January 25, 2013

The Legality of Legal Advising

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Matter considered:

Edgar Schmidt v Canada (Attorney General) Federal Court File #T-2225-12

Introduction

On December 13, 2012 Edgar Schmidt, a Department of Justice lawyer, filed a Statement of Claim in Federal Court naming the federal Attorney General as Defendant. The Statement of Claim alleges that the Minister of Justice and the Deputy Minister of Justice have violated their obligations under various pieces of legislation that impose duties on the Minister of Justice to examine proposed legislation to determine if it is "inconsistent with the purposes and provisions" of the *Canadian Bill of Rights* or the *Canadian Charter of Rights and Freedoms*, and to advise the House of Commons if it is so (see in particular: section 3 of the *Canadian Bill of Rights*, SC 1960, c 44; section 4.1 of the *Department of Justice Act*, RSC 1985 c J-2; section 3(2) and (3) of the *Statutory Instruments Act*, RSC 1985 c S-22).

In his Statement of Claim Schmidt states that the Minister of Justice has delegated responsibility for examining proposed legislation to the Legislative Services Branch of the Department of Justice. He further alleges that, with the knowledge and approval of the Deputy Minister, the Legislative Services Branch has since 1993 adopted a narrow interpretation of the Minister's duties. Across liberal and conservative governments it has taken the position that the Minister of Justice will not be advised that he or she has a duty to report to the House of Commons unless legislation is "manifestly" or "certainly" inconsistent with the *Bill of Rights* or the *Charter*. Further, Schmidt alleges that the policy of the Legislative Services Branch is that legislation will not be viewed as clearly or manifestly inconsistent provided that all of the arguments in favour of proposed legislation's consistency with the *Bill of Rights* or *Charter* add up to at least a 5% chance of success. Under the policy all that is necessary is that "some argument can reasonably be made" in favour of the proposed legislation's consistency with the *Bill of Rights* and the *Charter*, even if all of the arguments that can reasonably be made in its favour have cumulatively a 5% chance of succeeding. He alleges, in other words, that proposed legislation that has a 70%, 80%, 90% or even 94% chance of being struck down by a court is not viewed by the Legislative Services Branch as giving rise to any duty to report to the House of Commons by the Minister of Justice.

On the day after Schmidt filed his Statement of Claim he was suspended by the Department of Justice without pay (see Globe and Mail article here and Toronto Star editorial here). The Department of Justice has not yet filed a Statement of Defence to Schmidt's actions and according to media reports it has taken the position in motions before the Federal Court Trial

Division that "the courts shouldn't 'meddle in employment affairs' and that the minister's reporting practices are an issue between the minister and Parliament." (Globe and Mail). It has also apparently taken the position that the materials at issue are subject to solicitor-client privilege.

Obviously Schmidt's allegations are not proven. In this blog I want to explore, however, the issues of lawyers' ethics that the allegations raise – to treat them as, at this point, a hypothetical case. My focus will be on the substance of Schmidt's allegations rather than on the questions of solicitor-client privilege, since at this point the only information I have on the privilege dispute is based on media reports. With respect to Schmidt's allegations I will argue that lawyers who actually engaged in conduct such as that described in Schmidt's Statement of Claim would, absent some qualifying or mitigating facts, have engaged in seriously unethical conduct. The obligation of a lawyer is to be a zealous advocate for her client within the bounds of the law. That means that, while lawyers understand themselves to be advocates, advocacy is only ever legitimate where it remains within the law: a lawyer may be a hired gun, but that doesn't mean that you can hire him to rob a bank. And respect for the law imposes an actual obligation on the lawyer, an obligation to engage in good faith interpretation of what the law means, and of the duties and limits it imposes. A lawyer who opined that legislation is not "inconsistent with the *Charter of Rights and Freedoms*" where that legislation has only the slightest chance of surviving a constitutional challenge (5%!) would not have engaged in good faith interpretation of what the *Department of Justice Act* requires of the Minister of Justice. Indeed, that sort of interpretation may be better described as willful blindness about the law than as interpretation of it.

Why do lawyers have a duty to the law?

In earlier blogs, and in Chapter 2 of *Understanding Lawyers' Ethics in Canada* (Toronto: LexisNexis Canada, 2011), I have set out why we view lawyer advocacy as defined and constrained by the limits of legality (see, e.g., Lawyers Regulating Lawyers). I will only briefly review that position here. The system of laws constitutes a response to the problem of pluralism, to the fact that people within a society will have different – even radically different – conceptions of the right way to live. To allow people to live together peacefully, and to pursue collective action despite disagreement, we have a system of laws that allows us to set out the standards for our engagement and interaction with each other, to resolve disputes, and to allow each of us to pursue our own conception of the good within that social settlement. Lawyers allow people to access the system of law, access that the complexity and opacity of the system does not otherwise permit.

