

The Same-Sex Marriage Cases and Lessons for Attorney General Independence

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Abstract

Writing in 1987, John Edwards, the foremost scholar of Attorneys General in Canada, concluded that “[t]here appears to be considerable confusion as to whose interpretation of the law, whose assessment of the policy implications of the legal conflict should prevail” when “a conflict of opinion arises by virtue of the Attorney General's assessment of the legal and policy issues.” Almost twenty years later, this confusion persists. Using the framework of the lower court cases regarding same-sex marriage in 2003, this paper explores the relationship between the AG Canada and the political executive and Parliament in the conduct of litigation on behalf of the government. Specifically, should AG Cauchon have exercised greater independence in these cases, given his personal belief that the Charter's equality rights required extending marriage to same-sex couples, and the government's refusal to do so in legislation? Rejecting a long line of argument that began with Edwards, I argue that the AG does not have a unique responsibility to guard the “public interest” in civil litigation under the Charter, in part because the very concept of a coherent public interest is flawed. Thus, I contend that, from an institutional perspective, AG Cauchon acted appropriately in *Halpern* and *EGALE*. However, in *Hendrick*, where existing legislation and the will of the political executive were at odds, the AG should have defended the law in court, and sought formal amendments via Parliament.

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In the spring of 2003, lower court rulings by the Ontario¹ and British Columbia² Courts of Appeal legalized same-sex marriage (hereafter SSM). Since then, there has been a continuous and heated debate among politicians, academics, the media, and the general public over the rulings and the federal government’s subsequent drafting, and reference to the Supreme Court of Canada, of legislation recognizing SSM. What has been overlooked in this debate, however, is the institutional issue of whether the Attorney General (AG) of Canada should have acted independently of the government’s leadership in the conduct of the lower court cases. Indeed, the AG’s conduct of civil litigation under the Charter in general has received relatively little attention, in contrast with criminal prosecutions.³ As this paper will illustrate, then-AG Martin Cauchon personally agreed with the equality rights claims of the same-sex couples, yet, in keeping with the government’s official position, his department’s lawyers vigorously defended the traditional heterosexual definition of marriage in *Halpern* and *EGALE*. It was precisely this type of situation – when the rights claim of a minority was politically unpopular – that was foreseen almost 20 years ago by John L.I.J. Edwards⁴ and Ian Scott,⁵ and more recently by Debra McAllister,⁶ and which led them to advocate the independence of the AG in Charter litigation. However, this paper rejects their argument that the AG has a special duty to “guard the public interest” in Charter litigation, arguing that AG Cauchon acted entirely properly in defending Parliament and the Cabinet’s position, in light of the AG’s unique institutional role as the government’s and Parliament’s sole legal representative in court. The paper then considers the situation raised by the AG Canada’s subsequent conduct of the SSM case *Hendrick*⁷ in Quebec, where the government conceded the unconstitutionality of the opposite-sex definitions of marriage in civil and common law months before raising the issue in Parliament. Building on an earlier argument by Grant Huscroft,⁸ I argue that in situations where the legislature - as represented by existing legislation - and the will of the political executive are at odds, the AG should defend legislation in court, and seek formal amendments via Parliament.

I. Legislative Background of SSM

Although the institution of monogamous heterosexual marriage has existed for several centuries in the Anglo-American context, the common-law definition as of Spring 2003 dated to the 1866 case *Hyde v. Hyde and Woodmansee*.⁹ There was no statutory definition of marriage in Canada until 2000, as the common-law definition was widely taken for granted. As the B.C. Court of Appeal noted dryly in *EGALE v. Canada*, “same-sex conduct constituted a criminal offence in Canada until 1969. Thus, the prospect of same-sex marriages did not realistically arise in Canada until some time thereafter.”¹⁰ The 2000 statutory definition appears in section 1.1 of the *Modernization of Benefits and Obligations Act (M.B.O.A.)*¹¹—an omnibus bill amending 68 federal statutes to extend the benefits and obligations of heterosexual common-law spouses to same-sex couples—which affirms the traditional common-law definition of “marriage.” The section reads, “[f]or greater certainty, the amendments made by the Act do not affect the meaning of the word ‘marriage,’ that is, the lawful union of one man and one woman to the exclusion of all others.” The government proposed section 1.1 as an interpretive amendment to the *M.B.O.A.* after many MPs expressed concerns that the omnibus bill would lead to the redefinition of marriage. Support for the amendment was very strong, passing by a vote of 176-72. This echoed the overwhelming Parliamentary support (216 to 55), including among government members, for a 1999 Opposition motion affirming the traditional definition of marriage. Curiously, the parties in *Halpern* concurred that “s.1.1 does not purport to be a federal statutory definition of marriage,”¹² and the section was not reviewed by the court in that case. While the *M.B.O.A.* may not have been written with the intention of establishing a formal definition of marriage, it nonetheless does so, by setting out, in legislation, a definition of marriage. In any case, a more explicit attempt to define marriage came a year later, in section 5 of the *Federal Law-Civil Law Harmonization Act No. 1 (F.C.H.A.)*,¹³ which harmonized the federal law with the Quebec Civil Code, and stated that “Marriage requires the free and enlightened consent of a man and a woman to be the spouse of the other.” Notably, however, because the *F.C.H.A.* did not apply outside Quebec, it was not at issue in *EGALE* and *Halpern*, which focused instead on the common-law definition.¹⁴

After the *Halpern* ruling, the Liberal government drafted a bill legalizing same-sex marriage, and on July 17, 2003, referred its constitutionality to the SCC. The reference posed

three questions: (i) is the statutory definition of marriage solely within federal jurisdiction?; (ii) is the proposed legislation consistent with the *Charter*?; and (iii) does the *Charter*'s freedom of religion protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs? The second question was, to quote Huscroft, "simply disingenuous"¹⁵—it is inconceivable that *including* same-sex couples would violate the *Charter*. The more pertinent question, which the reference neatly avoided, was whether *barring* same-sex couples from marrying is permissible under the *Charter*'s equality rights or section 1 "reasonable limits" provision. "In terms of crass partisan advantage," Huscroft writes, "the government [used] the Court to fend off political criticism and buy time," as it postponed tabling the draft bill in the House until early 2005.¹⁶ In September 2003, the government narrowly defeated (by one vote!) another Opposition motion by the Canadian Alliance to affirm the traditional heterosexual definition of marriage, identical to the 1999 motion.¹⁷ This show of opposition to the government's draft bill recognizing gay marriage forced the leadership to alter the reference, and on January 28, 2004, Justice Minister Irwin Cotler included a question explicitly asking whether the heterosexual definition of marriage violates the *Charter*. Surprisingly, when the SCC issued its opinion in the *Reference re Same-Sex Marriage*¹⁸ in December 2004, it refused to answer this new question, citing the government's stated intention to legalize SSM regardless of the Court's decision. On February 1, 2005, the government tabled Bill C-38, the *Civil Marriage Act*, recognizing SSM (see Appendix for timeline).

