Federal Court of Appeal  Cour d'appel fédérale

Date: 20180320

Docket: A-105-16

Citation: 2018 FCA 55

CORAM: **STRATAS J.A.**
NEAR J.A.
RENNIE J.A.

BETWEEN:

EDGAR SCHMIDT

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

THE CANADIAN CIVIL LIBERTIES ASSOCIATION and THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Interveners

Heard at Ottawa, Ontario, on February 8, 2017.

Judgment delivered at Ottawa, Ontario, on March 20, 2018.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: NEAR J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] This is an appeal from the judgment dated March 2, 2016 of the Federal Court (*per* Noël J.): 2016 FC 269. The Federal Court dismissed the appellant's action for declaratory relief.

[2] The appellant sought a declaration concerning the meaning of three legislative provisions. Two require the Minister to "ascertain" or "examine" whether proposed legislation is "inconsistent" with the Charter or the *Canadian Bill of Rights*, as the case may be: *Canadian Bill of Rights*, S.C. 1960, c. 44, section 3; *Department of Justice Act*, R.S.C., 1985, c. J-2, section 4.1. A third applies to proposed regulations, and requires the Clerk of the Privy Council (in consultation with the Deputy Minister) to "examine [them]…to ensure" that, among other things, they do "not trespass unduly on existing rights and freedoms and [are not], in any case, inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*": *Statutory Instruments Act*, R.S.C., 1985, c. S-22, section 3.

[3] In certain circumstances, following the examination, a report of inconsistency must be made to the House of Commons or to regulation-making authorities, as the case may be. But what is the threshold for reporting under these provisions?

[4] In the Federal Court, the appellant submitted that a report must be made when proposed legislation is "more likely than not inconsistent" with these constitutional and quasi-constitutional standards. The respondent submitted that a report need be made only when no credible argument can be made that the proposed legislation meets these standards. The Federal Court agreed with the respondent.

[5] In my view, the Federal Court did not err. In fact, I agree substantially with its reasons, though I have additional reasons in support of the judgment it gave. Therefore, I would dismiss the appeal.

A. A preliminary objection

[6] In her memorandum, the respondent submits that the appeal should be dismissed because the appellant has failed to meet the conditions necessary for the granting of declaratory relief set out in *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99 at para. 11.

[7] The respondent adds that to the extent the appellant asks the Court to declare when the Minister ought to report an inconsistency to the House of Commons, Parliament is to decide that. It is Parliament's job to determine, as a matter of privilege, whether the Minister is performing her duty to the House as it expects: *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667.

[8] I reject the respondent's submissions. As a former examiner of proposed legislation under the examination provisions, the appellant had a sufficient interest to bring this challenge in the Federal Court and to seek the declarations. Were a declaration granted, there would be a real, practical effect: under the examination provisions, the reporting threshold would change.

[9] To find that the appellant does not have the standing to seek the declarations is to render the examination provisions immune from challenge. On these facts, were it necessary to do so, I would grant the appellant public interest standing to seek the declarations: *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524.

[10] I also reject the respondent's characterization of this matter as a matter of Parliamentary privilege.

[11] We are dealing with legislation that imposes obligations on the Minister and the Clerk of the Privy Council (in consultation with the Deputy Minister) to perform some action. The question before us is whether these public officials are complying with their legislative obligations. The answer turns on how we interpret the legislation.

[12] This is the normal stuff of judicial determination. This is especially so for the Federal Courts who are generally responsible for the policing and supervision of the exercise of legislative powers by the federal executive: *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385 at para. 24; *Federal Courts Act*, R.S.C. 1985, c. F-7, sections 18 and 18.1.

B. The legislative provisions in issue

[13] Section 3 of the *Canadian Bill of Rights* provides as follows:

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	**3.** (1) 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

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.	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.
(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.	(2) 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.

[14] Section 4.1 of the *Department of Justice Act* provides as follows:

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 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.	**4.1.** (1) 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 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.
(2) A regulation need not be examined in accordance with subsection (1) if prior to being made it was examined	(2) Il n'est pas nécessaire de procéder à l'examen prévu par le paragraphe (1) si le projet de règlement a fait l'objet

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.

