent bureaucracy; as such, this role can be fulfilled by the deputy attorney general and his or her subordinates.

Recalling that the AG's litigation role is primarily managerial, and that she is aided in that capacity by the usual complement of professionals appointed by the public service, there seems no more need to make the AG a professional appointment than with any other minister. To the extent that the AG should have legal training—a reasonable requirement, in light of their need to oversee government lawyers, and to communicate with them on matters of legal advice and strategy—this could be assured by the appointment of a prominent member of the legal community to the Senate and thence to AG.

The ability of an AG to be removed by the PM is more problematic, and would seem to create a conflict of interest between the AG's need to uphold the law (both in court and as legal adviser) and her desire to keep her job. As extensively argued above,

[102] *Cited in* Edwards, The Attorney General, *supra* note 43, at 73–74.

[103] Andrew Petter, *Legalise This: the Chartering of Canadian Politics, in* Contested Constitutionalism 33, *supra* note 66.

however, this erroneously assumes that the AG will be able to identify "bright-line" constitutional standards in civil law. A tenured, professional AG would presumably be better institutionally positioned to withstand partisan pressure to compromise his view of the law, on the same logic underlying judicial independence. However, a tenured, professional AG raises significant problems—most importantly, regarding accountability—in all other circumstances that, in our view, outweigh the benefits. We are also reminded of Edwards's view that, "in the final analysis it is the strength of character and personal integrity of the holder of the offices of Attorney General and of the Director of Public Prosecutions which is of paramount importance," and that "such qualities are by no means associated exclusively with either the political or non-political nature of the office of the Attorney General."[104]

6.3. Government representation in court and the relationship between law and politics

Roach argues that the AG is "not just the government's lawyer."[105] Even if that is true, the fact remains that the government *does* need legal representation in court, particularly in those situations where litigative dialogue can occur on constitutional interpretation. Roach responds to this criticism with the remarkable suggestion that third-party interveners or court-appointed *amicus curiae* can be counted on to defend the policy in question.[106] As Hennigar observes,

> [t]his seems like an odd suggestion, however, in light of . . . the fact that such actors are far less qualified than the government (in terms of resources, incentive, and access to relevant information) to defend legislation.[107]

Moreover, the government will typically have a broader conception of the public interest than private actors representing more sectional interests.

A more fundamental issue, however, is that separating the AG's litigation function (and advising function, for that matter) from the minister of justice and especially from cabinet seems to accept a sharp distinction between "law" and "politics." Invocations by Edwards and his supporters of the AG's need to protect the "rule of law" and constitutional values from violations by "political" authorities imply that somehow the two are unrelated, as though constitutional law is not inherently political. Julie Jai, herself a government lawyer, complains that when litigation positions are determined by the AG's office, "decisions tend to be made primarily on legal [i.e., jurisprudential] grounds, rather than by weighing the whole range of issues, including legal, policy, political, fiscal, and agenda management, which Cabinet would consider if it were [*sic*] reviewing the issue."[108] In particular, discussions about whether a law constitutes

[104] Edwards, Walking the Tightrope of Justice, *supra* note 83, at 133.
[105] Roach, *Not Just the Government's Lawyer, supra* note 70, at 620.
[106] *Id.* at 614.
[107] Hennigar, *Conceptualizing Attorney General Conduct in Charter Litigation, supra* note 80, at 198.
[108] Julie Jai, *Policy, Politics and Law: Changing Relationships in Light of the Charter*, 9 Nat'l J. Const. L. 1, 17 (1997–8).

a "reasonable limit" under section 1, in her view, "would also appear to be an issue involving as much policy as law, and might be most appropriately decided by Cabinet."[109] While this is particularly true of constitutional law and the Charter of Rights, as Jonathan Swainger rightly observes, the "fiction" of an apolitical AG has been perpetuated in Canada and the UK for centuries.[110] To the extent that bifurcation reinforces the fiction of a law-politics distinction, it is a mark against such a reform.

6.4. Accountability and Collective Responsibility

The final issue to be addressed here is that separating the attorney general from the minister of justice raises important questions about the accountability of the AG and the principle of collective responsibility. There are, in fact, two forms of accountability in play: to the cabinet and the prime minister (PM), and to Parliament. As a minister, the AG would be answerable to the PM, who can dismiss the AG—this is true even in the UK with respect to the AG's handling of criminal prosecutions.[111] This is yet another mark against a professional, tenured AG, who would effectively be accountable to no one for decisions taken in the government's name, and for which the government is politically accountable to the House and the public.

