Court File Number: T-2225-12

**FEDERAL COURT OF CANADA**
***SIMPLIFIED ACTION***

BETWEEN:

**EDGAR SCHMIDT**

Plaintiff

-and-

**ATTORNEY GENERAL OF CANADA**

Defendant

-and-

**CANADIAN CIVIL LIBERTIES ASSOCIATION**

Intervenor

# PRE-TRIAL MEMORANDUM OF THE DEFENDANT

## OVERVIEW

1. The *Canadian Bill of Rights* and the *Canadian Charter of Rights and Freedoms* (the "*Charter*") guarantee rights which promote values that are vital to ensuring a healthy democracy (the "guaranteed rights"). In keeping with the quasi-constitutional status of the *Canadian Bill of Rights*, Parliament established in 1960 a provision requiring the Minister of Justice to examine proposed legislation and regulations for any inconsistency with guaranteed rights and report any such inconsistency he "ascertained" to the House of Commons. In 1985, it adapted this mechanism to reflect the adoption of the *Charter*. By requiring the systematic review of all government bills and draft regulations for consistency with guaranteed rights, this mechanism serves to remind the executive of the importance of guaranteed rights and of the need to consider them when developing government policy.

2. That pre-legislative scrutiny mechanism is now contained in sections from three statutes: section 3 of the *Canadian Bill of Rights*, section 4.1 of the *Department of Justice Act* and section 3 of the *Statutory Instruments Act* (the "examination provisions"). The examination provisions mark the outer boundary of when law-

makers must be informed that a legislative measure is, in fact, inconsistent with a guaranteed right. Within that boundary, there remains considerable scope for debate as to how a proposed law may be viewed when measured against guaranteed rights and the Constitution more generally. Within the framework created by the Constitution, Parliament has recognized that a democratically-elected government is entitled to make policy choices and propose them to elected representatives. Those choices will be debated and discussed by law-makers and the public over the course of the legislative process.

3. The examination provisions impose on the Minister of Justice (the "Minister") for government bills and on his Deputy Minister (the "Deputy Minister") for regulations, two consecutive duties. First, they must "*ascertain*" or "*ensure*" («*rechercher*» or «*vérifier si*») whether any of the provisions of draft legislation or regulations "*are inconsistent*" («*est incompatible*») with guaranteed rights. Next, they must "*report any such inconsistency*" («*signaler toute semblable incompatibilité*») to the appropriate law-maker, where they ascertained that one existed – the House, in the case of the Minister and the regulation-maker, through the Clerk of the Privy Council, for the Deputy Minister. To perform that task, both have adopted the credible argument standard: they will report an inconsistency only when no credible argument can be advanced in support of the consistency of legislation; that is, an argument that is reasonable, *bona fide* and capable of being raised before and accepted by the Courts.

4. The credible argument standard is the appropriate interpretation of the examination provisions. Any lower threshold fails to give due weight to Parliament's choice of words. Any lower threshold fails to reconcile the important responsibility of the Department to advise the Minister not only in relation to his statutory obligations, but also on how to turn policy into draft legislation on behalf of elected officials who are accountable for their choices to Parliament and, ultimately, to the Canadian people.

## I. THE FACTS

5. Laws do not exist in a factual vacuum. The plaintiff offers an incomplete description of the context within which the examination provisions operate.[1] The executive branch of government is intimately familiar with the constitutional and institutional context in which it develops legislation. To assess more comprehensively whether the credible argument standard is a proper interpretation of the examination provisions, the defendant has filed six affidavits to describe the inner workings of the government.[2] A seventh describes the statutory pre-legislative mechanisms adopted by other Commonwealth countries, a matter of fact which must be proven by an expert witness.[3]

6. While the process through which government bills are developed and adopted is not the same as the process employed for draft regulations, the object of the pre-legislative scrutiny is the same – to ascertain whether any of the provisions thereof are inconsistent with guaranteed rights and, in the case of regulations, also whether they are authorized by law. The differences in process are explained in the affidavit of John Mark Keyes and need not be repeated here. Since the issue in this case is confined to the degree of certainty that must be present to trigger the reporting obligation, the fact that the examination of regulations must also consider whether they are authorized is not relevant. Further, the Minister remains accountable before the House for the actions of departmental officials, including the Deputy Minister.

### *A. PARLIAMENT'S INTENTION*

7. In 1960, Parliament enacted the *Canadian Bill of Rights*. That statute contained a provision imposing new duties on the Minister. The then Minister of Justice described the purpose of the provision in his testimony before the Special Committee on Human Rights and Fundamental Freedoms during that committee's

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[1] *Memorandum of the plaintiff* at paras 2-4 and 12-21.
[2] *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306 at paras 27 and 30-33.
[3] SL Phipson, *Phipson on Evidence*, 13th ed (London: Sweet & Maxwell, 1982) at paras 27-41.

clause-by-clause examination. The purpose of the duties to ascertain inconsistency and to report such inconsistencies, where found by the Minister, was to ensure that the executive would give serious consideration to guaranteed rights throughout the policy development and legislative drafting processes which entirely take place before the government introduces a bill in Parliament.

> "*Clause 4 affects the executive. This is a directive to the Minister of Justice, as a member of the executive, having the primary responsibility in this field. It is a specific directive to him, imposing upon him certain obligations with respect to ensuring that all subsequent bills and regulations decided upon shall be, in so far as they lie in the power of the minister to do it, in conformity with the bill of rights.*"[4]

8. The Minister explained to Parliament that the combined effect of those duties would be powerful since the executive would suffer important political consequences where questions of inconsistency were not resolved to the Minister's satisfaction. This deterrent aspect enhances the Minister's ability to convince his Cabinet colleagues and was described to Parliament as "*a most valuable aspect*" of the scheme.[5] If an inconsistency is not resolved to the Minister's satisfaction, the Minister explained that he would need to consider resignation.

> "*In so far as government measures are concerned, I would think my function would be to advise the cabinet, my colleagues in cabinet, as to whether, in the view of myself and my advisers, they are proposals which transgress the letter, or the principles of the bill of rights. I would imagine that if such advice were given in concrete form, cabinet would have the responsibility of making a judgment.*
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> ...
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> *The cabinet, of course, is the body which decides what bills will be introduced by the government, and what policy the government will follow, and its decisions are reached on a collective basis, under the doctrine of collective responsibility.*
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> *Therefore, a minister of justice who found himself in the position of having advised his colleagues that, in his opinion, a bill runs contrary or counter to*

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[4] House of Commons, *Minutes of Proceedings and Evidence of the Special Committee on Human Rights and Fundamental Freedoms*, 24th Parl, 3rd Sess, No 1 (22 July 1960) at 406 (Hon ED Fulton (Minister of Justice)) (emphasis added).

[5] House of Commons, *Minutes of Proceedings and Evidence of the Special Committee on Human Rights and Fundamental Freedoms*, 24th Parl, 3rd Sess, No 1 (20 July 1960) at 334 (Prof AR Lower).

> *the bill of rights but whose advice was rejected by his colleagues, would have to make one or two fundamental decisions. He would have to conclude that he is wrong and that his colleagues are right, or that the exigencies of the situation require to accept the collective advice of cabinet and therefore go along with it or should he not be able to come to one of those conclusions his next decision, as a simple alternative, would have to be to resign. That would be the position as I see it."*[6]

9. Between the time these duties were first enacted in 1960 and 1985, when similar obligations were enacted to reflect the adoption of the *Charter*, the Minister submitted only one report to the House of Commons.[7]

10. In 1985, Parliament was considering amendments to the *Department of Justice Act* and to the *Statutory Instruments Act* which proposed to adapt the examination provision from the *Bill of Rights.* At second reading and in testimony before the House and Senate Committees, the then Minister and a senior Justice official made the point that the amendments under consideration imposed the same duties on the Minister of Justice as the ones he was already obliged to discharge under section 3 of the *Canadian Bill of Rights*.

> *"The Minister of Justice already has an obligation under the law to examine Bills and regulations to ensure they are consistent with the Bill of Rights. I am referring to the Bill of Rights enacted under the late great John Diefenbaker when his Government was in power. These amendments provide a similar obligation on the Minister of Justice to examine regulations and Government Bills to ensure they are consistent with the Charter."*[8]

> *"The amendments to the Department of Justice Act and the Statutory*

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[6] House of Commons, *Minutes of Proceedings and Evidence of the Special Committee on Human Rights and Fundamental Freedoms*, 24th Parl, 3rd Sess, No 1 (20 July 1960) at 333 and 335 (Hon ED Fulton (Minister of Justice)).

[7] *Affidavit of JM Keyes*, Exhibit 5, Sessional Paper No 301-7/13, in the 1st session of the 30th Parliament. A government bill, introduced in the Senate, was amended by the Senate. The Minister of Justice found the amendment to be inconsistent with the presumption of innocence (executives of a corporation would automatically have been guilty if a corporation was found guilty of contravening the *Feeds Act*). The Standing Committee on Agriculture of the House of Commons amended the bill to remove the inconsistency. (House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Agriculture*, 30th Parl, 1st Sess, No 63 (18 November 1975) at 19-27.

[8] *House of Commons Debates*, 33rd Parl, 1st Sess, Vol 3 (27 March 1985) at 3422 (Hon John C Crosbie).