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.

[15] Section 3 of the *Statutory Instruments Act* provides as follows:

3. (1) Subject to any regulations made pursuant to paragraph 20(a), where a regulation-making authority proposes to make a regulation, it shall cause to be forwarded to the Clerk of the Privy Council three copies of the proposed regulation in both official languages.

3. (1) Sous réserve des règlements d'application de l'alinéa 20a), l'autorité réglementaire envoie chacun de ses projets de règlement en trois exemplaires, dans les deux langues officielles, au greffier du Conseil privé

(2) 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

(2) 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 :

(a) it is authorized by the statute pursuant to which it is to be made;

a) le règlement est pris dans le cadre du pouvoir conféré par sa loi habilitante;

(b) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;

b) il ne constitue pas un usage inhabituel ou inattendu du pouvoir ainsi conféré;

(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; and

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;

(d) the form and draftsmanship of the proposed regulation are in accordance with established standards.	d) sa présentation et sa rédaction sont conformes aux normes établies.
(3) When a proposed regulation has been examined as required by subsection (2), the Clerk of the Privy Council shall advise the regulation-making authority that the proposed regulation has been so examined and shall indicate any matter referred to in paragraph (2)(a), (b), (c) or (d) to which, in the opinion of the Deputy Minister of Justice, based on that examination, the attention of the regulation-making authority should be drawn.	(3) L'examen achevé, le greffier du Conseil privé en avise l'autorité réglementaire en lui signalant, parmi les points mentionnés au paragraphe (2), ceux sur lesquels, selon le sous-ministre de la Justice, elle devrait porter son attention.
(4) Paragraph (2)(d) does not apply to any proposed rule, order or regulation governing the practice or procedure in proceedings before the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court, the Tax Court of Canada or the Court Martial Appeal Court.	(4) L'alinéa (2) d) ne s'applique pas aux projets de règlements, décrets, ordonnances, arrêtés ou règles régissant la pratique ou la procédure dans les instances engagées devant la Cour suprême du Canada, la Cour d'appel fédérale, la Cour fédérale, la Cour canadienne de l'impôt ou la Cour d'appel de la cour martiale du Canada.

[16] Though the legislation differs in minor ways, for the purposes of this case they may be dealt with together. This is in keeping with the "principle of statutory interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter": *R. v. Ulybel Enterprises Ltd*., 2001 SCC 56, [2001] 2 S.C.R. 867 at para. 52. For the remainder of these reasons, I shall refer to this legislation as the "examination provisions".

C. Is there a standard of review to be applied?

[17] In an appeal from a judgment on an application for judicial review in the Federal Court, we must assess whether that Court chose the correct standard of review and whether it applied it properly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47.

[18] In doing this, first we must assess the true or real nature or the essential character of the appellant's application: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] D.T.C. 5001 at paragraph 50; *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418, at para. 137. The form of the pleading takes a back-seat to its substance: *JP Morgan* at paras. 49-50.

[19] In this case, the appellant does not challenge any specific administrative decision. Rather, he seeks declaratory relief. The appellant says that the Minister, the Clerk of the Privy Council and the Deputy Minister have been misinterpreting and misapplying the examination provisions by adopting too high a reporting threshold.

[20] The Federal Court observed (at para. 40) that, despite being framed as an action for a declaratory judgment, the proceeding was in effect a judicial review of the interpretation of the examination provisions by the Minister, the Clerk of the Privy Council and the Deputy Minister. I agree.

[21] This Court adopted this approach in *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, 379 D.L.R. (4th) 737. In that case, a First Nation sought a declaration that it was entitled to be consulted before the Government of Canada entered to an international agreement. In substance, the request for a declaration arose in the context of an administrative decision made by the Government of Canada. The Government of Canada decided—implicitly or explicitly in the face of the First Nation's stated position—that it could bring the international agreement into effect without consulting with the First Nation or other Indigenous peoples. Through the use of a declaration, the First Nation sought to set aside the administrative decision. Given this was the substance of the matter, this Court went on to determine the standard of review, as it does whenever it is asked to review administrative decision-making. It applied the reasonableness standard.