What that means is that the existence, function and purpose of the legal profession depends on the system of law; the advocacy and work of lawyers has no justification apart from that system. It is true that lawyers advise clients on matters that are apart from law – on business, on personal relationships, on questions of morality – but it is the law that justifies and constrains the lawyer-client relationship.

What does that duty mean when advising a client?

In the context of client advising the duty of legality means most obviously that a lawyer cannot offer advice to a client in order to assist the client to commit unlawful actions. Doing so is inconsistent with the normative concept of the lawyer's role and is, as well, prohibited by the codes of conduct that govern the profession. As set out in Rule 2.02(10) of the Alberta Code of Professional Conduct, "a lawyer must not advise or assist a client to commit a fraud, crime or

illegal conduct, nor instruct the client on how to violate the law and avoid punishment" (see similarly, Federation of Law Societies, Model Code of Conduct Rule 3.2-7). In addition, a lawyer must give the client advice that accurately reflects the law and facts as applicable to the client's case. Thus Rule 2.02(2) of the Alberta Code of Conduct requires that the lawyer's advice be "honest and candid" and notes in the Commentary that this may require that the lawyer be "firm" and give advice that "will not please the client" (See also, Federation of Law Societies Model Code Rule 3.2-2).

One might reasonably ask, of course, why a lawyer (or client) would ever want advice that does not honestly and candidly reflect the state of the law. The answer lies in the legal effects of a lawyer's opinion. When a lawyer gives an opinion to a client, that opinion can shield the client from the consequences of unlawful action, even if the opinion is legally erroneous. Thus, for example, when the Northwest Territories government was sued as a result of its failure to act in relation to the Giant mine strike, the lawsuit was unsuccessful because the government was relying on a legal opinion when deciding not to intervene. This was the case even though the legal opinion was wrong, and even though the government's conduct was negligent when assessed by the courts (*Fullowka v Pinkerton's of Canada Ltd.*, 2010 SCC 5). The incorrect legal opinion allowed the government to escape liability for its negligence.

There can occasionally be consequences imposed on lawyers for giving erroneous legal opinions – under, e.g., the *Income Tax Act*, RSC 1985 (5th Supp) c 1, s 163.2(4)) – but generally speaking a lawyer is not liable to third parties for actions taken on the client's behalf (see, e.g., *Hanson v Hanson*, 2009 ABCA 222). As a consequence, an erroneous legal opinion can provide security for the client while creating only minimal legal risk for the lawyer who provides it.

The practical temptation to provide erroneous legal advice heightens the importance of the lawyer's ethical duty not to do so. It is the lawyer's conscience and willingness to abide by her legal and ethical duties that ensures that clients are not enabled to inflict unlawful harm on others while escaping legal consequences for doing so.

What about government lawyers advising clients?

One of the most important legal ethics cases of the past decade was the case of the "Torture Lawyers of Washington," the lawyers in the Office of the Legal Counsel who provided legally erroneous advice to President George Walker Bush to facilitate the unlawful use of executive power in order to combat the war on terror. Specifically, the lawyers in the Office of the Legal Counsel gave opinions that suggested that various executive actions, most notably waterboarding of detainees, were lawful and which reached that conclusion by ignoring clearly applicable precedent and engaging in distorted and perverse legal reasoning. As noted by David Luban, "the torture memos were disingenuous as legal analysis, and in places they were absurd" (David Luban, *Legal Ethics and Human Dignity* (Cambridge: Cambridge University Press, 2007 p 163)). But the effect of those legal opinions was nonetheless to permit waterboarding and other activities to go on, and to make it less likely that those who engaged in them would face legal consequences for having done so. In offering the opinions the lawyers who wrote them thus not only betrayed their craft through engaging in shoddy legal work, they also facilitated the violation of the rule of law, and the inflicting of wrongful injury on others. As Luban further notes (p 205):

> It is one thing for boy-wonder lawyers to loophole tax laws and write opinions legitimizing financial shenanigans. It is another thing entirely to loophole laws against

> torture and cruelty. Lawyers should approach laws defending human dignity with fear and trembling….
>
> I have little doubt that only intelligent, well-educated lawyers could write these memos, larded as they are with sophisticated-looking tricks of statutory interpretation. But there is such a thing as being too clever for your own good.