II. The Attorney General and Litigation

According to s.5(d) of the *Department of Justice Act*,¹⁹ the Attorney General of Canada "shall have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada." With few exceptions, the AG Canada does indeed exercise this monopoly over litigation.²⁰ This expansive authority explains the Department of Justice Canada's reputation as "Canada's largest law firm."²¹ As I've detailed elsewhere,²² the AG Canada does not of course personally conduct the government's litigation; this task falls primarily to legal-area specialists in several Regional Offices across Canada, and less frequently, Justice Department lawyers located in various line

departments and in the Department's Headquarters in Ottawa. In his dual capacity as the Minister of Justice,²³ the AG also appoints a large number of private members of the bar, or "agents," to conduct trial-level federal prosecutions, primarily in narcotics cases.²⁴ However, "all counsel, whether in-house or agents, work under the direction of group heads and regional directors."²⁵

While the government's legal representation is therefore somewhat decentralized, its litigation strategy at the appellate court level, such as in the SSM cases discussed here, is highly centralized. These strategic issues include the decision whether to appeal and the authoring of facta, or written legal arguments presented to the court. As one senior Department litigator stated:

When someone gets the approval of the Ministry to take one up, their written argument...has to be processed and it's the same thing with facta on appeal. There's a real process of review and commentary, and...we've sent facta back to be entirely rewritten because they're just not up to what we feel our standard is and what the court expects of us. It's something that plays right through the process, from proposal to seek leave to the end of filing a factum.²⁶

As the above comment suggests, arguments to the higher appeal courts require formal Ministry approval, a process with at least two stages: National Litigation Committee recommendation; and final decision by the Minister of Justice. The National Litigation Committee (NLC) is composed of eighteen "core" members (senior litigation managers in issue-specific portfolios at Headquarters) and several "invited" members who "have a strong interest in specific areas covered in the Committee's agenda," including senior Regional Directors and the counsel litigating the case.²⁷ The NLC works closely with the counsel who will actually appear in court. The Justice Department's internal regulations state that

Generally speaking, it is within the discretion of appellate counsel to concede on a particular issue in an appeal without conceding the appeal itself, where there is no reasonable argument to be made on that issue. Where that issue concerns the

constitutional validity of federal legislation, however, instructions must be sought from the Department's Litigation Committee.²⁸

Indeed, the NLC's mandate includes "reviewing all facta before they are filed in the Supreme Court of Canada or, in significant cases, before they are filed in provincial appellate courts."²⁹ There can be no doubt that the SSM cases in the Ontario, B.C. and Quebec Courts of Appeal qualified as "significant."

The work of the NLC is then subject to the approval of the Assistant Deputy Attorney General (ADAG) for the area of law in question (e.g., criminal law, civil law, aboriginal law, etc.). In particularly important cases, the ADAG refers the issue to the Deputy AG and ultimately the AG. AG approval for (or rejection of) facta is no mere formality. As a current member of the NLC stated, "the [National Litigation] Committee always treats its work as a recommendation to the Deputy and to the Minister.... There is further review, and the committee is very cognizant that the Minister has the last word."³⁰ Similarly, another member of the NLC recalled instances where the Committee concluded there was an issue of public importance, but left the decision entirely with the Minister due to the presence of "other, more political concerns where we have no expertise."³¹ The Minister or Deputy Minister also might refer it back to the NLC to consider other factors that may have not been considered.³²

In the case of SSM, sources inside the Liberal government revealed that the conduct of the lower court cases was debated at the highest levels of the political executive, by Cabinet and then-Prime Minister Jean Chrétien.³³ The main conclusion to be drawn from all of this is that senior government officials were directly involved in developing the litigation strategy regarding SSM, notwithstanding the AG's exclusive statutory authority over "the regulation and conduct of all litigation for or against the Crown or any department."

As we've seen, when the appeal courts of Ontario and BC considered the issue of SSM in the Spring of 2003, the government was officially firmly committed to protecting the traditional heterosexual definition of marriage. It had affirmed this position in legislation at least twice only a few years before, and the Liberal leadership – including the Prime Minister and even, notably, Justice Minister Cauchon - had overwhelmingly supported an Opposition motion to the same effect. Even after the rulings in *Halpern* and *EGALE*, it is reported that the Prime Minister was reluctant to legally recognize SSM, not only because of his personal values as "a 69-year-old

Catholic from rural Quebec,” but because he knew many rural MPs in the Liberal caucus “would have a tougher time” in an election that was anticipated within the year “if the government rushed passage of a law.”³⁴ In short, part of the government’s resistance to legalizing SSM was based on partisan concerns about retaining power.

Given the foregoing description of the factum-drafting process, it is perhaps not surprising that the government’s opposition to SSM was manifested in its legal arguments in *Halpern* and *EGALE*. The AG Canada presented a vigorous defense of the traditional definition of marriage. The crux of the federal government’s argument was that “marriage relates to the capacities, needs and circumstances of opposite-sex couples. The concept of marriage—across time, societies and legal cultures—is that of an institution to facilitate, shelter and nurture the unique union of a man and woman who, together, have the possibility to bear children from their relationship and shelter them within it”³⁵; in other words, a core purpose of marriage is procreation, which the government argued cannot be achieved naturally by gays and lesbians within the confines of an exclusive conjugal relationship. However, both the Ontario and B.C. courts observed that same-sex couples can choose to have children through adoption, surrogacy and donor insemination. Notwithstanding its argument that marriage is inherently associated with procreation, the AG Canada acknowledged in its facts that procreation and child-rearing are not the only purposes of marriage, nor the only reasons why couples choose to marry. However, to counter this, the AG Canada advanced a second line of argument, that the heterosexual definition of marriage was not discriminatory because of the convergence of the legal treatment of same-sex and opposite-sex “common-law” (unmarried) spouses, with the attendant benefits and responsibilities. Much of this harmonization had, recall, been accomplished by the *M.B.O.A.*, in response to the SCC’s ruling in *M. v. H.*³⁶ This argument was not without its weaknesses, though, as common-law spouses must, unlike married couples, cohabit for a specified period of time, and not all marital rights and obligations have been extended to cohabiting couples - a distinction that had been upheld in 2002 by the SCC in *Nova Scotia (Attorney General) v. Walsh*.³⁷

Notably, the AG Canada offered an additional argument in *Halpern*, that “marriage is not simply a shopping list of functional attributes but a unique opposite-sex bond” that “is not truly a common-law concept, but one that predates our legal framework, through its long existence outside of it.”³⁸ The Ontario Court of Appeal categorically rejected this argument, stating bluntly

that “the fact that the common law adopted, rather than invented, the opposite-sex feature of marriage is irrelevant”; rather, the court found that the legal distinction is the crux of the matter.³⁹ Furthermore, the Court criticized the AG Canada’s “argument that marriage is heterosexual because it ‘just is’” as circular reasoning which sidesteps the entire s.15 analysis.⁴⁰