[22] The thrust of this proceeding is an attack against the Minister's longstanding administrative conduct in relation to the examination provisions, and specifically her longstanding conduct in failing to make a report of inconsistency when one allegedly should be made. The core of this proceeding is the Minister's interpretation of the meaning of the examination provisions. This Court is asked in essence to quash that interpretation. As in *Hupacasath* and as the Federal Court noted, the standard of review must be considered.

D. What is the standard of review?

[23] In the case before us, the Minister and the Clerk of the Privy Council (in consultation with the Deputy Minister) are charged with the responsibility of examining proposed legislation.

They are "interpreting [their] own statute or statutes closely connected to [their] function, with which [they] will have particular familiarity": *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 54. Thus, the presumptive standard of review in this circumstance is reasonableness: *ibid*. This has been reaffirmed in many other cases: see, *e.g.*, *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 34; and, most recently, see *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, 412 D.L.R. (4th) 103, and *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron*, 2018 SCC 3.

E. Principles concerning administrative decision-makers and the interpretation of legislation

[24] The Supreme Court has given much guidance on how courts should interpret legislative provisions. However, it has never definitively and explicitly told us how administrative decision-makers should interpret legislative provisions. Implicitly, though, it has. Without exception, when the Supreme Court has conducted reasonableness review of administrative decision-makers' interpretations of legislative provisions, it assesses their interpretations using the methodology it has told courts to use.

[25] What is that methodology? Legislative provisions are to be interpreted in accordance with their text, context and purpose: *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601.

[26] In undertaking the interpretive task we must also be mindful that these provisions are to be given "such fair, large and liberal construction and interpretation as best ensures the attainment of [their] objects": *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12. And both the English and French versions of each statute are equally authoritative statements: *Schreiber v. Canada* (*Attorney General*), 2002 SCC 62, [2002] 3 S.C.R. 269 at para. 54.

[27] We analyze the text, context and purpose with a view to discerning "what the legislation authentically means": *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252 at para. 48; *Canada v. Cheema*, 2018 FCA 45 at para. 80.

[28] This must be done objectively and dispassionately without regard to extraneous considerations such as personal policies or political preferences. We must not drive for results we personally prefer, fasten onto what we like and ignore what we don't, or draw upon what we think is best for Canadians or Canadian society. Common to these practices is an improper focus on what we want the legislation to mean rather than on what the legislation authentically means: *Williams*, at para. 48.

[29] Put another way, "the proper focus when interpreting legislation is, and must always be, on what the legislator actually said, not on what one might wish or pretend it to have said": *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para. 202 (per Brown J., McLachlin C.J. concurring, the other Justices not disagreeing with the statement).

[30] This Court recently put this same idea as follows:

> Judges are only lawyers who happen to hold a judicial commission. Just like the people they serve, judges are unelected and are bound by legislation. What, then, is the right of judges to avert their eyes from the authentic meaning of legislation enacted by the elected and, instead, to choose a meaning that accords with their own particular views[…]

(*Cheema* at para. 79; see also *Williams* at para. 49.)

[31] On a similar note, this Court also put it this way:

> Absent a successful argument that legislation is inconsistent with the Constitution, judges—like everyone else—are bound by the legislation. They must take it as it is. They must not insert into it the meaning they want. They must discern and apply its authentic meaning, nothing else.
>
> How do we go about this? As the authorities suggest, we are to investigate the text, context and purpose of the legislation as objectively and fairly as we can. On this, especially when investigating the purpose, we have assistance: the *Interpretation Act*, R.S.C. 1985, c. I-2, canons of statutory construction known to both legislative drafters and courts, and other legitimate aids to interpretation such as—in certain circumstances and with appropriate caution—extraneous, contemporaneous materials (*e.g.*, regulatory impact or official explanatory statements), legislative debates, and legislative history.

(*Williams* at paras. 50-51.)