The point of the torture lawyers example is two-fold. First, it illustrates the principle that government lawyers are no different from other lawyers in having an obligation of honesty and candour in the legal advice they provide, and in having a duty not to facilitate unlawful conduct. Second, it shows how lawyers who work in government have, by virtue of their office, the capacity to inflict particularly grave injury on others when they violate those duties.

Why a 5% Rule Wouldn't Satisfy the Lawyers' Duties

What about a legal opinion that concluded that a proposed law is not "inconsistent with the purposes and provisions of the *Charter of Rights and Freedoms*" where the arguments that can reasonably be made in favour of that law's constitutionality have a combined 5% chance of succeeding in court? Would that sort of opinion satisfy a lawyer's obligations when issuing an opinion to a client?

First, it is important to note the extreme nature of any policy that allows a favourable legal opinion to be granted where there is only a 5% chance of succeeding in court. A 5% chance is extraordinarily remote, and suggests that the lawyer has not articulated any meaningful case in the law's favour. A good argument, one based in existing precedent or statute, or plausible statutory or constitutional interpretation, and positing the sorts of facts that will arise under the law, should at least raise the chance of success to 30 or 40%. When the likelihood of success is only 5%, the lawyer is essentially asserting that if you get the right judge on the right day, or are lucky in the facts that ground the constitutional challenge or a section 1 analysis, you might prevail, but almost all of the time you will not. Nineteen out of twenty cases will go against you.

It is certainly the case that legal analysis is an interpretive act, and the question of whether proposed legislation is "inconsistent with the purposes and provisions of the *Charter*" would normally be subject to varying points of view. At the same time, however, not every statement that can be articulated in a lawyer's vocabulary constitutes a valid legal argument. There are legal arguments that are frivolous, illegitimate and bogus, and that would be recognized as such by the interpretive community of the legal profession. As suggested by American judge Frank Easterbrook, a case may be considered frivolous where "99 of 100 practicing lawyers would be 99% sure that the position is untenable, and the other 1% would be 60% sure it's untenable" (cited in Luban, p 193). Or to use another useful heuristic, if the argument you are making is one that would make a lawyer you respect laugh (or cringe), then you are probably in the world of the frivolous not the reasonable.

Second, it is important to note the legal effect of an opinion given to the Minister of Justice. While Schmidt's Statement of Claim suggests that the Minister retains the discretion to reach a different conclusion than that offered by the Legislative Services Branch, the fact of the opinion, if one was offered, would give the Minister a good faith basis for asserting that he or she had complied with the requirements of the *Department of Justice Act* and other legislation. It would, in other words, likely shield the Minister from any legal consequences that could arise from his or her failure to advise the House of Commons that proposed legislation may be inconsistent with the *Charter* or the *Bill of Rights*. This is particularly so as Schmidt does not allege that the

Minister knew of the Legislative Services Branch's policy, but only that the Deputy Minister did so. In addition, the effect of such an opinion, if a lawyer ever gave one, would be to ensure that the Minister would likely not advise the House of Commons even where legislation is more likely than not to fail constitutional scrutiny. If the Minister advised the House based on the actual legal position – that the proposed legislation is more likely than not to fail constitutional scrutiny – the House could still pass the legislation, but it would do so with the benefit of legal caution, and subject to the influence of media scrutiny and the opinion of an informed public. The provision of an opinion that proposed legislation is inconsistent with the *Charter*, and the Minister's advising the House of that fact, might mean that legislation that is contrary to fundamental legal and constitutional values does not get passed into law, and that people who would be wrongfully subject to it avoid that burden and the costs associated with resisting the law's wrongful application. Similarly, those wrongfully excluded from unconstitutionally under-inclusive legislation might benefit from an opinion that resulted in the legislation being expanded after scrutiny from the House.

At the end of the day, lawyers for the government do act for the state, and they have a duty to advocate for the state's interests, taking into account the political priorities of the government of the day. A government lawyer does not have an amorphous duty to the public interest, and can be legitimately influenced by things that are a priority for one government but which are not for another. The government lawyer is also, though, as subject to the constraints of legality as any other lawyer, and can only provide advice and opinions that reflect an honest, candid and good faith assessment of the law and facts applicable to the government's proposed course of action. The government lawyer who fulfills that duty has the capacity to ensure the maintenance of the rule of law in a more direct and straightforward way than do most lawyers, simply because of the power that her client can wield over its citizenry. Helping to ensure that the government respects the law is the best way of maintaining the rule of law there is. At the same time, a government lawyer who fails to fulfill that duty has the power to inflict real and serious harm, to facilitate government abuse of power, and to enable wrongful conduct. And a lawyer who so fails acts wrongfully and unethically.