> *Instruments Act will provide for the scrutiny of bills and regulations to ensure consistency with the Charter. That is, the onus will be on us to do that; it will be our responsibility to do that. A similar obligation already exists with respect to the Canadian Bill of Rights.*[9]

> *"The next area of the bill is an area which involves the casting of a responsibility on the Minister of Justice to examine bills and regulations to ensure that, when Parliament is dealing with a bill, there has been an assessment made of its compatibility with the Charter. That is essentially similar to the responsibility which the minister now has under the Canadian Bill of Rights."*[10]

### B. DEVELOPMENT OF LEGISLATION ENTAILS A CONTINUUM OF INTERNAL REVIEW

11. In Canada's system of parliamentary democracy, the government of the day is responsible for introducing legislation in Parliament that those elected representatives believe to be in the public interest. Introducing a bill in Parliament represents the culmination of a process of policy development and of a process of legislative drafting.[11] The review mandated by the examination provisions occurs at the end of these processes, only after a bill has been introduced in the House. The review relates to the bill in that form.[12]

12. Before that formal review and throughout those processes, the executive receives legal advice from Department lawyers. These lawyers' only mandate is to support the Minister in his dual roles as official legal advisor to the executive and as representative of the Crown in all litigation.[13] They must do so in a professional and politically neutral fashion – public servants are accountable to elected officials who, in turn, are accountable to Parliament and ultimately to the Canadian public.[14]

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[9] House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 33rd Parl, 1st Sess, No 25 (23 April 1985) at 15 (Hon John C Crosbie).
[10] Senate, *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, 33rd Parl, 1st Sess, No 15 (12 June 1985) at 8 (DM Low, General Counsel, Human Rights Law Section, Department of Justice).
[11] *Affidavit of WF Pentney* at paras 23, 25, 39 and 77.
[12] *Affidavit of JM Keyes* at para 49.
[13] *Affidavit of MD MacNair* at paras 6-8.
[14] *Affidavit of MD MacNair* at paras 9-11, 17, 26, 28 and 31-40.

13. The formal review takes place after legal risks have already been identified and assessed throughout the policy development and legislative drafting processes. Legal risks, including concerns about the inconsistency of draft legislation with guaranteed rights, are assessed throughout the policy development and legislative drafting processes.[15] The bulk of the advisory work of Justice lawyers is focused on advising policy officials across government about how to achieve their policy objectives while respecting the Constitution and all other relevant legislation and legal requirements.[16] The examination provisions operate within that context.

14. Legal risk is a defined concept in the government. It involves two assessments, the risk of an adverse outcome and the impact of such an outcome on pre-established classes of interests.[17] It is not, as the plaintiff would have it, the numerical assessment of only the risk of an adverse outcome.[18]

15. Lawyers in three areas of the Department provide guidance and advice to government officials throughout the policy development and legislative drafting processes to ensure that concerns are addressed and mitigated, and if required, reported: the departmental legal services units ("LSU"), the Legislative Services Branch and the Human Rights Law Section ("HRLS"). Through this process of consultation and review, policies can be changed and significant legal risks and concerns can be addressed before a policy proposal is submitted to Cabinet for approval. By the same process, draft legislation can also be amended before it is introduced in Parliament.[19]

16. The Department has legal services units that provide legal advice to every federal department. LSU counsel are typically consulted at the outset of a policy proposal initiated by a government department and assist by identifying *Charter* and other legal issues and providing legal advice on questions arising from the policy

[15] *Affidavit of JM Keyes* at para 44.
[16] *Affidavit of WF Pentney* at para 37.
[17] *Affidavit of P Vézina* at paras 27(b) and 34.
[18] *Memorandum of the plaintiff* at paras 2, 3.
[19] *Affidavit of WF Pentney* at paras 46, 49; *affidavit of JM Keyes* at paras 17, 45-46.

development and legislative drafting processes.[20]

17. Legislative counsel in the Legislative Services Branch are specialized lawyers responsible for drafting legislation and are responsible for examining legislation and regulations for consistency with guaranteed rights.[21]

18. The HRLS is the centre of expertise on all human rights issues in Justice, including the *Charter*, the *Canadian Bill of Rights*, the *Canadian Human Rights Act* and Canada's international human rights obligations. The advice of HRLS lawyers is sought throughout the policy development and legislative drafting processes where risks of inconsistency with guaranteed rights have been identified by LSU or legislative counsel. HRLS counsel advise on the risks that a proposed measure infringes a guaranteed right, and if so, the likelihood of successfully defending an infringement.[22]

19. Legislative proposals cannot proceed without Cabinet approval. Legal risk assessments, including compliance with *Charter* rights, must also be included in the Memorandum to Cabinet which seeks Cabinet approval of a policy. Therefore, any significant legal concerns, including inconsistency with guaranteed rights, can be discussed in Cabinet where the Minister of Justice performs a critical advisory role as the exclusive source of legal advice to Cabinet.[23]

20. Once Cabinet approves the policy, the legislative drafting process can begin. If legal concerns arise during the drafting process, legislative counsel consult with the subject matter experts in the HRLS and departmental officials responsible for the policy. Concerns can often be resolved in this way.[24]

21. Where a legal risk is significant, including risks identified as something lower than that which could trigger the Minister's duty to report, concerns are brought

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[20] *Affidavit of WF Pentney* at para 43; *affidavit of JM Keyes* at paras 17-19; *affidavit of DM Low* at para 24.
[21] *Affidavit of WF Pentney* at paras 57-58; *affidavit of JM Keyes* at para 24.
[22] *Affidavit of WF Pentney* at paras 44-45; *affidavit of JM Keyes* at paras 21-23; *affidavit of DM Low* at paras 10, 25-26.
[23] *Affidavit of WF Pentney* at paras 48, 53-54; *affidavit of JM Keyes* at para 15.
[24] *Affidavit of WF Pentney* at para 56; *affidavit of JM Keyes* at paras 45-47.

to the attention of the Chief Legislative Counsel and the Deputy Minister.[25] The concern will also be discussed with their counterparts in the client departments. Concerns can often be resolved in this way.[26] There is therefore no basis to the plaintiff's representation that risks which are not reportable are never brought to the attention of the Minister or of the Deputy Minister.[27]

22. The formal review mandated by the examination provisions happens at the end of the policy development and legislative drafting processes, once the bill is introduced in the House of Commons. At that point in time, the legislative counsel who drafted the bill provide the Chief Legislative Counsel with a memorandum indicating that they have examined the bill, in the form in which it was introduced in the House, for any inconsistencies with guaranteed rights.[28]

23. If inconsistency with the guaranteed rights were to be found ("inconsistency" being the absence of a reasonable and *bona fide* argument that the provision complies with the *guaranteed rights)*, the memorandum would so indicate. In the course of drafting, measures are sometimes identified that the client must take to support an argument that any infringements of *Charter* rights are justifiable under section 1 of the *Charter*. If so, those measures must also be mentioned in the memorandum to the Chief Legislative Counsel.[29]

24. The Chief Legislative Counsel provides the final examination from the Legislative Services Branch of all government bills for inconsistency with guaranteed rights and can consult with HRLS, if required.[30] He formally confirms to the law-makers that the review mandated by the examination provisions has been performed.[31]

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[25] *Affidavit of WF Pentney* at paras 36-37, 46-51; *affidavit of JM Keyes* at paras 44-47; *affidavit of DM Low* at paras 23-31.
[26] *Affidavit of WF Pentney* at paras 49, 51-56, and 67; *affidavit of JM Keyes* at paras 15, 17, 46.
[27] *Memorandum of the plaintiff* at paras 12, 14, 15.
[28] *Affidavit of JM Keyes* at para 49.
[29] *Affidavit of JM Keyes* at paras 50-51.
[30] *Affidavit of WF Pentney* at para 59; *affidavit of JM Keyes* at para 52.
[31] *Affidavit of JM Keyes* at paras 48-52, 61, 63 and 66-68.

### *C. AND OF CONTINUING EXTERNAL REVIEW*

25. Scrutinizing and approving bills is Parliament's main task and forms a substantive basis for holding the government accountable for its legislative proposals.[32] Its legislative scrutiny role is therefore neither insignificant nor passive.

26. Before a bill becomes law, Parliament will have many stages of debate and review.[33] Consideration of a bill by the House of Commons normally requires five stages, including a clause-by-clause examination and approval before the appropriate House committee; the process before the Senate is similar.[34]

27. The committee stage is the mechanism enabling detailed scrutiny and analysis of bills. Not only can the parliamentary committees hear from the sponsoring minister or officials, it may send for other witnesses the committees believe can provide useful advice – outside experts, lawyers, organizations, law professors. In this exchange, witnesses provide expertise, present their views and respond to members' questions.[35]

28. The committee can additionally receive, where it wishes, a wide range of advice or research from expert witnesses, the law clerk and parliamentary counsel from both Houses, and subject specialists at the Library of Parliament.[36]

### *D. JUSTICE DEVELOPS THE CREDIBLE ARGUMENT STANDARD*

29. Since 1982, Justice has employed a benchmark to gauge when lawyers should inform the Minister of a reportable inconsistency. At first known as the "no reasonable argument" approach,[37] this benchmark was re-articulated in 1993 as the "credible argument" standard. Since then, it has been reviewed four times to assess whether it remained an appropriate standard.[38]

#### 1. The "no reasonable argument" approach

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[32] *Affidavit of JA Stilborn* at p 16.
[33] *Affidavit of JA Stilborn* at p 15.
[34] *Affidavit of JA Stilborn* at p 15-16.
[35] *Affidavit of JA Stilborn* at p 20-22.
[36] *Affidavit of JA Stilborn* at p 36-38.
[37] *Affidavit of DM Low* at para 16.
[38] *Affidavit of JM Keyes* at paras 28, 35-41.