[32] In interpreting legislation, one can assess the likely effects or results of rival interpretations to see which accords most harmoniously with text, context and purpose. This is appropriate:

> The judge is assessing effects or results not to identify an outcome that accords with personal policies or political preferences. Rather the judge is assessing them against the standard, accepted markers of text, context and purpose in order to discern the authentic meaning of the legislation. For example, if the effect of one interpretation offends the legislative purpose but the effect of another interpretation does not, the latter may be preferable to the former.

(*Williams* at para. 52.)

[33] The legislation at issue in this case bears upon the Charter. In a case like this, the danger of personal policies or political preferences illegitimately injecting themselves into the interpretive process is high—the Charter arouses strong views and passions in some.

[34] Many take the view that the Charter is part of a living tree that should grow and expand. Thus, any measure that relates to the Charter, such as the legislation before us, should be interpreted in order to promote the greatest possible advancement of Charter rights and freedoms generally. By way of example, the intervener, the Canadian Civil Liberties Association, urges that the reporting threshold for reports of inconsistency with the Charter should be lowered significantly so that more reports are made and a more intense consideration of Charter issues takes place during the legislative process, perhaps eliminating the burdens of Charter litigation for would-be Charter claimants.

[35] On this subject, we are dealing with legislative provisions that, among other things, require the vetting of proposed legislation for inconsistency with the Charter. In interpreting these provisions, we must be on guard not to adopt a one-sided view of the Charter at the behest of any party. The Charter is a document suffused with balances. Take the opening section as an

example. It tells us that the Charter guarantees rights and freedoms. But it also tells us that this is subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." And the Constitution of which it is a part—our supreme law under section 52 of the *Constitution Act, 1982*—is not just a "living tree capable of growth and expansion," but also one whose "growth and expansion [is] within its natural limits": *Edwards v. Canada (Attorney General)*, [1930] A.C. 124, [1930] D.L.R. 98 at pp. 106-107 D.L.R.

F. Conducting reasonableness review

[36] How should one conduct reasonableness review of an administrative decision-maker's interpretation of legislative provisions? On this, the Supreme Court has given us a little guidance.

[37] Legislative provisions come in all types, for many purposes. Some are very exact in their wording and possess little or no ambiguity in their meaning. For those, we would expect there to be very few permissible acceptable and defensible interpretive options available to the administrative decision-maker—perhaps even just one: see *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at para. 38.

[38] Others are more loosely worded, with ambiguity, using phrases such as "in its opinion," "in its discretion," "in the public interest," and "when reasonable," and, thus, many more permissible, acceptable and defensible options are available to the administrative decision-maker: Frank A.V. Falzon, Q.C., "Statutory Interpretation, Deference and the Ambiguous Concept of 'Ambiguity' on Judicial Review," C.L.E. B.C. conference, November 16, 2015.

Because of the breadth and ambiguity of these sorts of phrases, the administrative decision-maker trying to discern their meaning will have much regard to context and purpose. And some administrative decision-makers are very well placed to appreciate context and purpose due to their specialization, experience and expertise.

[39] It must be remembered that reasonableness is a deferential standard: *Dunsmuir* at para. 47. We must be on guard not to do what some call "disguised correctness review." This Court explained this concept as follows:

> Under the reasonableness standard, we do not develop our own view of the matter and then apply it to the administrator's decision, finding any inconsistency to be unreasonable. In other words, as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did, finding any inconsistency to be unreasonable. That is nothing more than the court developing, asserting and enforcing its own view of the matter—correctness review.

(*Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 at para. 28.)

[40] Thus, when reviewing courts review administrative decision-makers' interpretations of legislative provisions, they must take care not to interpret the legislative provisions in a definitive way and then use that definitive interpretation as a yardstick to measure what the administrator has done.

G. Analysis

[41] Overall, I conclude that the Minister's interpretation of the examination provisions—in particular, the threshold at which a report of inconsistency must be made, is reasonable. In fact, I consider the Minister's interpretation to be correct.

(1) The legislative text

[42] The text of the examination provisions is carefully drawn. It does not obligate the Minister to make a general report concerning the consistency of the proposed legislation with particular standards. Nor does it require a general report to be made on the potential effects of the proposed legislation on particular standards. It is drawn far more narrowly.