III. The Case for AG Independence

What makes the AG Canada’s legal strategy in *Halpern* and *EGALE*—not to mention his voting record in the House until the summer of 2003—all the more surprising is that Martin Cauchon did not personally believe the arguments his lawyers were advancing. After leaving office, Cauchon revealed that he had agreed with lower court rulings that the Charter’s equality rights required extending marriage to gay and lesbian couples.⁴¹ In a speech to Equality Forum, a Philadelphia-based organization which promotes GLBT equality, Cauchon stated: “In my society there is no place at all for homophobia...I believe that if the institution of marriage would be basically more open, if the institution of marriage would be more inclusive, at the end of the day, its a much better institution reflecting who we are...a stronger institution that [would remain] a cornerstone of society.”⁴² In a later speech at Harvard University, he says he rejected instituting same-sex civil unions instead of SSM because “separate but equal doesn’t exist in our country.”⁴³ Furthermore, Cauchon had been lobbying Cabinet and Prime Minister Chrétien even before the lower court rulings to address the issue of gay marriage, and had succeeded in getting Chrétien to refer the issue to the Commons justice committee for study.⁴⁴

There are some—the late John Edwards, the influential scholar of the Attorney General’s office, foremost among them—who would be troubled by Cauchon’s conduct in this matter. Edwards’s widely-cited argument from 1987 is that

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. It is not enough to assume that a public spirited

citizen or interest group will step forward to assert a Charter challenge. Merely insuring that the necessary funding is forthcoming to maintain such a suit...is not sufficient.”⁴⁵

He concludes, “[t]he door must be left open for the *extraordinary demonstration of the Attorney General's independent status...to argue the case on behalf of the public interest*”; that is, to advance a legal argument in court at odds with the wishes of the government.⁴⁶ It is likely that Cauchon’s situation is precisely what Edwards had in mind: an AG who holds a principled belief that the constitution requires a particular course of action, facing a political leadership who opposes this course of action on the basis of partisan politics.

Former Ontario AG Ian Scott and, more recently, Department of Justice Canada Senior Counsel Debra McAllister echo Edwards’s position. Scott contends that

[t]he proper representation of the public interest in some [Charter] cases may well require that the Attorney General argue that the challenged statute violates constitutional guarantees. The faithful exercise of the Attorney General’s responsibility to represent the public interest requires an *independent and objective* assessment of the circumstances of each case.⁴⁷

Scott emphasizes that AGs should strive to prevent situations when their litigation strategy is at odds with another Minister’s policy preferences, through the AG’s legal advisory role within Cabinet. However, when referring to those situations when “Cabinet refuses to take his or her advice that a legislative provision is unconstitutional,” particularly because of public pressure, Scott invokes Edwards’s admonition that the AG should make an extraordinary demonstration of his or her independent status.⁴⁸

Similarly, McAllister strongly endorses the view that AGs have the authority to litigate independently of the political executive’s control. Rejecting the view that Charter litigation fits a “2-sided courts-and-legislatures model,” she concludes that the AG “has become, increasingly, the guardian of the public interest under the Charter....What is most important is that the Attorney General has discretion, in the discharge of this function, to concede in a Charter challenge that legislation is unconstitutional.”⁴⁹ She goes on to stress that “there must be a clear imperative under the Constitution...a compelling legal or public interest reason for the Attorney

General to make a concession.”⁵⁰ Ironically, writing before the Court of Appeal decisions in *Halpern* and *EGALE*, she argued that “there is no overwhelmingly clear public interest choice to be made in the [same-sex] marriage cases,” as “marriage as an institution has almost as many detractors as supporters across society,” and the converging status of common-law partnerships and marriage means that recognizing SSM will have very few “concrete outcomes that impact on a person’s ability to live.”⁵¹

As I argue in the next section, McAllister’s focus is misplaced. The problem is not simply that there is no sufficiently clear public interest regarding SSM, but that the “public interest” is an inappropriate paradigm to guide the AG’s litigation behaviour.

IV. The Case Against the “Public Interest” Doctrine

From what does this “larger constitutional duty” to act as the “guardian of the public interest” derive, exactly? The answer from proponents of AG independence is surprisingly obscure. According to McAllister, Section 5(a) of the *Department of Justice Act* (and similar provisions in the provinces), which assigns the AG the responsibilities of the Attorney General of England, “imports the common law and has generally been understood to mean that the Attorney General must safeguard the public interest.”⁵² However, as Carney⁵³ notes, the very concept of the AG as “guardian of the public interest” in the context of civil litigation is a quite recent one, and was first articulated by Edwards in 1964.⁵⁴ Moreover, Edwards identifies the historical roots of this role in the AG of England’s practice of assisting tribunals inquiring into “definite matters of urgent public importance” (i.e., Royal Commissions or Commissions of Inquiry in the Canadian parlance), even when this was damaging to the AG’s party.⁵⁵ Needless to say, assisting a Royal Commission bears only passing resemblance to the conduct of constitutional litigation on behalf of the government, where the law itself is directly at stake. On this basis, Carney concludes, “It is apparent that the role of the Attorney as the guardian of the public interest is not as far reaching as that noble title might suggest. The functions outlined by Edwards in both his texts are quite specific and there is no acknowledgement of some all encompassing responsibility to take positive steps to protect the public interest whenever it is threatened.”⁵⁶

It is also problematic that Edwards and, by extension, Scott and McAllister, rely on the *British* tradition to justify AG independence in Charter litigation. While the British legal system provided the blueprint for Canadian legal institutions, the two systems have diverged dramatically since 1867. In particular, the British tradition lacks both entrenched rights and substantive judicial review of such rights—that is, judicially-enforced constitutional supremacy, in contrast to Parliamentary supremacy. Canadian-style rights litigation is not, therefore, an aspect of the AG of England’s role. It logically follows that the “powers and duties” of the AG of England cannot be invoked to justify the independence of Canadian AGs in such litigation. I argue elsewhere that a better analogy to Charter litigation comes from our own tradition of constitutional litigation in division of powers cases.⁵⁷ As the late Brian Dickson, former Chief Justice of the Supreme Court of Canada, admonished,

It has long seemed to me that many commentators are unaware that since 1867 Canadian courts have, in division of powers cases, decided whether Parliament in a particular piece of legislation has infringed provincial authority...or whether a provincial legislature has improperly entered the federal domain.... Many commentators rush to assert that the Charter marks the advent of a new era without fully exploring the nature of the era that preceded.⁵⁸

Like Charter rights, the federal division of powers is constitutionally entrenched and part of the “supreme law” identified by section 52(1) of the *Canada Act, 1982*. As such, the Constitution authorizes judicial review on the basis of federalism just as it does for the Charter, although federalism litigation has been conducted for much longer, beginning shortly after Confederation. While the foci of federalism and Charter litigation are obviously different—governmental jurisdiction versus the rights of citizens—both types of litigation affect policy areas that are beyond the scope of the AG’s jurisdiction, even in his dual capacity as Minister of Justice. As well, both Charter and federalism litigation often entail attempting to influence the judicial interpretation of constitutional text. My brief examination elsewhere of government litigation in six major federalism cases, ranging in time from 1938 to 1985, reveals a clear precedent of AGs tailoring their legal arguments in constitutional litigation to serve the government's political interests.⁵⁹

For the sake of argument, however, let us put aside the dubious historical roots of the “public interest” doctrine. It is still the case that the AG is mandated by statute to regulate and conduct all litigation for or against the Crown or any department⁶⁰; one could argue that “guarding the public interest” is an appropriate guideline for the AG in the discharging of this responsibility. This view is, however, deeply flawed for several reasons, which I discuss in turn below.