30. In 1982, in anticipation of the coming into force of the *Charter*, Justice created HRLS to serve as the centre of expertise for all human rights issues.[39] HRLS was tasked with advising on how Justice would perform the examination under the examination provisions.[40]

31. HRLS developed the "no reasonable argument" approach to examination: HRLS would advise the Minister to make a report to the House where HRLS considered that there was no reasonable argument that a proposed law was consistent with the guaranteed rights or, expressed differently, where there was no reasonable chance of successfully defending the legislation against a foreseeable challenge under the *Charter* or the *Canadian Bill of Rights*.[41]

32. To develop this approach, HRLS and senior Justice officials engaged in significant and ongoing deliberations. Several factors led to the adoption of the no reasonable argument approach: [42]

a. the text of the examination provisions;[43]

b. the consultative process inherent in legislative drafting;[44]

c. the implications of the Minister reporting an inconsistency with guaranteed rights;[45] and

d. the need for a qualitative approach that accounted for an examination that could not be conducted with precision or certainty.[46]

33. Adoption of the no reasonable argument approach resulted in a rigorous analysis which allowed for the necessary consideration of evolving jurisprudence and novel policy objectives.[47] This approach was used consistently from its development

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[39] This includes: the *Charter*, the *Canadian Bill of Rights*, the *Canadian Human Rights Act* and Canada's international human rights obligations: *affidavit of DM Low* at para 10.
[40] *Affidavit of DM Low* at para 14.
[41] *Affidavit of DM Low* at para 16.
[42] *Affidavit of DM Low* at para 18.
[43] *Affidavit of DM Low* at paras 18-19.
[44] *Affidavit of DM Low* at para 18.
[45] *Affidavit of DM Low* at para 18.
[46] *Affidavit of DM Low* at para 40.
[47] *Affidavit of DM Low* at para 41.

until the formalization of an examination standard in 1993.[48]

2. The "credible argument" standard

34. In 1993, the Department sought to formalize the existing examination approach. This effort was spearheaded by HRLS, but involved consultations across the Department and deliberation by Justice's most senior committees – the *Charter* Committee when the credible argument standard was first formalized in 1993 and, when its appropriateness was revisited in 2003, by the Executive Committee.[49]

35. This meticulous process considered the views of the plaintiff on the matter. He opines that the examination standard should be "more-likely-than-not" inconsistent with guaranteed rights.[50] His opinion was presented to the Executive Committee and debated there.[51] In subsequent years, the plaintiff continued to lobby his superiors to accept his opinion as correct.[52]

36. On at least eight different occasions since 1993, the Minister, or a departmental official, has articulated the credible argument standard before various House committees. No Member of the House ever questioned the appropriateness of the credible argument standard.

a. In 1993, the Hon. Pierre Blais, then Minister of Justice, explained to the Senate Standing Committee on Legal and Constitutional Affairs how he performed his reporting obligations pursuant to the examination provisions.[53]

b. Stanley A. Cohen discussed the credible argument standard during an appearance before a parliamentary committee on November 24, 2005. The Hon. Irwin Cotler, then Minister of Justice, also described how he performed the review required by the examination provisions.[54] On that occasion, Minister Cotler summarized his responsibility as granting to a

[48] *Affidavit of DM Low* at para 44.
[49] *Affidavit of JM Keyes* at paras 28-31, 36-40.
[50] *Statement of claim* at para 27 d. to f; *Memorandum of the plaintiff* at paras 23 and 64.
[51] *Affidavit of JM Keyes* at paras 39-40.
[52] *Affidavit of JM Keyes* at para 42.
[53] *Affidavit of JM Keyes* at para 69, Exhibit 7.
[54] *Affidavit of JM Keyes* at para 69, Exhibit 8.

bill "the good housekeeping seal of constitutional approval".[55]

c. In June 2006, the Hon. Vic Toews, then Minister of Justice, confirmed to the Senate Standing Committee on Legal and Constitutional Affairs that the Department of Justice continued to employ the same standard in its review of government bills conducted pursuant to the examination provisions.[56]

d. The Hon. Rob Nicholson, then the Minister of Justice, explained how he construed his reporting obligation to the House on October 30, 2007.[57]

e. Mr. Cohen again explained the credible argument standard to a legislative committee of the House of Commons in 2007.[58]

f. Minister Nicholson again, explained how he construed his reporting obligation to the House on November 23, 2007, during debates.[59]

g. Minister Nicholson again spoke to the standard of review he employed before a House Committee on November 6, 2012.[60]

h. Minister Nicholson described the credible argument in depth to the House of Commons on March 18, 2013.[61]

37. In 2013, during the 41st Parliament, the Hon. Irwin Cotler, a former Minister of Justice, introduced in the House Bill C-537 to lower the reporting threshold to Parliament. Through this bill, Mr. Cotler proposed to amend the examination provisions so that:

a. Every bill would be examined by the Law Clerk and Parliamentary Counsel of the House in which it is introduced, with the assistance of

[55] *Affidavit of JM Keyes* at para 69, Exhibit 8, p 25:75.
[56] *Affidavit of JM Keyes* at para 69, Exhibit 9.
[57] *Affidavit of JM Keyes* at para 69, Exhibit 10.
[58] *Affidavit of JM Keyes* at para 69, Exhibit 11.
[59] *Affidavit of JM Keyes* at para 69, Exhibit 12.
[60] *Affidavit of JM Keyes* at para 69, Exhibit 13.
[61] *Affidavit of JM Keyes* at para 69, Exhibit 14.

the Library of Parliament.[62]

b. The purpose of the examination would be "*to determine whether any of the provisions of the bill is likely to be inconsistent*" with guaranteed rights or the Constitution.[63]

c. A provision of a bill would likely be inconsistent with guaranteed rights where the responsible Law Clerk and Parliamentary Counsel would form the opinion "*that, if that provision were to be challenged in court, it would, on the balance of probabilities, be found to infringe, limit or violate*" those rights.[64]

### *E. WHAT OTHER COMMONWEALTH COUNTRIES ARE DOING*

38. New Zealand, the United Kingdom, the Australian Capital Territory, the Australian State of Victoria and the Federal legislature in Australia have statutory pre-legislative review and reporting mechanisms.[65] Professor McLean explains how those review and reporting mechanisms differ in their terms and in the contexts in which they operate from Canada.[66] Annex "A" to these submissions summarizes her evidence. Simple comparisons - such as the number of reports tabled in the legislative assembly - are likely to be misleading.[67]

39. An important factor of distinction is the wording of the duty to examine and report. Thus, for example:

a. In New Zealand, the Attorney General must report "any provision that appears to be inconsistent" for every bill introduced.[68]

b. At the federal level in Australia, the Member of Parliament introducing a bill must state his opinion as to whether the bill is compatible with

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[62] Bill C-537 at cl 3.
[63] Bill C-537 at cl 3.
[64] Bill C-537 at cl 5.
[65] *Statement of JM McLean*, Appendix A at p 1.
[66] *Statement of JM McLean*, Appendix A at p 3.
[67] *Statement of JM McLean*, Appendix A at p 26.
[68] *Statement of JM McLean*, Appendix A at p 3 (emphasis added).

human rights.[69]

c. In the Australian Capital Territory, the Attorney General must state whether a government bill is consistent or inconsistent with human rights.[70]

d. In the state of Victoria, the Member of Parliament introducing a bill must state his opinion as to whether the bill is compatible or incompatible with human rights.[71]

e. Under the UK's *Human Rights Act*, the minister responsible for the bill must make a statement of compatibility with Convention rights or, if that can't be said of the bill, that the minister nevertheless wants to introduce the bill.[72]

40. Another important distinguishing factor is the powers granted to courts when faced with a provision incompatible with human rights. In Canada, courts can declare the provision to be of no force and effect to the extent of its inconsistency with guaranteed rights.

a. In New Zealand, courts cannot refuse to apply inconsistent provisions.[73]

b. At the federal level in Australia, the issue is not yet resolved.[74]

c. In the Australian Capital Territory, a court must give legislation a rights-consistent interpretation, if possible, but cannot refuse to give effect to legislation that is inconsistent.[75]

d. In the state of Victoria, a court must give legislation a rights-consistent interpretation, if possible, but cannot refuse to give effect to legislation

[69] *Statement of JM McLean*, Appendix A at p 24.
[70] *Statement of JM McLean*, Appendix A at p 17.
[71] *Statement of JM McLean*, Appendix A at p 19.
[72] *Statement of JM McLean*, Appendix A at p 12.
[73] *Statement of JM McLean*, Appendix A at p 9-10.
[74] *Statement of JM McLean*, Appendix A at p 26.
[75] *Statement of JM McLean*, Appendix A at p 18-19.

that is inconsistent.[76]

e. Under the UK's *Human Rights Act*, courts must first strive to give effect to the legislation in a way that is compatible with Convention rights. If that is not possible, the court may make a declaration of incompatibility, but such declaration does not render the statute invalid or unenforceable.[77]

## II. QUESTION IN ISSUE

41. Is the credible argument standard the appropriate interpretation of the examination provisions?

## III. ARGUMENTS

### *A. CONSTRUING THE WORDS OF THE EXAMINATION PROVISIONS*

42. The examination provisions must "be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[78] Context plays an important role in interpreting legislation since words "*take colour from their surroundings*".[79] The modern approach to statutory interpretation accepts that legislators are skilful and careful in choosing the legislation's words and do so with a specific purpose in mind - "[t]*he legislator does not speak in vain.*"[80]

43. The first step of this analysis is to consider the text used by Parliament in both official languages. Parliament's intent is reflected through the meaning of the

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[76] *Statement of JM McLean*, Appendix A at p 23.
[77] *Statement of JM McLean*, Appendix A at p 15.
[78] *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42. [2002] 2 SCR 559 at para 26, citing Elmer Driedger, *Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983) at 87.
[79] *Bell ExpressVu v The Queen*, 2002 SCC 42, [2002] 2 SCR 559 at paras 26-27, citing John Willis, "Statute Interpretation in a Nutshell" (1938), 16 *Can Bar Rev* 1 at 6.
[80] *Schreiber v Canada (Attorney General)*, 2002 SCC 62, [2002] 3 SCR 269 at para 73; *Bell ExpressVu v The Queen*, 2002 SCC 42, [2002] 2 SCR 559 at para 37.

words shared by both official versions of the enactment.[81]

44. The examination provisions create two consecutive, but related, duties. First, the Minister must "*ascertain*" or "*ensure*" whether (*«rechercher»* or *«vérifier si»*) any of the provisions of draft legislation "*are inconsistent*" (*«est incompatible»*) with guaranteed rights. Where he reaches that conclusion, the Minister must "*report any such inconsistency*" (*«signaler toute semblable incompatibilité»*) to the appropriate law-maker. The duty to report qualifies the duty to examine because the duty to report arises when, and only when, the Minister is certain that an inconsistency does indeed exist. The sections read as follows (we highlighted in bold).