[43] This is to be contrasted with the breadth of proposed, new examination provisions that are currently before Parliament: Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, s. 73 (requiring the Minister in every case to give to Parliament a statement on the "potential effects" of proposed legislation on Charter rights and freedoms).

[44] The examination provisions speak of ascertaining or examining whether proposed legislation is inconsistent with certain standards or "ensuring" that proposed legislation is not inconsistent with certain standards, and, if the proposed legislation is inconsistent, to report.

[45] Implicit in this is the idea that a positive finding must be made, to some degree of certitude, that the legislation is inconsistent before a report can be made. The shared meaning of the words “ascertain” and “ensure” and “rechercher” and “vérifier si” require a person to be satisfied that a state of affairs exists. Thus, under the examination provisions, either the Minister is satisfied that a provision is “inconsistent” or she is not.

[46] The examination provisions do not require the Minister and the Clerk of the Privy Council (in consultation with the Deputy Minister) to go so far as to confirm that the legislation is consistent with standards. I agree with the following submission in the respondent’s memorandum (at para. 59):

> Despite the appellant’s affirmation to the contrary, ascertaining *inconsistency* (“*incompatibilité*”) is not the same thing as ascertaining “consistency” (“compatibilité”). By choosing not to ask the Minister to ascertain “consistency”, Parliament signals that it expects the Minister to offer her assurance that the bill is defensible; the credible argument standard matches this expectation.

[47] I wish to offer more detailed analysis of the text of the examination provisions.

– I –

[48] First, the text of section 3 of the Canadian Bill of Rights and section 4.1 of the Department of Justice Act. As noted by the Federal Court at paragraphs 113 and 114, the key words in these sections are: “ascertain whether”/“rechercher si”/“vérifier si” and “are inconsistent”/“est incompatible”.

[49] The word “ascertain” is defined by the *Canadian Oxford Dictionary*, (2d ed., 2004), as “find out as a definite fact.” Therefore, the plain text of both English versions directs the Minister to find out whether the provisions that she is examining are inconsistent with guaranteed rights and freedoms.

[50] *Le Petit Robert* (2006) defines “rechercher” (French version of the *Canadian Bill of Rights*) as “(1) chercher de façon consciente, méthodique […]; (2) chercher à connaître, à découvrir […], “déterminer” is listed as a word of shared meaning; (3) reprendre […]; (4) tenter d’obtenir par une recherche […]; (5) tenter, essayer de connaître […].”

[51] *Le Petit Robert* defines “vérifier” (French version of the *Department of Justice Act*) as “(1) examiner la valeur de, par une confrontation avec les faits, ou par un contrôle de la cohérence interne […], “examiner” and “contrôler” are listed as words of shared meaning; (2) examiner (une chose) […]; (3) Reconnaître ou faire reconnaître pour vrai par l’examen […].”

[52] Both French words require some sort of examination and conclusion. “Rechercher” requires the Minister to look into the matter in a methodical manner in order to make a determination. “Vérifier” speaks to the same duty, requiring the Minister to examine the provisions. Both of these words are entirely consistent with the English word “ascertain”. All three words require the Minister of Justice to undertake an examination and come to a conclusion.

[53] “Ascertain”, “rechercher” and “vérifier” cannot be divorced from the words that follow: “whether” and “si”. The words “whether” and “si” colour the preceding words.

[54] *Le Petit Robert* defines “si” as “introduit soit une condition (à laquelle correspond une conséquence dans la principale), soit une simple supposition ou éventualité.” That is, the word introduces a conditional clause with a corresponding consequence. The *Canadian Oxford Dictionary* defines “whether” as “(1) introducing an indirect question […]; (2) introducing an indirect question, simple inquiry, or opinion, in which the second alternative is implied only […].” The French word “si” is closer in meaning to the English word “if” than the word “whether”. However, this difference is not material in interpreting these provisions.

[55] Though the French and English versions are slightly different they do share a common meaning. Taken together the key words ask the Minister to examine the provisions in question and make a determination. The Minister must answer the question “are these provisions inconsistent with guaranteed rights and freedoms.” If the Minister determines that they are, the Minister is to report to the House of Commons.