1. *The Myth of the “Public Interest”*

As Roach observes, “the very notion of a single public interest...is hotly contested.”⁶¹ Echoing Stenning,⁶² he acknowledges that “the idea of the public interest is based on a consensus view of politics. Always suspect, this view has become increasingly unrealistic in the last two decades as various groups have made their claims and their allegiance to certain parts of the Charter clear.”⁶³ In a society as complex and pluralistic as Canada, Edwards’s conception of the public interest is little more than code for “what the AG believes to be right.” It is important at this point to re-emphasize that I am speaking here of civil litigation, and not of criminal prosecution; the latter raises the spectre of politically-motivated charges against innocent people, and it is uncontested that AGs should enjoy enough independence from government to prevent such miscarriages of justice. It remains less clear whether that independence should extend to conceding the unconstitutionality of *Criminal Code* provisions during criminal trials and appeals,⁶⁴ but that is another matter, and not germane here.

2. *No AG Monopoly Over Guarding the Public Interest*

It follows directly from the preceding point that the AG does not have any monopoly over either the interpretation or representation of the public interest. On one hand, the pluralistic public interest can be represented *by* the public in litigation, through the participation of citizens and interest groups. After all, why does the public interest need to be guarded by a state official—a full, partisan member of the political executive, no less—if the “public” can appear in court to speak for itself? This has been encouraged in a variety of ways over the past thirty years,

including: the relaxation of traditional standing rules by the Supreme Court of Canada, culminating in *Minister of Justice v. Borowski*⁶⁵; government funding of interest group litigation through the Court Challenges Program⁶⁶; and, most importantly, increasing access to courts for third-party interveners. Huscroft concurs: “Developments in the law of standing...suggest that, although the Attorney General exercises important powers in the public interest, these powers can no longer be described as exclusive.”⁶⁷ Edwards’s statement, cited above, that it is “not enough” for the AG “to assume that a public spirited citizen or interest group will step forward to assert a Charter challenge” clearly anticipated this criticism. However, Edwards merely stating this opinion is not a convincing rebuttal. Moreover, in the case of SSM, no such assumption was even necessary: in *Halpern* alone, seven same-sex couples challenged the legal status quo, with the support of three interest groups (EGALE Canada, the Metropolitan Community Church of Toronto, and Canadian Coalition of Liberal Rabbis for Same-Sex Marriage) and the Canadian Human Rights Commission. This is not to deny the importance of courts hearing a variety of viewpoints (a point to which I return below), however, there are other measures the courts can employ to this effect that do not require the AG to oppose his or her own government. McAllister argues that judicial review of AG concessions, combined with the court’s ability to appoint an amicus (third-party “friend of the court”), provide a “sufficient safeguard” against the AG abusing the power to concede.⁶⁸ Why could not the same safeguards suffice to ensure that the public interest was adequately represented by other parties, while maintaining the adversarial nature of legal argument upon which our judicial system is based?

On the other hand, the AG’s responsibility to serve the public interest is not unique among government officials. Carney correctly observes, AGs “are not *the* guardians of the public interest. That 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.”⁶⁹ If the AG has no legitimate claim to a monopoly on the public interest, then his or her monopoly over the conduct of government litigation presents a problem when used to concede a law’s unconstitutionality on the basis of the public interest, over the objections of Cabinet. 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.

The AG's conception of the public interest might also be excessively legalistic. Julie Jai, herself a government lawyer, comments, "[w]here litigation positions are determined within the Ministry of the Attorney General, decisions tend to be made primarily on legal 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."⁷⁰ In the context of Charter litigation and the section 1 "reasonable limits" provision, she continues,

In cases where legal and policy perspectives lead to differing conclusions, it is arguable that these competing values should be weighed at a forum involving not just lawyers, but politicians and policy professionals. The determination of whether section 1 of the Charter can be used to defend a government action in question in a particular case would also appear to be an issue involving as much policy as law, and might be most appropriately decided by Cabinet.⁷¹

3. *The Indeterminacy of Constitutional Law*

Closely tied to the AG's supposed role as guardian of the public interest is the idea that the AG must have the institutional freedom to ensure that the Constitution is respected. For example, McAllister states, "Clearly, the Attorney General is obligated to review legislation to ascertain whether it is consistent with the Charter. Although this applies most clearly when legislation is being drafted, a similar obligation must apply where there is a constitutional challenge and the Attorney General has carriage of the litigation."⁷² Similarly, Freiman asserts that "The Chief Law Officer of the Crown must ensure that no position is taken in court that is inconsistent with the law regardless of policy preferences."⁷³

This view betrays an overly simplistic understanding of the nature of constitutional law, namely, that Charter rights are fixed and unequivocal. As former United States Supreme Court Justice William Brennan writes, "the Constitution does not take the form of a litany of specifics. There are, therefore, very few cases where the constitutional answers are clear."⁷⁴ In the Canadian context, Knopff and Morton write, echoing Peter Russell, "The wording of the Charter is a tolerably clear expression of the regimes' core principles," but

the kinds of questions most likely to arise for judicial review under the Charter do not concern such basic challenges to the “central core” of liberal democratic principles. The bulk of Charter jurisprudence turns on questions encountered “as we move out from the central core of these values” toward the periphery, where the Charter's meaning is “ambiguous and indeterminate.”⁷⁵

Similarly, legal scholar Jeremy Webber writes:

Legal texts are never self-executing. They never specify, with complete clarity, all the situations in which they apply. Instead, they are phrased in general terms, describing the general type of situation they govern, with what typical effect. This is especially true of constitutional norms, which are usually highly abstract, affirming broad principles applicable to a wide variety of circumstances.⁷⁶

The indeterminacy of what Charter rights mean is vividly illustrated by the fact that Supreme Court Justices frequently disagree about the scope of rights, what justifies their violation under section 1, and what sorts of remedies should follow from unreasonable violations. Similarly, one cannot assume that the Court’s jurisprudence is a reliable guide, as it is “not always marked by predictability, consistency or coherence.”⁷⁷ Furthermore, constitutional law is inherently indeterminate when applied to new factual issues or social situations, for example, the demand for same-sex marriage.