| ***Canadian Bill of Rights*, subs. 3(1)** | ***Déclaration canadienne des droits*, par. 3(1)** |
|---|---|
| Subject to subsection (2), the Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and every Bill introduced in or presented to the House of Commons by a Minister of the Crown, in order **to ascertain** whether any of the provisions thereof **are inconsistent** with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity. | Sous réserve du paragraphe (2), le ministre de la Justice doit, en conformité de règlements prescrits par le gouverneur en conseil, examiner tout règlement transmis au greffier du Conseil privé pour enregistrement, en application de la *Loi sur les textes réglementaires*, ainsi que tout projet ou proposition de loi soumis ou présentés à la Chambre des communes par un ministre fédéral en vue **de rechercher** si l'une quelconque de ses dispositions **est incompatible** avec les fins et dispositions de la présente Partie, et il doit signaler toute semblable incompatibilité à la Chambre des communes dès qu'il en a l'occasion. |
| ***Department of Justice Act*, s. 4.1(1)** | ***Loi sur le Ministère de la Justice*, par. 4.1(1)** |
| Subject to subsection (2), the Minister shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration | Sous réserve du paragraphe (2), le ministre examine, conformément aux règlements pris par le gouverneur en conseil, les règlements transmis au greffier du Conseil privé pour enregistrement, en application de la *Loi* |

[81] M Bastarache et al, *The Law of Bilingual Interpretation* (Markham, Ont: LexisNexis Canada Inc, 2008) at 32-34.

| | |
|---|---|
| pursuant to the *Statutory Instruments Act* and every Bill introduced in or presented to the House of Commons by a minister of the Crown, in order **to ascertain** whether any of the provisions thereof **are inconsistent** with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity. | *sur les textes réglementaires* ainsi que les projets ou propositions de loi soumis ou présentés à la Chambre des communes par un ministre fédéral, en vue **de vérifier si** l'une de leurs dispositions **est incompatible** avec les fins et dispositions de la *Charte canadienne des droits et libertés*, et fait rapport de toute incompatibilité à la Chambre des communes dans les meilleurs délais possible. |
| ***Statutory Instruments Act*, s. 3(1)(c)** | ***Loi sur les textes réglementaires*, al. 3(1)(c)** |
| On receipt by the Clerk of the Privy Council of copies of a proposed regulation pursuant to subsection (1), the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, shall examine the proposed regulation **to ensure** that | À la réception du projet de règlement, le greffier du Conseil privé procède, en consultation avec le sous-ministre de la Justice, à l'examen des points suivants : |
| . . . | [...] |
| (c) it does not trespass unduly on existing rights and freedoms and **is not**, in any case, **inconsistent** with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*; | c) il n'empiète pas indûment sur les droits et libertés existants et, en tout état de cause, **n'est pas incompatible** avec les fins et les dispositions de la *Charte canadienne des droits et libertés* et de la *Déclaration canadienne des droits*; |

45. The ordinary meaning of the words used by Parliament is plain: the Minister is to reach a definite view of whether an inconsistency exists. This stems from the relevant operative portions of the examination provisions: first, he must "ascertain"; then, he must ascertain that the provisions "are"; lastly, the Minister must ascertain that that the provisions are "inconsistent".

46. First, the Minister must "*ascertain*" or "*ensure*". Both mean to make

certain.[82] While the French version of these acts uses different verbs - «*rechercher*» and «*vérifier si*», both of these verbs share the same meaning as "*ascertain*" and "*ensure*".[83] To reach the level of certainty required to "ascertain", the Minister must carry out an objective investigation to establish a fact – the inconsistency.[84]

47. The level of certainty required of the Minister must mirror the principle of the separation of powers which forms part of the context. Only courts have the power to decide the validity of an enactment and Parliament is mindful of the separation of powers. Consequently, it cannot be assumed that Parliament expected the Minister to rule on the issue. It follows that Parliament does not expect the Minister to reach the same level of certainty judges are expected to reach.

48. Then, the Minister must ascertain that the provisions "are" («*est*»). Both the use of the verb and the tense employed are indicative of Parliament's intent. The verb "*to be*"[85] has the same meaning as the verb «*être*»:[86] the matter to be ascertained must have an objective existence.

49. The use of the present tense indicates that the matter to be ascertained must exist when the Minister investigates the matter. This heightens the level of certainty Parliament expects the Minister to reach since it could have used less imperative tenses, such as *may be* (*pourrait être*).

50. Finally, the Minister must ascertain that the provisions are "inconsistent" («*incompatible*»). Since «*incompatible*» requires an impossibility to reconcile flowing

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[82] *Webster's Ninth New Collegiate Dictionary*, Merriam-Webster Inc, Springfield, 1986. **Ascertain** (p 107): "*to make certain, exact or precise; to find out or learn with certainty*". **Ensure** (p 414): "*to make sure, certain, or safe*".

[83] *Le Petit Robert 1*, Dictionnaire Le Robert, Paris, 1986. **Rechercher** (p 1623): « *chercher de façon consciente, méthodique ou insistante ; chercher à connaître, à découvrir.*» **Vérifier** (p 2078) : «*reconnaître ou faire reconnaître une chose pour vraie par l'examen, l'expérience, ou en examinant la valeur de (qqch.), par une confrontation avec les faits ou par un contrôle de la cohérence interne.* **Vérifier si** : *examiner de manière à constater que…*»

[84] *Stinson v College of Physicians and Surgeons of Ontario*, [1912] 27 OLR 565 at 581-582 (Ont HCJ, Div Ct).

[85] *Webster's Ninth New Collegiate Dictionary*, Merriam-Webster Inc, Springfield, 1986, p 137: "*to have an objective existence: have reality or actuality*".

[86] *Le Petit Robert 1*, Dictionnaire Le Robert, Paris, 1986, p 710 : «*avoir une réalité.*»

from essential differences, [87] the shared meaning of "inconsistent" [88] and «*incompatible*» requires an express contradiction.[89]

51. A determination whether a provision is inconsistent with guaranteed rights can be made only once the entire analysis is completed. Where *Charter* rights are involved, the inconsistency can arise only if the provision is not justified under section 1. It is only at the end of the entire analysis that the invalidity decreed by section 52(1) of the *Constitution Act, 1982* can be pronounced. It follows that the Minister must necessarily consider the case that could be presented to a court under section 1 of the *Charter*.

52. Despite the plaintiff's assertion to the contrary, ascertaining "inconsistency" («*incompatibilité*») is not the same thing as ascertaining "consistency" («*compatibilité*»).[90] "Consistency" («*compatibilité*») is established as soon as there is a possibility of harmonious relation of parts to one another or to a whole. [91] "Inconsistency" («*incompatibilité*»), on the other hand, requires an express contradiction. The ordinary meaning of the words thus suggest that, in some circumstances, consistency imposes a lower threshold than inconsistency.

53. Parliament expects the Minister to report when, and only when, he is nearly certain that there indeed exists an "inconsistency" («*incompatibilité*»). Only the credible argument standard provides that level of certainty.

54. Where the Minister believes that there is an argument that a provision is consistent with guaranteed rights that is reasonable, *bona fide* and capable of being

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[87] *Le Petit Robert 1*, Dictionnaire Le Robert, Paris, 1986 at p 980. **Incompatibilité**: «*impossibilité de s'accorder, d'exister ensemble, résultant de différences essentielles*».

[88] *Webster's Ninth New Collegiate Dictionary*, Merriam-Webster Inc, Springfield, 1986. **Inconsistency** (p 610): "*the quality or state of being inconsistent*". **Inconsistent**: "*not compatible with another fact or claim; containing incompatible elements; incoherent or illogical in thoughts or action*".

[89] Peter W Hogg, *Constitutional Law of Canada*, 5th ed, Vol 1 (Scarborough: Thomson Carswell) at 16-4.

[90] *Memorandum of the Plaintiff* at para 36.

[91] *Webster's Ninth New Collegiate Dictionary*, Merriam-Webster Inc, Springfield, 1986. **Consistency** (p 280): "*agreement or harmony of parts or features to one another or to a whole; ability to be asserted together without contradiction*".
*Le Petit Robert 1*, Dictionnaire Le Robert, Paris, 1986, p 348 : **compatibilité**: «*caractère, état de ce qui est compatible.*» **Compatible** : « *qui peut s'accorder avec autre chose, exister en même temps* ».

raised before and accepted by the Courts, he could not be certain that an inconsistency exists: the fact in question would not have been ascertained and he would have nothing to report.

55. Subsections 4.1(2) of the *Department of Justice Act* and subsection 3(2) of the *Canadian Bill of Rights* use the same verbs - "*to ensure*" («*destiné à vérifier*»). No examination is necessary if the regulation has already been examined, pursuant to section 3 of the *Statutory Instruments Act*.

| ***Canadian Bill of Rights*, subs. 3(2)** | ***Déclaration canadienne des droits*, par. 3(2)** |
|---|---|
| A regulation need not be examined in accordance with subsection (1) if prior to being made it was examined as a proposed regulation in accordance with section 3 of the Statutory Instruments Act **to ensure that it was not inconsistent** with the purposes and provisions of this Part. | Il n'est pas nécessaire de procéder à l'examen prévu par le paragraphe (1) si le projet de règlement a fait l'objet de l'examen prévu à l'article 3 de la Loi sur les textes réglementaires et **destiné à vérifier sa compatibilité** avec les fins et les dispositions de la présente partie. |

| ***Department of Justice Act*, s. 4.1(2)** | ***Loi sur le Ministère de la Justice*, art. 4.1(2)** |
|---|---|
| A regulation need not be examined in accordance with subsection (1) if prior to being made it was examined as a proposed regulation in accordance with section 3 of the Statutory Instruments Act **to ensure that it was not inconsistent** with the purposes and provisions of the Canadian Charter of Rights and Freedoms. | Il n'est pas nécessaire de procéder à l'examen prévu par le paragraphe (1) si le projet de règlement a fait l'objet de l'examen prévu à l'article 3 de la *Loi sur les textes réglementaires* et **destiné à vérifier sa compatibilité** avec les fins et les dispositions de la *Charte canadienne des droits et libertés*. |

56. Parliament's use of language supports the conclusion that the duty to report is triggered only if the Minister concludes with certainty that the legislation is, in his opinion, inconsistent. The examination provisions provide no support for the "more-likely-than-not inconsistent" approach advocated by the plaintiff.

57. Not only did Parliament use similar language to express the Minister's duty, the House also chose to adopt similar language for itself. The examination provisions do not apply to private member's bills. Where the House must decide

whether it will consider a private member's bill, the House has chosen to allow only those bills that do not clearly violate the *Charter* to proceed.[92] Thus, both under the examination provisions and pursuant to the House's own internal rules, debate on a legislative proposal is curtailed only where it is certain that there is inconsistency with guaranteed rights.