There are those who argue that the AG should also be accountable to Parliament. Even with respect to criminal law, Edwards stresses that accepting the principle of AG prosecutorial independence "in no way minimizes the complementary doctrine of the Law Officers' ultimate responsibility to Parliament, in effect the House of Commons, for the exercise of their discretionary powers."[112] Huscroft echoes this view, but stresses that accountability to Parliament may conflict with the AG's accountability to his government colleagues.[113] This is because the AG's government may wish him to concede in court that valid legislation passed under a previous government is unconstitutional, when amending or repealing the legislation is not politically viable because the government lacks the votes or "is unwilling or unable to expend the political capital necessary."[114] Such tactics disrespect the legislative branch and the democratic process, and Huscroft argues that AGs should have to defend impugned legislation in court, thus forcing the government to repeal or amend laws through Parliament.

There is much to commend Huscroft's view in this regard. One possible criticism of his position is that ministerial accountability to Parliament usually involves after-the-fact answerability for one's actions, rather than strict adherence to Parliament's will in the discharge of ministerial discretion. That is how Edwards conceives it with respect to criminal prosecutions:

[109] *Id.* at 18.

[110] Swainger, *supra* note 52, at 20–21.

[111] Edwards, The Law Officers of the Crown, *supra* note 43, and Edwards, The Attorney General, *supra* note 43.

[112] Edwards, The Law Officers of the Crown, *supra* note 43, at 224.

[113] Huscroft, *Reconciling Duty and Discretion, supra* note 91, at 804. For a more extensive version of this argument, *see* Huscroft, *The Attorney General and Charter Challenges to Legislation, supra* note 89.

[114] Huscroft, *Reconciling Duty and Discretion, supra* note 91.

> To be explicit, it is conceived that, *after the termination of the particular criminal proceedings*, the Attorney-General . . . is subject to questioning by members of the House in the same way as any other Minister of the Crown. Like any other Minister they are answerable for their ministerial actions.[115] (Emphasis added).

Edwards's argument equates ministerial discretion in the conduct of litigation with other forms of ministerial discretion, however, and this is a dubious analogy, for the simple reason that traditional ministerial discretion (for example, over Orders-in-Council) cannot have the effect of striking down legislation; AGs conceding in court that legislation is unconstitutional does exactly that.[116]

If we accept on either account that the AG is accountable to Parliament, it bolsters the case for an AG drawn from the House who must face Parliament in Question Period. An alternative means of ensuring accountability to Parliament would be to require the AG to appear before parliamentary committees dealing with the policy issues affected by the AG's conduct of civil litigation. Both of these options are more in the *ex post facto* model of accountability; Huscroft's concerns, on the other hand, could be satisfied by adding a provision to the statute governing the AG's office that would require the AG to defend all legislation passed by Parliament. Whether this would be desirable from the perspective of litigation strategy is another matter, and beyond the scope of this article.

6.5. The reporting function and section 4.1.1 of the Department of Justice Act

The call for reassigning the minister of justice's reporting function to the attorney general is simply recognition that, in its present form, it is unworkable and prevents the development of a fulsome dialogue within Parliament and between cabinet ministers on the compatibility of the government's legislative agenda. For instance, is a proposed policy considered Charter compliant because it does not infringe a protected right or freedom, or is it considered constitutional because a limitation is demonstrably justified? While both scenarios are based on reasoned considerations leading to assessments of compatibility, the failure to separate the distinct components of Charter review—the legal analysis within the substantive provisions (sections 2–23) and the policy/political analysis required when compatibility is based on recourse to section 1—renders section 4.1.1 inoperative as it is unclear why the cabinet considers its legislative agenda compatible with the Charter. Perhaps more importantly, it seriously reduces the integrity of weak-form mechanisms such as the notwithstanding clause. Indeed, section 33 is viewed as a denial of rights and not, as it was intended, an alternative approach to reasonable limits that results in parliamentary disagreement with a judicial ruling. The responsibility for this misperception is the cabinet's as its approach to section 4.1.1 has

[115] Edwards, The Law Officers of the Crown, *supra* note 43, at 224 [emphasis in original].

[116] Matthew Hennigar, *The Same-Sex Marriage Cases and Lessons for Attorney General Independence*, Paper presented to the annual meeting of the Canadian Political Science Association (London, Ont., June 2–4, 2005), 17.

hidden the complexity of constitutionalism and failed to educate the public on what section 33 actually does—an ability to justify policy in the public interest despite a negative judicial assessment. Assigning the reporting function to the attorney general is not an attempt to create an apolitical minister but an attempt to separate the distinct components of constitutionality in a manner that ensures that section 4.1.1 is meaningful and can facilitate a substantive Charter dialogue within Parliament.