The indeterminacy of Charter meaning has two important consequences for the issue of AG independence. First, the argument for independence implies a somewhat mechanistic application of legal principles and jurisprudence to policy issues, which is clearly false. Moreover, in the context of s.1, there may be a wide variety of possible justifications for both the objective of a policy and the policy means chosen. As well, multiple legal strategies are possible, including full defense, conceding only the violation but not s.1, conceding both, not conceding a violation but offering no s.1 defense, or (somewhat oddly) conceding only s.1, not to mention the range of remedial issues (invalidation, “reading in,” severance, and whether to suspend the

judicial remedy).⁷⁸ The AG cannot resolve how to approach these issues purely on the basis of law or principle.

The second consequence of the Charter's indeterminate meaning relates to the AG's responsibility to the courts. A central component of the judge's role, especially in constitutional law cases, is trying to resolve this indeterminacy, and nothing in the Charter alters the fundamentally adversarial nature of litigation. If the AG fails to provide possible interpretations of Charter rights that would save the government policy at stake, the court cannot make fully-informed decisions. Justices Lamer and La Forest said as much in their criticism of the federal government's concession in *Schachter*: "[the concession] precludes this court from examining the s.15 issue on its merits, whatever doubts might or might not exist about the finding below. Further, the appellants' choice not to attempt a justification under s.1 at trial deprives the court of access to the kind of evidence that a s.1 analysis would have brought to light."⁷⁹ By declaring policies unconstitutional prior to formal adjudication—what Scott calls the “quasi-judicial function”⁸⁰—AGs in fact usurp the interpretive function of the judicial branch. If, like Tushnet,⁸¹ Huscroft,⁸² and Waldron⁸³ (among others), we go one step further and deny that the judiciary has a monopoly over the “correct” interpretation of the constitution, it is even more important that AGs faithfully represent their government's position.

None of this is to suggest that the government should not proceed if it wishes to promote constitutional principles, such as equality. For example, it need not wait to legalize SSM just because there is litigation pending. However, as I argue below, it should seek to do so through the formal legislative mechanisms of Parliament.

V. The AG's Responsibility to Parliament

To this point, my argument has focused on the scenario where the AG's personal position conflicts with that of the political executive (Cabinet/PM), as was the situation for Cauchon in *Halpern* and *EGALE*. Related to the inherent problems with the “public interest” doctrine, I have argued that the AG should represent the interests of the government, which is, ultimately, the AG's client; as Huscroft writes, “[l]ike any other litigant, the Crown is entitled to its day in court.”⁸⁴ But what about when the wishes of the political executive are at odds with Parliament?

This scenario most commonly arises when the government wants to concede in court that existing legislation violates the constitution, rather than repealing or amending the law through Parliament. The AG's legal argument in *Hendrick*, a SSM case in the Quebec Court of Appeal, raised precisely this issue.

On September 6, 2002, the Superior Court of the District of Montreal struck down section 5 of the *F.C.H.A.* (Harmonization Act), section 1.1 of the *M.B.O.A.*, and that part of paragraph 2 of article 365 of the *Civil Code of Quebec* providing that marriage can only be solemnized between a man and a woman, but suspended this remedy for 2 years. The AG Canada initially appealed this decision to the Quebec Court of Appeal, but on July 15, 2003—five weeks after the *Halpern* ruling but two days before unveiling draft legislation legalizing SSM and referring it to the Supreme Court—Cauchon withdrew the appeal and renounced the suspension of the declarations of invalidity. Cauchon's position was now consistent with the Cabinet's, as represented by the draft bill and reference,⁸⁵ but he was conceding the unconstitutionality of validly enacted legislation before Parliament had even been permitted to debate the draft legislation.

Huscroft has written the most developed criticism of AG litigation that by-passes Parliament in this fashion, on the grounds that it does not respect the role of the legislative branch and the democratic process.⁸⁶ Although he argues that the AG should be independent from the political executive, it is only to the extent necessary for the AG to adhere to the will of the legislature. Huscroft argues that, as a member of Parliament, a government Minister, and the Chief Law Officer of the Crown, the AG has a duty to represent the legislature, which requires defending impugned legislation and prosecuting existing laws. Huscroft criticizes Scott for his “presumption that the public interest lies only in vindicating the *Charter* rights of individuals,” which “overlooks the constitutional interest inherent in defense of the legislative process,” in particular “the effect of denying the legislative branch a voice in the judicial process.”⁸⁷ Put simply, governments should repeal or amend “obviously unconstitutional” laws through the legislature, and not leave it to the AG to orchestrate their judicial nullification.

Huscroft bases his argument that “the Attorney General is also the Legislature's lawyer” on the AG's responsibility for drafting private members' Bills, providing advice to the Legislature and legislative committees about proposed legislation, and his accountability as a member of Cabinet (and of Parliament) to the House.⁸⁸ One possible counter-argument is that

none of these roles suggest that the AG should be *bound* to the will of the Legislature, let alone past Legislatures. The AG's advisory functions clearly do not generate such a duty, and the typical understanding of Ministerial accountability—including for criminal prosecutions—does not either.⁸⁹ Stenning, citing Edwards, observes that Ministerial accountability in a parliamentary system means answerability for one's actions after-the-fact, rather than strict adherence to the will of the legislature in the conduct of litigation: "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."⁹⁰

This argument equates ministerial discretion in the conduct of litigation with other forms of ministerial discretion, such as Orders-in-Council—an analogy that is flawed. While both kinds of discretion are authorized by prior legislation (for example, in Acts establishing the Ministries and their jurisdiction), an Order-in-Council (or, the decision whether to prosecute a given case) cannot have the effect of striking down legislation; AGs conceding in court that legislation is unconstitutional does exactly that. Thus, after-the-fact "answerability" to parliament for ministerial decisions takes on quite a different character for our two types of discretion. In the case of Orders-in-Council, the Minister must defend why she exercised her discretion in the way that she did, while accepting (barring improper conduct) that the Minister does have the legislative authority to exercise that discretion. For the AG, on the other hand, the question from parliament is "why did you not defend our legislation?," where the AG's actions had the effect of usurping the legislative branch's authority to amend or repeal legislation. The adoption of the Charter may have fundamentally altered our constitutional order, but it did not eliminate the convention of responsible government which is the bedrock of the Canadian democratic process, nor the presumption that laws duly enacted by parliament retain their full legal weight until formally repealed or amended *by* parliament.