58. The use of consistent language also illustrates that Parliament could have enacted a different examination standard by choosing different language. A variant of the "more-likely-than-not inconsistent" standard was proposed to the last Parliament, prior to its dissolution.[93] Other Commonwealth legislators have used different language. In New Zealand for example, it suffices that a provision appears to be inconsistent to trigger the Attorney General's duty to report.[94]

### *B. THE SCHEME AND OBJECT OF THE EXAMINATION PROVISION*

59. The second step in the interpretative analysis is considering the scheme of the acts as a whole and the objects of the examination provisions. Both the text of the enactments containing them and the larger constitutional and institutional context in which they operate support the conclusion that the duty to report was meant to ensure that guaranteed rights were considered during the policy development process and to dissuade the executive branch from introducing legislation it knows to be inconsistent with guaranteed rights. These objectives confirm that the purpose of the examination is to reach a definite view of whether an inconsistency exists.

#### 1. Historical context

60. The *Canadian Bill of Rights* incorporates political measures to ensure compliance. Those measures reflect the concept of deterrence.[95] Deterrence is a strategy intended to dissuade someone from taking an action not yet begun, or to prevent them from doing something that someone else desires. To be credible, a

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[92] *Affidavit of JM Keyes* at paras 71-73, Exhibit 17.
[93] Bill C-537 at cl 3 and 5.
[94] *Statement of JM McLean*, Appendix A at p 3.
[95] House of Commons, *Minutes of Proceedings and Evidence of the Special Committee on Human Rights and Fundamental Freedoms*, 24th Parl, 3rd Sess, No 1 (20 July 1960) at 332-333 and 335 (Hon ED Fulton (Minister of Justice)); EA Driedger, "The Meaning and Effect of the *Canadian Bill of Rights*: A Draftsman's Viewpoint" (1977) 9 Ottawa LR 303 at 306, 310-312.

deterrent must be always at the ready, yet may be rarely or never used.

61. The *Canadian Bill of Rights* contains two political measures of dissuasion: the duty to report and a notwithstanding clause.[96] The first obliges the Minister to table a report of incompatibility in the House. The second obliges the government to save an otherwise incompatible provision by including an explicit notwithstanding clause in the offending bill. Through both of these measures, the executive remains politically accountable for introducing inconsistent legislation, first to Parliament and, ultimately, to the Canadian public.[97]

62. The effect of the first measure of dissuasion cannot be underestimated – it is "*a most valuable aspect*" of the scheme.[98] It ensures that the extent or degree of a potential risk of incompatibility is given serious consideration at senior levels throughout the policy development and legislative drafting processes and, because of the possible political ramifications, is usually resolved.[99] If the inconsistency is not resolved to the Minister's satisfaction, he needs to consider resignation, a most public and political act. That is precisely how the then Minister of Justice explained the role he would be called to play under the examination provision. [100]

63. By enhancing the Minister's ability to convince his Cabinet colleagues, the first examination provision delivered on its promise. Between the moment it was first enacted in 1960 and was then adapted as section 4.1 of the *Department of Justice Act* in 1985, only one report was submitted to the House of Commons.[101]

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[96] *Canadian Bill of Rights* at s 2.
[97] JL Hiebert, *Charter Conflicts: What is Parliament's Role?* (Canada: McGill-Queen's University Press, 2002) at 4-5.
[98] House of Commons, *Minutes of Proceedings and Evidence of the Special Committee on Human Rights and Fundamental Freedoms*, 24th Parl, 3rd Sess, No 1 (20 July 1960) at 334 (Prof AR Lower).
[99] EA Driedger, "The Meaning and Effect of the *Canadian Bill of Rights*: A Draftsman's Viewpoint" (1977) 9 Ottawa LR 303 at 311-312; *affidavit of DM Low* at paras 45-48.
[100] House of Commons, *Minutes of Proceedings and Evidence of the Special Committee on Human Rights and Fundamental Freedoms*, 24th Parl, 3rd Sess, No 1 (20 July 1960) at 333 and 335 (Hon ED Fulton (Minister of Justice)).
[101] *Affidavit of JM Keyes*, Exhibit 5, Sessional Paper No 301-7/13, in the 1st session of the 30th Parliament. A government bill, introduced in the Senate, was amended by the Senate. The Minister of Justice found the amendment to be inconsistent with the presumption of innocence (executives of a corporation would automatically have been guilty if a corporation was found guilty of contravening the *Feeds Act*). The Standing Committee on Agriculture of

64. That history was known to Parliamentarians when they considered the amendment of the *Department of Justice Act* in 1985. Section 3 of the *Canadian Bill of Rights* was used to draft s. 4.1 of the *Department of Justice Act*. At that time, Parliament was made aware that there was not a practice of regular reporting to the House under the *Canadian Bill of Rights*. At second reading and in testimony before the House and Senate Committees, the then Minister and a senior Justice official made the point that section 4.1 of the *Department of Justice Act* imposed the same duties on the Minister of Justice as the ones he or she was already obliged to discharge under section 3 of the *Canadian Bill of Rights*.[102]

65. Parliament would also be aware that the examination provisions are just one among a wide array of mechanisms through which it can hold the executive to account for its legislative initiatives. John Stilborn describes thirteen different ways in which those parliamentary mechanisms operate and how the executive must account to Parliament for the legislation and regulations it proposes. He also explains the different sources of professional support parliamentarians can access to form an opinion about the legality of a bill.[103]

66. Parliament is taken to intend the legislation it enacts to be effective in achieving its objectives.[104] If Parliament had considered the paucity of reporting under s. 3 of the *Canadian Bill of Rights* to be unacceptable, it would have imposed a heightened duty in section 4.1 of the *Department of Justice Act*. It did not, presumably because it was satisfied that the duty to report was a credible measure of deterrence - always at the ready, yet rarely if ever used.

67. Parliament is also aware of the conclusions reached by courts about the compatibility of federal legislation with guaranteed rights. Annex "B" tabulates how the Supreme Court of Canada disposed of challenges to the constitutional validity of

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the House of Commons amended the bill to remove the inconsistency. (House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Agriculture*, 30th Parl, 1st Sess, No 63 (18 November 1975) at 19-27.

[102] *House of Commons Debates*, 33rd Parl, 1st Sess, Vol 3 (27 March 1985) at 3422 (Hon John C Crosbie); Senate, *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, 33rd Parl, 1st Sess, No 15 (12 June 1985) at p 8 (DM Low, General Counsel, Human Rights Law Section, Department of Justice).

[103] *Statement of JA Stilborn*, Appendix A at p 1.

[104] *Canada (Attorney General) v Celgene Corporation*, 2009 FCA 378 at para 45.

federal legislation in the decisions it rendered during a period of ten years – from 2006 to 2015.

a. 34 cases addressed a *Charter* challenge to federal legislation.

b. In 12 of them – or 35% - the Court found a *Charter* violation that was not saved by section 1 and which resulted in a declaration of invalidity. Those cases are shaded in **blue** in Annex "B".

c. In 4 – or 33% of the 12 cases where a *Charter* violation was found, there was a dissent about the *Charter* violation. Those cases are shaded in **green** in Annex "B"

d. In 4 – or 33% out the 12 cases where the Supreme Court found a *Charter* violation, there were inconsistent lower court decisions or a dissent at the Court of Appeal about the *Charter* violation. Those cases are also shaded in **green** in Annex "B"

68. The picture drawn by these numbers is useful for two reasons. First, it confirms that the Supreme Court concluded that federal legislation passed *Charter* muster in 65% of the challenges it decided. Second, it illustrates that, even where the Court found that the legislation violated the *Charter*, unanimity of opinion did not always prevail. Put another way, in more than half of those cases, a judge agreed that the argument presented to defend the legislation was reasonable and *bona fide* by concluding that it was constitutional.

69. This picture illustrates the falsity of the plaintiff's assumption that lowering the examination standard somehow promotes the rule of law.[105] Having a more demanding standard than "more-likely-than-not inconsistent" serves an important democratic function.

70. Where the Minister has not reached the level of certainty the examination provisions expect, debate occurs, witnesses testify and the parliamentary proceedings themselves may generate evidence and discussions relevant to a Parliament's decision whether to adopt the bill and, ultimately, to a court's

[105] *Memorandum of the plaintiff* at para 63.

determination. That is precisely what occurred in *Mills*, where the Supreme Court accepted that Parliament could validly enact a regime that differed from an approach the Court had previously indicated was constitutionally sound.[106]

71. The plaintiff's assumption also fails to account for the fact that it is for the Minister alone to decide whether he concludes that he has ascertained that a provision in a bill is inconsistent with guaranteed rights. Yet, what the Minister does in Parliament – or fails to do – is only for Parliament to pass judgment on. The Constitution guarantees to Parliamentarians, like the Minister, that they account only to Parliament for what they say and do – or fail to say or do.[107] The discharge of the Minister's reporting duty "*is administered by the House rather than by the Courts.*"[108] Under the guise of challenging the Department's interpretation of the examination provisions, the plaintiff is attempting to impose on the House of Commons his view of how one of its members ought to conduct himself or herself in the performance of duties owed to the House.

72. When the lawmaker is a regulation-making authority, the Deputy Minister's advice to the Clerk is similarly immune from review. Those privileges guarantee that the Deputy Minister answers to the Clerk, and only to the Clerk, for the provision of his or her legal advice.

73. Thus, the constitutional role of courts begins where the lawmakers' ends. Courts consider, construe and apply legislation once enacted; they do not inquire into the circumstances leading to its enactment.[109]

74. This historical context demonstrates another flaw in the plaintiff's reasoning. He assumes that the Minister is performing the pre-legislative scrutiny of

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[106] *R v Mills*, [1999] 3 SCR 668.

[107] The principle behind Article 9 of the *Bill of Rights 1688*, the protection of parliamentary privilege, has constitutional status through the preamble and s 18 of the *Constitution Act, 1867*, (UK), 30 & 31 Vic, c 3; and see s 4 and 5 of the *Parliament of Canada Act*, RSC 1985, c P-1. *Canada*. See also: *(House of Commons) v Vaid*, [2005] 1 SCR 667, 2005 SCC 30 at para 29.