In New Zealand the attorney general publishes on the ministry of justice website all Bill of Rights Act (BORA) advice by the Ministry of Justice and Crown Law Office used to determine whether a section 7 report to Parliament should be issued.[117] Indeed, BORA advice involves legal analysis of a proposed statute's compatibility with the enumerated provisions of the NZBORA and, where required, a policy analysis justifying the limitation as demonstrably justified under section 5 of the Act. The release of BORA advice and section 7 reports to Parliament are suggested to facilitate parliamentary dialogue on rights and greater transparency in the policy process involving the NZBORA.[118]

The attempt to facilitate dialogue has recently been advanced by the Australian State of Victoria which introduced the Charter of Human Rights and Responsibilities Act in 2006. Under section 28 of the Victorian Charter all bills introduced into Parliament must be accompanied by a statement of compatibility presented by the sponsoring minister. Although not required under the Victorian Charter, the practice is one where the statement of compatibility discusses how a bill is considered compatible: for instance, whether rights or freedoms are engaged, and if so, on what basis does the minister consider the infringement demonstrably justified under section 7(2) of the Victorian Charter, the equivalent of the Canadian Charter's section 1 clause.[119]

While the statement of compatibility is introduced as part of the bill by the sponsoring minister, it is divided between legal analysis—whether rights are infringed—and policy analysis—whether the infringement is justified under section 7(2) of the Victorian Charter. The statement of compatibility is created in collaboration with the solicitor general (a public service appointment), the Department of Justice (answerable to the attorney general), and the sponsoring minister. Specifically, the Victorian Government Solicitor's Office (VGSO) has responsibility for providing legal advice that assesses whether a proposed bill infringes a right or freedom.[120] If VGSO determines that the statement of compatibility requires a section 7(2) analysis, because this is a policy defense, it is the responsibility of the attorney general and the Human Rights Unit at the Department of Justice in collaboration with the sponsoring minister and department.[121]

[117] Bill of Rights Act 1990 (N.Z.), *available at* http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights.

[118] Carolyn Archer & Grace Burt, *Section 7 of the Bill of Rights Act*, N.Z. L. J. 320, 321 (Aug. 2004).

[119] George Williams, *The Victorian* Charter of Human Rights and Responsibilities: *Origins and Scope*, 30 Melbourne U. L. Rev. 880, 902–903 (2006).

[120] Victorian Government Solicitor's Office, *available at* http://www.vgso.vic.gov.au/.

[121] Interview with senior departmental official, Victorian Government Solicitor's Office, Melbourne, Australia (Feb. 13, 2008); Interview with senior departmental official, Department of Justice, Melbourne, Australia (Feb. 11, 2008).

Although the Victorian Charter is a recent parliamentary bill of rights, it has resulted in 175 statements of compatibility (2006–8), of which seventy-four acknowledge that the statute is only compatible via section 7(2).[122] Why is this important? First, it demonstrates that the absence of reports under section 4.1.1 of the Department of Justice is the reluctance of the Canadian cabinet to acknowledge the complexity of constitutionalism and that Charter compatibility is based on legal and policy considerations. Secondly, it demonstrates that an effective reporting duty is essential for the development of parliamentary dialogue involving the Charter. Finally, it suggests that the reporting duty can be reconciled with the principles of cabinet government without undermining the passage of the government's agenda as constitutional. An attorney general with a unique relationship to cabinet, we believe, would be best positioned to inform Parliament whether the government's legislative agenda violates rights or freedoms under the Charter. The responsibility for defending the policy as reasonable via section 1 by the sponsoring minister, we conclude, is consistent with Canada's tradition of responsible government. What is required, however, is a different approach to Charter compatibility and the principle of collective responsibility and the attorney general that exists at the present time.

Following the practice in Victoria, the reporting duty under the Department of Justice Act, once reassigned to the attorney general, should be changed from a requirement to report incompatibility to one that requires the attorney general to issue statements of compatibility/incompatibility when a bill is introduced into the House of Commons. Indeed, such statements would require the attorney general to provide an assessment whether a bill engages a right or freedom, and if so, whether the engagement can be considered a reasonable limitation. As in New Zealand, a statement of incompatibility by the attorney general would not prevent the government from proceeding with proposed legislation. Instead, it would require the government to either dispute the attorney general's approach to section 1 and proceed on an assumption that the courts will accept the government's position, or to pass the legislation into law notwithstanding the attorney general's advice. Indeed, "parliamentary bills of rights" and weak-form review are premised on the very notion that legislation may be of sufficient public interest to proceed despite potential conflicts with instruments such as charters of rights. We believe that the evidence from Australia demonstrates that dividing the labor of sponsoring bills from the task of reporting to Parliament whether such bills contain potential rights violations will help rehabilitate the reporting function and enhance the quality and transparency of rights-related debate in Parliament. Moreover, statements of compatibility or incompatibility produced initially by someone other than the sponsoring minister are likely to be more informative than those from sponsoring ministers, as it avoids the ministerial conflict of interest inherent in "self-reporting" on right-compliance.