The core of Huscroft's thesis therefore remains compelling: the government's use of the AG and the courts to amend or repeal legislation undermines the legitimacy of representative institutions. This is particularly troubling given the current view—largely deserved—that legislatures are ineffective because of their domination by the executive, and increasingly First Ministers.⁹¹ Moreover, it is widely accepted that the "judicialization" of politics—whether through greater involvement in policymaking by judges or legal bureaucrats—has come largely

at the expense of the legislative branch, a fact recently lamented by Janet Hiebert.⁹² For these reasons, I share Huscroft’s view that AGs should defend the constitutionality of legislation, but also his caveat that

It does not follow, however, that they should do so in an aggressive or overzealous manner. The Attorney General cannot be concerned simply with winning Charter challenges. Advocacy on behalf of the Crown should be measured and respectful, and the Attorney General must be concerned with the orderly development of the law. The Attorney General should ensure that, in defending legislation subject to Charter challenge, all relevant arguments are put before the Court, whether or not they support the argument of constitutionality. But there should be no doubt that the Attorney General has a duty to defend legislation subject to Charter challenge.⁹³

Notably, senior lawyers in the AG’s office seem to concur. As one indicated in his own words, “the AG’s role, I think, as most of us conceive it, is to be Parliament’s lawyer, to say what can be said on behalf of that legislation, regardless of who passed it.”⁹⁴ According to another, “I think the overriding concern in the non-criminal area, is, if not actually winning the case, minimizing the loss, so that Parliament can have a range of policy options.”⁹⁵

VI. Conclusions

In defending then-AG Cauchon’s decision to defend the traditional definition of marriage in *Halpern* and *EGALE*, I have articulated a radical critique of the oft-cited arguments by John Edwards and Ian Scott that the AG has a special duty to guard the public interest in Charter litigation. I reject the very notion that the AG has such a duty when duly-enacted laws are subjected to constitutional challenge under the Charter, first, because the concept of a coherent “public interest” is unintelligible, and second, because the AG has no monopoly over interpreting and defending the public interest. Notwithstanding my approval of Cauchon’s actions in those cases, however, the government and the AG should not have conceded in *Hendrick* and used the reference procedure to advance their ultimate goal—legalizing SSM—through indirect and

disingenuous means which disrespected the democratic role of parliament. As Cauchon himself said after leaving government: “Politicians should not run for the job if they are not prepared to face up to social challenges and them through, respectfully, with citizens.... Political leadership is important because not fulfilling your duty ultimately undermines democracy, and contributes to cynicism about politics and politicians.”⁹⁶

To clarify, I do not take this position based on an ideological or policy preference with respect to SSM; on the contrary. Rather, this is a matter of properly exercising institutional authority, and, as such, represents a “hard case” for an AG with a strong principled stand in favour of SSM. That said, it was not the case that there was no other way to pursue this policy change other than conceding the unconstitutionality of heterosexual marriage in court. It was, and is, possible to work through Cabinet and parliament, as we know Cauchon did.⁹⁷ This route may ultimately work, if the recent vote defeating the Opposition motion to block Second Reading of the *Civil Marriage Act* is any indication. And what if Parliament proves unwilling to recognize SSM? This would seem to be precisely the type of situation for which the courts, insulated from elections, are well-suited to protect the rights of a minority, should the judges so decide—and they are perfectly able to do so without the AG pre-emptively conceding the matter, as demonstrated in *Halpern*. A court ruling ultimately falls back to Cabinet and Parliament, which must choose whether they are sufficiently opposed to the court's ruling to use the legislative override. In short, there are already sufficient legislative and judicial mechanisms in place to pursue policies such as SSM, without the AG (even with the blessing of the political executive) using the shortcut of “conceding” the law's unconstitutionality.

It is another matter *why* AG Cauchon and his lawyers argued *Halpern* and *EGALE* the way they did, and why, if he fundamentally disagreed with Cabinet's position, he did not resign rather than argue against his conscience. I have written previously that the AG occupies a complex institutional position that simultaneously serves all three branches of government, in addition to being fully implicated in partisan politics by virtue of the AG's status as an elected MP and full member of Cabinet.⁹⁸ As cited above, Justice Department personnel clearly see themselves as having a duty to Parliament. Also, it is know well-known that Cauchon pushed Cabinet and PM Chrétien to recognize SSM in his capacity as the government's chief legal advisor, as he was fully within his authority and responsibility to do. Perhaps he felt that he could better serve the interests of same-sex couples by remaining within Cabinet, and using

persuasion over confrontation. Unfortunately, Mr. Cauchon's office did not respond to my requests for an interview.

Finally, it should go without saying that I reject unequivocally Edwards's⁹⁹ proposal that Canada should establish a separate litigation office to represent the government in all criminal and civil proceedings (Ministry of Solicitor General, according to Edwards), which would be responsible to the AG but would sit outside Cabinet, like the Office of the Solicitor General in the United States. The very notion of such an institution, operating at arm's length from the elected branches (in non-criminal litigation, anyway), is premised on the idea that it has a higher duty beyond representing the government—typically, to guard the “public interest.” As I have detailed above, there is no justification for such a duty, at least in civil litigation, in our system of government.

APPENDIX

SSM Timeline:

Sept. 6, 2002	Superior Court of the District of Montreal declares in <i>Hendrick</i> that section 5 of the <i>Federal Law-Civil Law Harmonization Act, No. 1</i> (Harmonization Act), section 1.1 of the <i>Modernization of Benefits and Obligations Act</i> and that part of paragraph 2 of article 365 of the <i>Civil Code of Quebec</i> providing that marriage can only be solemnized between a man and a woman to be inoperative, but suspends the declarations of invalidity for a period of two years.
May 1, 2003	BCCA rules in <i>EGALE</i> ; remedy delayed until July 12, 2004
June 10, 2003	OCA rules in <i>Halpern</i> ; remedy immediate
June 17, 2003	AG Canada Cauchon announces Ottawa won't appeal either decision
July 8, 2003	AG Canada lifts suspension of BCCA remedy
July 15, 2003	AG Canada withdraws appeal in <i>Hendrick</i> (case continues anyway, as appeal brought by 3 rd party, the Catholic Civil Rights League)
July 17, 2003	Draft legislation legalizing SSM referred to SCC
Sept. 16, 2003	By one vote, House of Commons defeats Opposition motion by the Canadian Alliance to reaffirm the traditional heterosexual definition of marriage. 52 Liberals vote for motion, 31 abstain, and Cabinet is forced by PM Chrétien to oppose motion.
December 12, 2003	Irwin Cotler appointed AG Canada and Minister of Justice
January 26, 2004	Arguments heard before QCA in <i>Hendrick</i>
January 28, 2004	Revised terms of SSM reference to SCC announced (whether status quo violates Charter)
March 19, 2004	QCA strikes down FCHA, MBOA and CCQ provisions in <i>Hendrick</i>
October 6-7, 2004	SSM Reference case heard by SCC
December 9, 2004	SSM Reference decision rendered by SCC, clarifying issue is federal jurisdiction and bill would not violate Charter. However, they concluded while the Charter's religious freedoms would prevent the state from compelling churches to marry gay couples, legislative guarantees to that effect are provincial, not federal, jurisdiction. Also, SCC refuses to rule on whether the opposite-sex requirement for marriage in civil and common law violates Charter
February 1, 2005	Liberal government tables Bill C-38, the <i>Civil Marriage Act</i> , which recognizes SSM.
April 13, 2005	Proposed amendment to Bill C-38 by Opposition Conservative Party, which would have denied the bill second reading, defeated.