[108] *Awatere Huata v Prebble*, [2004] 3 NZLR 359 at para 55 (CA); *Boscawen v AG*, [2009] NZLR 229 (CA); *Mangawaro Enterprises Ltd v AG*, [1994] 2 NZLR 451 at 457 (HC).

[109] *Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49 at 87-88, 91-92; *British Railways Board v Pickin*, [1974] AC 765 (HL); *Turner v Canada*, [1994] 3 FC 458 at 462 (CA)

legislation as an advisor to Parliament and that the "more-likely-than-not inconsistent" approach he advocates would result in greater Parliamentary debate.[110] That is not what Parliament intended.

75. Since 1868, the *Department of Justice Act* has attributed to the Minister the role of chief legal advisor to the executive, not Parliament, and the exclusive legal advisor to Cabinet.[111] Each House of Parliament, on the other hand, can seek legal advice from its own Law Clerk.[112]

76. When Parliament enacted section 3 of the *Canadian Bill of Rights* or added section 4.1 of the *Department of Justice Act*, it was aware that both of its Houses had access to legal advisors independent from the executive and that the Minister could not also be the legal advisor to the Houses of Parliament. Thus, it cannot be lightly assumed that Parliament intended to impose on the Minister conflicting duties – on the one hand, representing the executive in Parliament and, on the other, acting as Parliament's legal advisor on the same issues.

77. This underscores that the objective of the examination provisions is dissuasion, not that more-likely-than-not *Charter* risks be brought to the attention of the House for debate, as the plaintiff would have it.

2. The examination provisions in their larger context

78. The larger institutional and constitutional context within which the examination provisions operate also supports the appropriateness of the credible argument standard.

79. At the institutional level, the examination provisions do not, as the plaintiff seems to believe, represent the only occasion to consider the impact of a provision on guaranteed rights. That impact is, to the contrary, a topic of constant consideration and discussion by government officials, Justice lawyers and elected officials. The Minister's officials advise him of the legal risks presented by any legislative proposal,

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[110] *Statement of claim* at para 27 d. to f.; *Memorandum of the plaintiff* at para 62.
[111] *An Act respecting the Department of Justice*, 1868, 31 Vic, c 39; *Department of Justice Act*, RSC 1985, c J-2 at s 4 and 5; *Canada (AG) v Central Cartage Co* (1987), 10 FTR 225 (TD); aff'd (1990), 109 NR 373 (FCA); leave to appeal to SCC refused, (1991), 126 NR 336.
[112] *Affidavit of JA Stilborn* at paras 36-37; *affidavit of MD MacNair* at para 11.

even where the possibility of an adverse outcome is low; the Minister may or may not agree with those assessments.

80. The credible argument standard reflects this purpose and also takes into consideration the context within which the Department operates. In particular, it is for the government of the day to decide which policy proposals it wishes to ask Parliament to enact into law, subject to the outer limits imposed by the Constitution. Subject to those same limits, it is the role of the Department to support the democratically elected representatives in their pursuit of the policy initiatives upon which they were elected.

81. At the constitutional level, a high threshold to trigger the reporting obligation best accords with the foundational principles of the separation of powers, democracy and responsible government, a corollary of which is the neutrality of the public service.

82. The Supreme Court reaffirmed, in its landmark opinion in *Reference re Secession of Quebec,* that it is legitimate to consider the organizing principles animating the written text of the Constitution, either to construe the provisions of the Constitution or of a law embodying or furthering constitutional values.[113] As the Court stated, those underlying constitutional principles delineate the role of our political institutions.[114] They may in certain circumstances give rise to substantive legal obligations; they are invested with a powerful normative force, and are binding upon both courts and governments.[115] In the *Reference re Senate Reform*, the Court added :

> ". . . *the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text.*" [116]

83. Thus, the analysis of provisions aimed at ensuring that rights guaranteed

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[113] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 53.
[114] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 52.
[115] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 54.
[116] *Reference re Senate Reform,* 2014 SCC 32, [2014] 1 SCR 704 at para 26.

by the *Charter* and the *Bill of Rights* is done throughout the policy development and legislative drafting processes. This analysis must consider "*how a particular interpretation fits with other constitutional powers and the assumptions that underlie the text.*"[117]

84. A representative and responsible government is fundamental to our conception of democracy, [118] the "*baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated.*" [119] Democracy expresses itself through the election of members of Parliament to which the executive is accountable;[120] democracy is about who makes the difficult decisions about what a "right answer" might be.[121] Democracy entrusts to the government of the day the responsibility of pursuing policies and legislation it considers to be in the public interest, within the outer boundary of guaranteed rights and the Constitution more generally.

85. Within that boundary, Parliament has recognized that a democratically-elected government is entitled to make policy choices and propose them to elected representatives. There remains considerable scope for debate as to how a proposed law may be viewed when measured against guaranteed rights and the Constitution more generally. Those choices will be debated and discussed by law-makers and the public over the course of the legislative process.

86. The unwritten constitutional principle of democracy intersects with the separation of powers, itself a foundational constitutional principle.[122] The principle of the separation of powers recognizes that public power is divided amongst the three branches of government – the legislature, the executive and the judiciary. Elected by the sovereign will of the people, the government of the day introduces bills into Parliament as one of the means of implementing its democratic mandate. If the legislature enacts a bill into law, the executive must administer and implement it,

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[117] *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 SCR 31 at para 27.
[118] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 64-65.
[119] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 62.
[120] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 65-67.
[121] *Affidavit of WF Pentney* at para 77.
[122] *House of Commons v Vaid*, [2005] 1 SCR 667 at para 21.

while the role of the judiciary is to interpret and apply the law and, where called upon, determine its constitutional validity.[123] The credible argument standard reflects this foundational principle because it reflects the proper role of the executive.

87. The neutrality of the public service supports these underlying values by providing the executive with the means to fully carry out its role. To administer and implement laws, and to prepare the legislative proposal members of Cabinet wish to put to Parliament, the elected members of the executive rely on the public service.[124] From this symbiotic relationship between the elected members and the public servants stems the convention of political neutrality, central to the principle of responsible government.[125] Political neutrality calls for an examination standard that supports the Minister in performing his duties, not one which purports to dictate how he should exercise them.[126]

88. A high threshold for reporting echoes the constitutional principles of democracy and responsible government and the related value of a neutral public service which are consistent with the purpose of deterring the introduction of inconsistent legislation. The absence of reports under s. 4.1 of the *Act,* reveals that the standard is operating as it should, namely that concerns and issues are addressed before introducing legislation, negating the need for a report to Parliament.[127]

### C. CONCLUSION

89. The examination provisions are part of the Minister's home statute. They deal with an office steeped in a long and honourable tradition. The examination provisions reflect the careful and considered view of the Department. The credible argument standard has been developed, applied and reconsidered – taking the

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[123] *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455 at 469-470.
[124] *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455 at 470.
[125] *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69 at 86. See also *OPSEU v Ontario (Attorney General)*, [1987] 2 SCR 2 at 42-45.
[126] *Affidavit of WF Pentney* at paras 65-66.
[127] Janet L Hiebert, "Wrestling with Rights: Judges, Parliament and the Making of Social Policy" in Paul Howe & Peter H Russell, *Judicial Power and Canadian Democracy* (Mc-Gill-Queen's University Press, 2001) 164 at 170, 172-5.

plaintiff's view into account – over a lengthy period of time. Successive Ministers have explained to the House how they discharged their reporting obligation and the House has never expressed dissatisfaction. The House consciously decided, in 1985, that it was satisfied with the manner in which the Minister performed his reporting duty, knowing that he had reported but one inconsistency in the previous twenty-five years. Parliament wanted the Minister to continue to play his political and statutory roles, not become a judge ruling on the validity of proposed legislation.

90. The credible argument standard is the proper interpretation of the examination provisions. As Parliament intended, it enables the executive to execute its policy development role with a wide degree of latitude, even proposals that may attract legal risks short of the clear unconstitutionality the examination provisions deter. All of this necessarily occurs within the outer boundaries set by the Constitution and by guaranteed rights, recognizing that the courts have the ultimate responsibility to decide whether legislation is constitutional. The credible argument standard properly reflects Parliament's intent to allow each branch of government to perform its appropriate role in ensuring that guaranteed rights are respected.

91. The Department of Justice's approach to the examination of legislation and regulations in support of the Minister's obligation is thus informed by the need to be respectful of the democratic process, while at the same time supporting the Minister of Justice and Attorney General of Canada in the exercise of his roles and duties, including, but not limited to, upholding the rule of law. The plaintiff would reduce the Minister's role to that single constitutional principle,[128] ignoring the Supreme Court's admonition to the contrary. Defining constitutional principles, like the rule of law, must

> "*. . . function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.*"[129]

[128] *Memorandum of the plaintiff* at para 63.
[129] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 49.

## IV. Costs

92. In the exceptional circumstances of this case, the defendant does not seek costs and neither should the plaintiff. If the plaintiff is successful, the advance costs order already fully compensates him, up to the end of the trial of this action.

## V. Relief Sought

93. For all of these reasons, that the Court:

a. Dismiss this simplified action.

b. Declare that credible argument examination standard used by the Department in its review of legislation under section 3 of the *Canadian Bill of Rights*, section 4.1 of the *Department of Justice Act* and section 3 of the *Statutory Instruments Act* is appropriate and lawful.

c. Declare that the "more-likely-than-not inconsistent" approach advocated by the plaintiff does not reflect section 3 of the *Canadian Bill of Rights*, section 4.1 of the *Department of Justice Act* and section 3 of the *Statutory Instruments Act*.

d. Declare that the examinations that have been conducted in accordance with the credible argument standard were conducted in accordance with the statutory examination provisions.

e. Without costs.