Hiebert notes that some have criticized the statements of compatibility issued by sponsoring ministers under section 19 of the UKHRA 1998 for "providing inadequate

[122] James B. Kelly, *A Difficult Dialogue: Statements of Compatibility and the Victorian Charter of Human Rights and Responsibilities Act*, 46 Austl. J. Pol. Sci. 257 (2011).

information for public evaluation of the merits of decisions that are claimed to be compatible with Convention rights."[123] An additional problem in the UK case is that ministerial instructions permit a statement of compatibility under the fairly generous guideline that "it is more likely than not that the provisions of the Bill will stand up to challenge on Convention grounds before the domestic courts and the Strasbourg Court."[124] Tushnet further observes that the "Strasbourg Court" (the European Court of Human Rights) has developed a doctrine of deference to national governments that facilitates a "probability" assessment that supports the UK government issuing a statement of compatibility as opposed to incompatibility.[125] Our proposal to require a clearer statement about both potential *prima facie* rights violations and "reasonable limits" analysis would avoid this problem, as Canada does not have the added complication of having to consider supranational jurisprudence.

7. Conclusion

Depending on where you stand, Canada is either the strongest of the weak-form systems of judicial review, or the weakest of the strong-form systems because of the notwithstanding clause. In this article, we have argued that the demise of weak-form review is contestable because Canada functions as a weak-form system despite parliamentary reluctance to employ the formal instruments of this model such as section 33. A number of factors explain the endurance of weak-form review in Canada: the legislative strategy of statutory reversal of Charter decisions by the SCC in response to *Seaboyer*, *O'Connor*, and *Pearson/Morales*: a practice we labeled "notwithstanding-by-stealth" to distinguish it from the constitutional ability to reverse judicial decisions through section 33; the structure of the Department of Justice and the fusing of law and politics within a single parliamentarian and department; the deficiencies of the minister of justice's reporting duty and the ability of the cabinet to challenge judicial decisions without engaging in parliamentary disclosure; and, although not a focus of this article, judicial acceptance of legislative reversal as evidence of the Court's commitment to the dialogic elements of the Charter and Canadian constitutionalism. In the absence of judicial quiescence to legislative reversal, weak-form review without the instruments of weak-form constitutionalism such as the Charter's notwithstanding clause surely would have not become an accepted parliamentary practice in Canada.

A more fundamental weakness with Tushnet's position is the limited number of statutes that are reviewed and invalidated by the SCC as inconsistent with the Charter. For strong-form review to be the dominant paradigm, this would require the SCC to review a large number of Charter cases and to invalidate statutory provisions as unconstitutional. However, the present trend in constitutional cases before the Court works against strong-form review being the dominant paradigm. For instance, in 2007

[123] Janet L. Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69 Mod. L. Rev. 7, 23 (2006).
[124] *Id.*
[125] Tushnet, Weak Courts, *supra* note 2, at 142.

the SCC reviewed only twelve cases involving the Charter and supported the rights claimant in three cases.[126] Similarily, in 2006, the SCC heard fifteen cases involving the Charter and supported the rights claimant in three cases.[127] What this suggests is that infrequent judicial pronouncements in recent years leave the cabinet generally free to design legislation consistent with parliamentary interpretations of the Charter. As such, Canada may have weak-form review by default as well as by design.

Although we conclude that the creation of an attorney general would address the discrepancy between the theory and the practice of weak-form review, it is acknowledged that, unlike the provision of constitutional advice, there is no compelling reason to assign responsibility for civil litigation to an independent attorney general's office. However, litigation and legal advice are the responsibilities of the attorney general's office in the United Kingdom and the Crown Law Office in New Zealand (which reports to the attorney general). In both countries, the ministry of justice is responsible for the creation and advocacy of legal policy within government. Thus, in supporting the separation of the minister of justice/attorney general, we advocate the approach to these complementary—but distinct—offices in advanced Westminster democracies that have reflected upon the experience of the Canadian Charter and improved the parliamentary approach to bills of rights.

While the notwithstanding clause would potentially be rehabilitated by a more transparent reporting duty, the principle benefit would be derived by Parliament as an institution. The present reporting duty undermines effective parliamentary scrutiny as the cabinet is not required to disclose the constitutional footing of its legislative agenda. The introduction of statements of compatibility/incompatibility would require the cabinet to engage with Parliament when legislation departs from judicial understandings of constitutionality. This would strengthen weak-form review and establish the parliamentary approach as a clear alternative to strong-form review in the United States.

[126] Patrick J. Monahan & James Gotowiec, *Constitutional Cases 2007: An Overview*, 42 Sup. Ct. L. Rev. (2d) 3, 3–4 (2008).

[127] *Id.*