NOTES

- ¹ *Halpern v. Canada*, [2003] O.J. No. 2268.
- ² *EGALE v. Canada* [*subnom Barbeau v. Canada*], [2003] BCCA 251; EGALE (Equality for Gays and Lesbians Everywhere) is an organization which promotes civil and equality rights for gays and lesbians.
- ³ For examples of the latter, see Philip C. Stenning (1986) *Appearing for the Crown: a Legal and Historical Review of Criminal Prosecutorial Authority in Canada* (Cowansville, PQ: Brown Legal Publications); Ian Scott (1986-87) "The Role of the Attorney General and the Charter," 29 *Criminal Law Quarterly*, 187-199; Law Reform Commission of Canada (1990), *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor*, Law Reform Working Paper 62 (Ottawa: The Commission); Don Stuart (1995) "Prosecutorial Accountability in Canada," *Accountability for Criminal Justice: Selected Essays*, ed. Philip Stenning (Toronto: University of Toronto Press); Susan Chapman & John McInnes (1996) "The Role of the Attorney-General in Constitutional Litigation: Re-Defining the Contours of the Public Interest in a Charter Era," *The Charter's Impact on the Criminal Justice System*, ed. Jamie Cameron (Toronto: Carswell); Kent Roach (2000) "The Attorney General and the Charter Revisited," 50 *University of Toronto Law Review*: 1-40; and Lori Sterling & Heather Mackay (2003) "Constitutional Recognition of the Role of the Attorney General in Criminal Prosecutions: *Krieger v. Law Society of Alberta*," 20 *Supreme Court Law Review*(2d), 169-196.
- ⁴ J.L.I.J. Edwards (1987) "The Attorney General and the Charter of Rights," *Charter Litigation*, ed. Robert J. Sharpe (Toronto: Butterworths)
- ⁵ Ian Scott (1989) "Law, Policy, and the Role of the Attorney General: Constancy and Change in the 1980s," 39 *University of Toronto Law Journal*, 109-126.
- ⁶ Debra M. McAllister (2002) "The Attorney General's Role as Guardian of the Public Interest in Charter Litigation," 21 *Windsor Yearbook of Access to Justice (Symposium: 20 Years Under the Charter)*, 47-90. McAllister provides a thorough summary of the AG independence debate, and as such, the reader will detect some overlap between her work and my own in this regard.
- ⁷ *Hendrick v. Québec (Procureure générale)*, [2004] R.J.Q. 851, [2004] R.D.F. 247.
- ⁸ Grant Huscroft (1996) "The Attorney General and Charter Challenges to Legislation: Advocate or Adjudicator?," 5 *National Journal of Constitutional Law*, 125-162.
- ⁹ *Hyde v. Hyde and Woodmansee*, [1866] L.R. 1 P.&D. 130 at 133 per Lord Penzance.
- ¹⁰ [2003] BCCA 251 at para. 41.
- ¹¹ S.C. 2000, c. 12.
- ¹² *Halpern v. Canada* [2003] O.J. No. 2268 at para. 28.
- ¹³ S.C. 2001, c. 4.
- ¹⁴ Notably, section 1.1 of the *Modernization of Benefits and Obligations Act (M.B.O.A.)*, S.C. 2000, c. 12), an omnibus bill amending 68 federal statutes to extend benefits and obligations available to heterosexual common-law spouses to same-sex couples, affirms the common-law definition of "marriage." However, the parties in *Halpern* concurred that "s.1.1 does not purport to be a federal statutory definition of marriage," and the section was not reviewed by the court ([2003] O.J. No. 2268 at para. 28).
- ¹⁵ Grant Huscroft (2004) "'Thank God We're Here': Judicial Exclusivity in Charter Interpretation and Its Consequences," 25 *Sup. Ct. L. Rev.* (2d), 258.
- ¹⁶ *Ibid.*
- ¹⁷ Kim Lunman and Drew Fagan, "Marriage divides the House," *The Globe and Mail* (September 17, 2003), A1; A4.
- ¹⁸ [2004] 3 S.C.R. 698.
- ¹⁹ R.S. 1985, c. J-2. The section reads, "The Attorney General of Canada (d) shall have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada."
- ²⁰ Deborah MacNair identifies several of the exceptions to this monopoly, including the lawyers for the Canadian International Trade Tribunal, the Judge Advocate General (National Defence), the Canadian Human Rights Commission, the Office of the Information and Privacy Commissioners, the Senate and House of Commons: (2001) "The Role of the Federal Public Sector Lawyer: from Polyester to Silk" 50 *University of New Brunswick Law Journal*, fn 10. See also Mélanie Brunet (2000) *Out of the Shadows: The Civil Law Tradition in the Department of Justice Canada, 1868-2000* (Ottawa: Department of Justice Canada), 67.

21 Morris Rosenberg (2003) “An Inside Look: A Message from the Deputy Minister,” *Serving Canadians: Justice Canada* 1 (1), <http://www.justice.gc.ca/en/dept/pub/jc/vol1/no1/index.html>. See also Owen Lippert (1999) “The Cost of Justice-The Department That Is,” 23 *Canadian Lawyer* (8), 14-17.

22 Matthew Hennigar (2002) “Players and the Process: Charter Litigation and the Federal Government.” 21 *Windsor Yearbook of Access to Justice (Symposium: 20 Years Under the Charter)*, 91-109.

23 According to Section 2(2) of the *Department of Justice Act*, the Minister of Justice “is *ex officio* Her Majesty's Attorney General of Canada, holds office during pleasure and has the management and direction of the Department.” (R.S. 1985, c. J-2.) Thus, the AG simultaneously sits in Cabinet, acts as the official legal advisor to the Governor General, and is responsible for the administration of justice.

24 According to a 2001 report, the Federal Prosecution Service (FSP) engaged 233 legal firms and 763 counsel as agents, compared to only 316 in-house counsel: Department of Justice Canada (2001) *Serving Canadians: Report of the Federal Prosecution Service Review* (Ottawa: Department of Justice Canada), 3.

25 *Ibid.*

26 Personal interview (July 31, 2001, Ottawa).

27 Department of Justice Canada (2000), *Federal Prosecution Service Deskbook* (Ottawa: Department of Justice Canada), IX-46-1. Although not yet publicly available, there is a parallel handbook for civil litigation, which outlines the same process of NLC review and Ministerial approval.

28 *Ibid.*, Part IX, Chapter 45, “Consultation with Responsibility Centres,” and Part IX, Chapter 46, “The Role of the Litigation Committee.”

29 *Ibid.*, IX-46-3.

30 Senior Department of Justice Canada official, personal interview (April 17, 2002, Ottawa).

31 Senior Department of Justice Canada official, personal interview (July 31, 2001, Ottawa).

32 Senior Department of Justice Canada official, personal interview (April 17, 2002, Ottawa).

33 Tonda MacCharles, “It Was An Issue of Rights,” *Toronto Star* (October 2, 2004), H1, H4.

34 *Ibid.*, H4.

35 Quoted in *Halpern v. Canada (AG)*, [2003] O.J. No. 2268 (Ontario Court of Appeal) at para. 82.

36 [1999] 2 S.C.R. 3.

37 [2002] SCC 83.