DATED AT OTTAWA, this 31st day of August 2015

*Alain Préfontaine* *Elizabeth Kikuchi* *Sarah Sherhols*

Counsel for the Defendant

## VI. AUTHORITIES CITED

### A. *LEGISLATION*

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*Canadian Bill of Rights*, SC 1960, c. 44

*Department of Justice Act*, RSC 1985, c J-2

*Statutory Instruments Act*, RSC 1985, c S-22

### B. *CASES*

*Awatere Huata v Prebble*, [2004] 3 NZLR 359 (CA)

*Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559

*Boscawen v AG*, [2009] NZLR 229 (CA)

*British Railways Board v Pickin*, [1974] AC 765 (HL)

*Canada (Auditor General) v Canada (Minister of Energy, Mines and Resources)*, [1989] 2 SCR 49

*Canada (Attorney General) v Celgene Corporation*, 2009 FCA 378

*Canada (AG) v Central Cartage Co* (1987), 10 FTR 225 (TD)

*Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306

*Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455

*House of Commons v Vaid*, [2005] 1 SCR 667

*Mangawaro Enterprises Ltd v AG*, [1994] 2 NZLR 451 (HC).

*Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69

*R v Mills*, [1999] 3 SCR 668.

*Reference re Secession of Quebec*, [1998] 2 SCR 217

*Reference re Senate Reform,* 2014 SCC 32, [2014] 1 SCR 704

*Schreiber v Canada (Attorney General)*, 2002 SCC 62, [2002] 3 SCR 269

*Stinson v College of Physicians and Surgeons of Ontario*, [1912] 27 OLR 565 (Ont HCJ, Div Ct).

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House of Commons, *Minutes of Proceedings and Evidence of the Special Committee on Human Rights and Fundamental Freedoms*, 24th Parl, 3rd Sess, No 1 (22 July 1960)

*House of Commons Debates*, 33rd Parl, 1st Sess, Vol 3 (27 March 1985)

House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, 33rd Parl, 1st Sess, No 25 (23 April 1985)

Senate, *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, 33rd Parl, 1st Sess, No 15 (12 June 1985)

**ANNEX "A"**

Summary of Professor McLean's evidence about the statutory pre-legislative scrutiny and reporting mechanisms existing in other Commonwealth jurisdictions

| | New Zealand | UK | ACT | Victoria | Australia |
|---|---|---|---|---|---|
| **Instrument** | *New Zealand Bill of Rights Act 1990*, s 7. | *Human Rights Act 1998*, s 19. | *ACT Human Rights Act 2004*, s 37. | *Victoria Charter of Human Rights and Responsibilities 2006*, s 28. | *Human Rights (Parliamentary Scrutiny) Act 2011*, s 8. |
| **Scope of duty** | Every bill. | Government bills. | Government bills. | Every bill. | Every bill. |
| **Nature of reporting duty** | Any provision that appears to be inconsistent with any of the rights and freedoms. | Whether the bill is compatible with ECHR rights or whether this can't be said and the Minister wants to introduce the bill nevertheless. | Whether the bill is consistent/inconsistent with human rights, and basis of that opinion if inconsistent. | Whether the bill is compatible or incompatible with human rights, and explanation of compatibility or nature/extent of incompatibility. | Whether the bill is compatible with human rights as defined in seven international human rights treaties. |
| **Who reports** | Attorney General (separate from the Justice Minister). | Minister in charge of the bill. | Attorney General. | Member of Parliament who introduces the bill. | Member of Parliament who introduces the bill. |
| **Exercise of reporting duty** | If there appears to be an inconsistency, the AG considers whether a limit on a right is reasonable and reports only if he concludes that the | Statements of compatibility made if, on a balance of probabilities, the bill would be found compatible if challenged in court. Ministers ultimately decide how much | If there is an inconsistency, the AG will consider whether the limit on a right is reasonable, i.e. whether it "can be demonstrably justified in a free | If there is an incompatibility, the member will consider whether the limit on the right is reasonable. A version of the *Oakes* test is used.<br><br>A statement of | Compatibility will depend on the right at issue and the relevant treaty's wording. Consideration given to whether the protected right is derogable or non-derogable. |

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| | New Zealand | UK | ACT | Victoria | Australia |
|---|---|---|---|---|---|
| | limit is unjustifiable. | risk to take. | and democratic society." | incompatibility is not required where an override declaration is made. | |
| **Reports re: private bills** | 31 | N/A | N/A | 0 | 0 |
| **Reports re: gov. bills** | 28 | 3 | 0 | 2 | 0 |
| **Reporting duty judicially reviewable** | No. | Unlikely, but has not yet been judicially determined. | Unlikely, but has not yet been judicially determined. | Unlikely, but has not yet been judicially determined. | Unlikely, but has not yet been judicially determined. No consequences flow from a failure to present a statement of compatibility. |
| **Courts and inconsistent legislation** | Cannot invalidate or make inoperative inconsistent legislation. If a statute cannot be interpreted to comply with the *NZBOR*, it is nevertheless to be applied. | A court must give effect to legislation in a way that is compatible with Convention rights. If that is impossible, it may make a declaration of incompatibility. This declaration has no effect on the legislation's validity or operation. | A court must give legislation rights-consistent interpretations if possible. A court may grant a declaration of incompatibility, but this does not invalidate the law or render it ineffective. | A court must give legislation rights-consistent interpretations if possible. If this is not possible, a court may make a declaration of incompatibility, but this does not invalidate the law or render it inoperative. | The approach the courts will take is still unclear, but it is envisaged that statements of compatibility may assist in judicial interpretations of statutes and regulations. |

**Annex "B"**

Review of SCC decisions dealing with *Charter* or *Canadian Bill of Rights* challenges from 2006 to 2015
(as of 10 August 2015)

Shading in blue indicates that the SCC held there was a violation not saved under section 1 of the *Charter*.
Shading in green indicates an inconsistent result or dissent in lower courts where the SCC decided there was a *Charter* violation.

| # | Citation | Issue | Outcome | Violation [130] | SCC dissent [131] | Inconsistent result or dissent in lower courts [132] |
|---|---|---|---|---|---|---|
| 1. | ***Guindon v Canada*, 2015 SCC 41** | Whether s 163.2 of the *Income Tax Act* violates s 11 of the *Charter*. | Appeal dismissed.<br><br>S 11 of the *Charter* is not engaged by s 163.2. | **No** | | |
| 2. | ***R v Smith*, 2015 SCC 34** | Whether certain provisions of the medical marihuana access regime under the *Controlled Drugs and Substances Act* and the *Marihuana Medical Access Regulations* infringes s 7 of the *Charter*. | Appeal dismissed<br><br>Some of the challenged provisions under the Act violate s 7 of the *Charter*. | **Yes** | | There was a dissent at the Court of Appeal.[133] |
| 3. | ***R v Nur*, 2015 SCC 15** | Whether the mandatory minimum terms of | Appeal dismissed. | **Yes** | **Dissent** (3) | The Ontario Court of Appeal held that s 12 of |

[130] Violation not saved under section 1 of *Charter*.
[131] From majority decision of *Charter* violation.
[132] Where the SCC decided there was a *Charter* violation.
[133] 2014 BCCA 322.

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| # | Citation | Issue | Outcome | Violation [130] | SCC dissent [131] | Inconsistent result or dissent in lower courts [132] |
|---|---|---|---|---|---|---|
| | | imprisonment in ss 95(2)(a)(i) and (ii) of the *Criminal Code* infringe ss 7 and/or 12 of the *Charter*. | S 95(2)(a) violates s 12 of the *Charter*. | | | the *Charter* was violated.[134]<br><br>The Ontario Superior Court held that there was no violation of ss 12 or 15 of the *Charter*. It held there was a violation of s 7, but the applicant had no standing.[135] |
| **4.** | ***Canada (Attorney General) v Federation of Law Societies Canada*, 2015 SCC 7, [2015] 1 SCR 401** | Whether certain provisions in the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and *Regulations*, which relate to the information lawyers must keep and obtain about their clients, infringe ss 7 and/or 8 of the *Charter*. | Appeal allowed in part.<br><br>Some of the challenged provisions violate ss 7 and 8 of the *Charter*. | **Yes** | | |
| **5.** | ***Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331** | Whether the *Criminal Code* provisions prohibiting physician-assisted death violate ss 7 and/or 15 of the *Charter*. | Appeal allowed.<br><br>The challenged provisions violate s 7 of the *Charter*.<br><br>The Court did not consider s | **Yes** | | The British Columbia Court of Appeal held that there was no *Charter* violation because the trial judge was bound by |

[134] 2013 ONCA 677.
[135] 2011 ONSC 4874.

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| # | Citation | Issue | Outcome | Violation [130] | SCC dissent [131] | Inconsistent result or dissent in lower courts[132] |
|---|---|---|---|---|---|---|
| | | | 15 of the *Charter*. | | | *Rodriguez v BC (AG)*, [1993] 3 SCR 519. There was a dissent.[136]<br><br>The British Columbia Supreme Court held the prohibition violated s 7 of the *Charter*.[137] |
| **6.** | ***Meredith v Canada (Attorney General)*, 2015 SCC 2, [2015] 1 SCR 125** | Whether certain provisions of the *Expenditure Restraint Act* infringe s 2(d) of the *Charter*. | Appeal dismissed.<br><br>The challenged provisions do not violate the *Charter*. | **No** | | |
| **7.** | ***Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, [2015] 1 SCR 3** | Whether excluding RCMP members from collective bargaining and imposing a non-unionized labour relations regime under the *Royal Canadian Mounted Police* Regulations infringes s 2(d) of the *Charter*. | Appeal allowed.<br><br>The challenged provisions violate the *Charter*. | **Yes** | **Dissent** (1) | |
| **8.** | ***Wakeling v United States of America*, 2014 SCC 72, [2014] 3 SCR 549** | Whether federal legislation (the *Criminal Code* and *Privacy Act*) authorizing the sharing of lawfully obtained wiretap information between Canada and foreign law | Appeal dismissed.<br><br>The challenged provisions do not violate the *Charter*. | **No** | | |

[136] 2013 BCCA 435.
[137] 2012 BCSC 886.