38 Roslyn Levine, Attorney General of Canada factum in *Halpern v. Canada (AG)*, cited in Shannon Kari, “Marriage exists outside Canada’s law, Ottawa argues,” *The Gazette (Montreal)* (April 19, 2003), A14.

39 *Halpern v. Canada (AG)*, [2003] O.J. No. 2268 (Ontario Court of Appeal) at para. 68.

40 *Ibid.* at para. 71.

41 Tonda MacCharles, “Cauchon Takes Stand on Social Issues,” *Toronto Star* (October 4), A4.

42 Martin Cauchon, speech to Equality Forum International Business Colloquium Dinner, Philadelphia, PA, May 1, 2004, excerpted at <http://www.samesexmarriage.ca/advocacy/EF040504.htm>.

43 MacCharles (October 4, 2004), A4.

44 MacCharles (October 2, 2004), H4.

45 Edwards (1987), 53.

46 *Ibid.* [emphasis added].

47 Scott (1986-87), 197 [emphasis added].

48 Scott (1989), 126.

49 McAllister, 49.

50 *Ibid.*, 87.

51 *Ibid.*

52 *Ibid.*, 50. The full text of Section 5(a) reads as follows: “the Attorney General of Canada (a) is entrusted with the powers and charged with the duties that belong to the office of the Attorney General of England by law or usage, in so far as those powers and duties are applicable to Canada, and also with the powers and duties that, by the laws of the several provinces, belonged to the office of attorney general of each province up to the time when the *Constitution Act, 1867*, came into effect, in so far as those laws under the provisions of the said Act are to be administered and carried into effect by the Government of Canada.” (R.S. 1985, c. J-2.)

53 Gerard Carney (1997) “Comment—The Role of the Attorney-General,” 9 *Bond L.R.* (1), 5.

54 John Ll.J. Edwards (1964) *The Law Officers of the Crown: a study of the offices of Attorney-General and Solicitor-General of England with an account of the office of the Director of Public Prosecutions of England* (London: Maxwell & Sweet). See also J.Ll.J. Edwards (1984) *The Attorney General, Politics and the Public*

Interest (London: Maxwell & Sweet). Notably, McAllister acknowledges this point (52), but it does not shake her support for the AG's "guardian" role.

55 Carney (1997), 5.

56 *Ibid.*

57 Matthew A. Hennigar (1998) "Attorney General - Executive Relations in Charter Litigation," presented at the annual meeting of the Canadian Political Science Association, Ottawa.

58 Brian Dickson (1994) "The Canadian Charter of Rights and Freedoms: dawn of a new era?," 2 *Review of Constitutional Studies*, 4-5.

59 Hennigar (1998). The cases examined were: *Reference re Alberta Statutes* [1938] 2 S.C.R. 100; *Anti-Inflation Act Reference* [1976] 2 S.C.R. 373; *Patriation Reference* [1981] 1 S.C.R. 753; *AG Quebec v. Blaikie* [1979] 2 S.C.R. 1016; *AG Manitoba v. Forest* [1979] 2 S.C.R. 1032; and the *Reference re Manitoba Language Rights* [1985] 2 S.C.R. 374. The predominance of reference cases is not accidental. The fact that references are initiated by political executives provides a strong guarantee that political leaders are aware of and comprehend the issues at stake, and how the law relates to the policy issues.

60 See note 10 above.

61 Roach (2000), 26-27.

62 Stenning (1986), 304.

63 Roach (2000), 27.

64 See, for example, Huscroft (1996).

65 [1981] 2 S.C.R. 575.

66 See Ian Brodie (2002) *Friends of the Court: the Privileging of Interest Group Litigants in Canada* (Albany: State University of New York Press).

67 Huscroft (1996), 129-130.

68 McAllister (2002), 90.

69 Carney (1997), 6.

70 Julie Jai (1997-98) "Policy, Politics and Law: Changing Relationships in Light of the Charter," 9 *National Journal of Constitutional Law*, 17.

71 *Ibid.*, 18 [internal citations deleted].

72 McAllister (2002), 82.

73 Mark J. Freiman (2002) "Convergence of Law and Policy and the Role of the Attorney General" 16 *Sup.Ct.L.Rev.* (2d), 339-340.

74 William J. Brennan Jr. (1996) "How the Supreme Court Arrives at Decisions," *American Government: Readings and Cases* (12th edition), ed. Peter Woll (NY: HarperCollins), 455.

75 Knopff and Morton (1992), *Charter Politics* (Scarborough: Nelson Canada), 147.

76 Jeremy Webber (1994) *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (Montreal: McGill-Queen's University Press), 244.

77 Freiman (2002), 340.

78 Huscroft (1996), 141-161 explores the various strategies regarding concession in Charter litigation.

79 [1992] 2 S.C.R. 679 per Lamer J. at 689. This sentiment was echoed more recently by L'Heureux-Dubé and Bastarache JJ in *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 151, and by the four-Justice minority in *Sauvé v. Canada* [2002] 3 S.C.R. 519 at para. 78 per Gonthier J.

80 Scott (1989), 119.

81 Mark Tushnet (1995) "Policy Distortion and Democratic Debilitation: Comparative Illumination of the Counter-majoritarian Difficulty," 94 *Michigan L. Rev.*, 245-301.

82 Huscroft (2004).

83 Jeremy Waldron (1999) *Rights and Disagreement* (Oxford: Clarendon Press).

84 Huscroft (2003) "Reconciling Duty and Discretion: the Attorney General in the Charter Era," presented to the conference on The Attorney-General in the 21st Century: A Symposium in Honour of Ian Scott, Faculty of Law, Queen's University, Kingston, Ontario, 32 [publication forthcoming in a volume edited by David Mullan and Gary Trotter]. My thanks to the author for making this paper available]. See also Freiman (2002), 339.

85 MacCharles (October 2, 2004), H4.

86 Huscroft (1996); Huscroft (2003).

87 Huscroft (1996), 154-155.

88 *Ibid.*, 128.

89 See, for example, Stenning (1986), 301-306.

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- ⁹⁰ Cited in Stenning (1986), 302 [emphasis in original].
- ⁹¹ Donald J. Savoie (1999) *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press).
- ⁹² Janet Hiebert (2002) *Charter Conflicts: What is Parliament's Role?* (Montreal-Kingston: McGill-Queen's Press). On the nature and impact of judicialization generally, see C. Neal Tate and Torbjorn Vallinder, eds. (1995) *The Global Expansion of Judicial Power* (New York: New York University Press).
- ⁹³ Huscroft (2003), 43 [internal footnotes omitted].
- ⁹⁴ Personal interview (April 17, 2002, Ottawa).
- ⁹⁵ Personal interview (July 31, 2001, Ottawa).
- ⁹⁶ Cited in MacCharles (October 4, 2004), A4.
- ⁹⁷ MacCharles (October 2, 2004), H4.
- ⁹⁸ Matthew Hennigar (2004) "The Canadian Government's Litigation Strategy in Sexual Orientation Cases," presented at the annual meeting of the Canadian Political Science Association, Winnipeg.
- ⁹⁹ Edwards (1987), 56-7.