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| # | Citation | Issue | Outcome | Violation [130] | SCC dissent [131] | Inconsistent result or dissent in lower courts [132] |
|---|---|---|---|---|---|---|
| | | enforcement agencies infringes ss 7 and/or 8 of the *Charter*. | | | | |
| 9. | ***Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 SCR 176** | Whether s 3(1) of the *State Immunity Act* are inconsistent with s 2(e) of the *Bill of Rights* and/or infringe s 7 of the *Charter*. | Appeal dismissed.<br><br>S 2(e) of the *Bill of Rights* is not engaged in this case. There is no violation of s 7 of the *Charter*. | **No** | | |
| 10. | ***R v Conception*, 2014 SCC 60, [2014] 3 SCR 82** | Whether certain provisions of the treatment order regime under the *Criminal Code* infringe s 7 of the *Charter*. | Appeal dismissed.<br><br>The challenged provisions do not violate the *Charter*. | **No** | | |
| 11. | ***Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37, [2014] 2 SCR 33** | Whether the security certificate scheme under the *Immigration and Refugee Protection Act* infringes s 7 of the *Charter*. | Appeal allowed in part.<br><br>The challenged provisions do not violate the *Charter*. | **No** | | |
| 12. | ***Canada (Attorney General) v Whaling*, 2014 SCC 20, [2014] 1 SCR 392** | Whether s 10(1) of the *Abolition of Early Parole Act* that had the effect of delaying certain inmates' eligibility for day parole infringed s 11(h) of the *Charter*. | Appeal dismissed.<br><br>S 10(1) of the Act infringes s 11(h) of the *Charter*. | **Yes** | | |
| 13. | ***Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101** | Whether certain provisions of the *Criminal Code* that criminalizes various activities related to prostitution infringe | Appeal dismissed.<br><br>The challenged provisions violate the *Charter*. | **Yes** | | |

**Pre-trial memorandum of the defendant**

| # | Citation | Issue | Outcome | Violation [130] | SCC dissent [131] | Inconsistent result or dissent in lower courts [132] |
|---|---|---|---|---|---|---|
| | | ss 7 and/or 2(b) of the *Charter*. | | | | |
| 14. | ***Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 SCR 157** | Whether certain provisions of the *International Transfer of Offenders Act* that do not give a Canadian citizen who is sentenced abroad an automatic right to serve a sentence in Canada infringe s 6(1) of the *Charter*. | Appeal dismissed.<br><br>The challenged provisions do not violate the *Charter*. | **No** | | |
| 15. | ***R v Levkovic*, 2013 SCC 25, [2013] 2 SCR 204** | Whether s 243 of the *Criminal Code* infringes s 7 of the *Charter*. | Appeal dismissed.<br><br>S 243 of the *Code* does not infringe s 7 of the *Charter*. | **No** | | |
| 16. | ***R v St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 SCR 187** | Whether the statutory presumptions in certain provisions of the *Criminal Code* infringe ss 7, 11(c) and/or 11(d) of the *Charter*. | Appeal allowed in part.<br><br>The challenged provisions infringe s 11(d) of the *Charter*. This infringement is only justified after certain words in the provisions are severed. | **Yes** | **Dissenting in part** (2) | |
| 17. | ***R v Khawaja*, 2012 SCC 69, [2012] 3 SCR 555** | Whether certain provisions in the Terrorism section of the *Criminal Code* infringe ss 2 and/or 7of the *Charter*. | Appeal dismissed.<br><br>The challenged provisions do not violate the *Charter*. | **No** | | |
| 18. | ***Sriskandarajah v*** | Companion appeal to *R v* | Appeal dismissed. | **No** | | |

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| # | Citation | Issue | Outcome | Violation [130] | SCC dissent [131] | Inconsistent result or dissent in lower courts [132] |
|---|---|---|---|---|---|---|
| | ***United States of America*, 2012 SCC 70, [2012] 3 SCR 609** | *Khawaja*, 2012 SCC 69. | The challenged provisions do not violate the *Charter*. | | | |
| **19.** | ***R v Tse*, 2012 SCC 16, [2012] 1 SCR 531** | Whether s 184.4 of the *Criminal Code*, the emergency wiretap provision, infringes s 8 of the *Charter*. | Appeal dismissed.<br><br>S 184.4 of the *Code* violates s 8 of the *Charter*. | **Yes** | | |
| **20.** | ***Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134** | Whether ss 4(1) & 5(1) of the *Controlled Drugs and Substances Act*, which prohibit possession and trafficking, infringe s 7 of the *Charter*. | Appeal dismissed.<br><br>The challenged provisions do not violate the *Charter*. | **No** | | |
| **21.** | ***Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396** | Whether certain provisions in the *Public Service Superannuation* and *Canadian Forces Superannuation Acts* related to supplementary death benefits infringe s 15(1) of the *Charter*. | Appeal dismissed.<br><br>The challenged provisions do not violate the *Charter*. | **No** | | |
| **22.** | ***R v Ahmad*, 2011 SCC 6, [2011] 1 SCR 110** | Whether the s 38 scheme in the *Canada Evidence Act* infringes s 7 of the *Charter*. | Appeal allowed.<br><br>The challenged provisions do not violate the *Charter*. | **No** | | |
| **23** | ***Toronto Star Newspapers Ltd. V Canada*, 2010 SCC** | Whether s 517 of the *Criminal Code*, which requires a judge to order a | Appeal dismissed.<br><br>S 517 of the *Code* infringes | **No** | | |

**Pre-trial memorandum of the defendant**

| # | Citation | Issue | Outcome | Violation [130] | SCC dissent [131] | Inconsistent result or dissent in lower courts [132] |
|---|---|---|---|---|---|---|
| | **21, [2010] 1 SCR 721** | publication ban in certain circumstances, infringes s 2(b) of the *Charter*. | s 2(b) of the *Charter*, but the limit is justified under s 1. | | | |
| **24.** | ***R v J.Z.S.*, 2010 SCC 1, [2010] 1 SCR 3** | Whether s 486.2 of the *Criminal Code* and s 16.1 of the *Canada Evidence Act*, which relate to the manner in which children testify, infringe ss 7 and 11 (d) of the *Charter*. | Appeal dismissed.<br><br>The challenged provisions do not violate the *Charter*. | **No** | | |
| **25.** | ***Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9, [2009] 1 SCR 222** | Whether certain money management provisions in the *Indian Act* infringe s 15(1) of the *Charter*. | Appeals dismissed.<br><br>The challenged provisions do not violate the *Charter*. | **No** | | |
| **26.** | ***R v D.B.*, 2008 SCC 25, [2008] 2 SCR 3** | Whether certain reverse onus provisions in the *Youth Criminal Justice Act* infringe s 7 of the *Charter*. | Appeal dismissed.<br><br>The challenged provisions violate the *Charter*. | **Yes** | **Dissenting in part** (4) | |
| **27.** | ***R v Ferguson*, 2008 SCC 6, [2008] 1 SCR 96** | Whether the mandatory minimum sentence of imprisonment imposed by s 236(a) of the *Criminal Code* infringes s 12 of the *Charter*. | Appeal dismissed.<br><br>The challenged provision does not violate the *Charter*. | **No** | | |
| **28.** | ***Charkaoui v Canada (Citizenship and Immigration)*, 2007** | Whether the certificate of inadmissibility scheme under the *Immigration and Refugee* | Appeal allowed.<br><br>The challenged provisions | **Yes** | | The trial judge and the Court of Appeal held that the challenged |

**Pre-trial memorandum of the defendant**

| # | Citation | Issue | Outcome | Violation [130] | SCC dissent [131] | Inconsistent result or dissent in lower courts[132] |
|---|---|---|---|---|---|---|
| | **SCC 9, [2007] 1 SCR 350** | *Protection Act* infringes ss 7, 9, 10, 12 and 15 of the *Charter*. | violate s 7, 9, and 10 of the *Charter*. | | | provisions did not violate the *Charter*.[138] |
| 29. | ***Canada (Attorney General) v JTI-MacDonald Corp.*, 2007 SCC 30, [2007] 2 SCR 610** | Whether certain advertising and promotions provisions of the *Tobacco Act* and the *Tobacco Products Information Regulations* infringe s 2(b) of the *Charter*. | Appeal allowed.<br><br>The challenged provisions infringed s 2(b) of the *Charter*, but this infringement is justified under s 1. | **No** | | |
| 30. | ***Canada (Attorney General) v Hislop*, 2007 SCC 10, [2007] 1 SCR 429** | Whether provisions of the *Canada Pension Plan* limiting eligibility for survivor benefits to same-sex partners of certain deceased contributors infringe s 15(1) of the *Charter*. | Appeal dismissed.<br><br>Some of the challenged provisions violate the *Charter*. | **Yes** | | |
| 31. | ***R v Bryan*, 2007 SCC 12, [2007] 1 SCR 527** | Whether s 329 of the *Canada Elections Act*, which prohibits the transmission of election results in one district to another before all polling stations are closed, infringes s 2(b) of the *Charter*. | Appeal dismissed.<br><br>S 329 of the Act infringes s 2(b) of the *Charter*, but this infringement is justified under s 1. | **No** | | |
| 32. | ***United States of America v Ferras;*** | Whether the treaty method under s 32(1)(b) of the | Appeals allowed. | **No** | | |

[138] 2004 FCA 421, 2003 FC 1419.

**Pre-trial memorandum of the defendant**

| # | Citation | Issue | Outcome | Violation [130] | SCC dissent [131] | Inconsistent result or dissent in lower courts [132] |
|---|---|---|---|---|---|---|
| | ***United States of America v Latty*, 2006 SCC 33, [2006] 2 SCR 77** | *Extradition Act* infringes s 7 of the *Charter*. | S 32(1)(b) of the Act does not violate the *Charter*. | | | |
| **33.** | ***United Mexican States v Ortega; United States of America v Fiessel*, 2006 SCC 34, [2006] 2 SCR 120** | Companion appeal to *United States of America v Ferras; United States of America v Latty*, 2006 SCC 33. | Appeals allowed.<br><br>S 32(1)(b) of the Act does not violate the *Charter*. | **No** | | |
| **34.** | ***R v Rodgers*, 2006 SCC 15, [2006] 1 SCR 554** | Whether s 487.055(1) of the *Criminal Code*, which relates to taking DNA samples, infringes s 7, 8 and/or 11 of the *Charter*. | Appeal allowed.<br><br>S 487.055(1) of the *Code* does not violate the *Charter*. | **No** | | |
| | | | **Totals:** | **12/34** | **4/12** | **4/12** |