[56] The appellant submits at paragraphs 46-50 of his memorandum that the use of the word “whether” calls for a balanced opinion or judgment, “not certainty on one side and faint possibility on the other.” The appellant submits that as a result the Minister must come to both a conclusion on “consistency” with guaranteed rights and freedoms and also a conclusion on “inconsistency”.

[57] I disagree.

[58] This argument cannot be reconciled with the express wording of both Acts, which only use the term “inconsistent”, thereby requiring the Minister to undertake only one type of inquiry. Further, this argument cannot be reconciled with the French versions which use the word “si”. The Minister is to act only if she determines that a provision is inconsistent. The conditional clause is the finding of inconsistency and the consequence is a report to the House of Commons. The language of the *Canadian Bill of Rights* and the *Department of Justice Act* cannot support an interpretation that requires the Minister to make two determinations, one about consistency and one to inconsistency, and then “determine which of the two possible views is better”: appellant’s memorandum at para. 49.

[59] To that end, we come to the heart of the disagreement between the appellant and respondent: when is a statute inconsistent with the *Canadian Bill of Rights* and the Charter? Is it inconsistent when it is “more-likely-than-not inconsistent”? Or is it inconsistent if no “credible argument” can be made that it is consistent?

[60] The *Canadian Oxford Dictionary* defines “inconsistent”, in part, as “2. (often followed by with) not in keeping; discordant; at variance. 3. not staying the same throughout; having self-contradictory elements.”

[61] *Le Petit Robert* defines “incompatible” as “qui ne peut coexister, être associé, réuni (avec une autre chose)”; “contraire”, “inconciliable” and “opposé” are listed as words of shared

meaning. “Incompatible” is defined in the *Dictionnaire de Droit Québécois et Canadien 5e éd*, Wilson & Lafleur, 2015, as “1. Se dit certains textes juridiques qui s’opposent ou qui ne peuvent s’appliquer simultanément. (Angl. Inconsistent)”.

[62] Both the French “incompatible” and English “inconsistent” have the same meaning: things are inconsistent when they cannot stand together; they are opposite of one another; they are repugnant.

[63] The appellant, at paragraphs 30-31 of his memorandum, submits that “not inconsistent” [emphasis in the original] means “consistent for the purposes of the law”. No authority was cited to support this conclusion. To support this interpretation the appellant points to subsection 4.1(2) of the *Department of Justice Act* and subsection 3(2) of the *Canadian Bill of Rights*, the provisions that exempt the Minister of Justice from examining draft regulations if that task was already done by the Clerk of the Privy Council under the *Statutory Instruments Act*. The appellant points out that while the English version uses the words “not inconsistent” the French version uses “à vérifier sa compatibilité”. The appellant argues that in this way “Parliament has confirmed that it understands and intends “not inconsistent” to be the same as “compatible” (i.e., consistent)”.

[64] This submission is not compelling.

[65] Had Parliament intended to require the Minister to ensure that the draft provisions are consistent with guaranteed rights, Parliament could have used that word. It did not. Both

subsection 3(1) of the *Canadian Bill of Rights* and subsection 4.1(1) of the *Department of Justice Act* use the word “inconsistent”. The plain meaning of these provisions is not changed by the French version of a subsequent section which exempts the Minister from examining draft regulations if that job was already done by the Clerk of the Privy Council.

[66] The credible argument standard employed by the Minister of Justice allows the Minister of Justice to fulfill her obligations under the examination provisions. If the Minister of Justice believes that there is a *bona fide* argument based on the current state of the law that a court will accept that the proposed legislation passes muster—that it is arguably compliant with both the *Canadian Bill of Rights* and the Charter—she *cannot* come to the conclusion that the proposed legislation is inconsistent with guaranteed rights. The Minister will not be required to report. The credible argument standard allows the Minister to answer the only question asked of her.

[67] The Minister is not asked to perform a balancing exercise. This interpretation is bolstered by the use of the words “are” and “est” in the provisions. This language requires certainty as to the inconsistency.

[68] The appellant’s submission that the Minister must satisfy herself that proposed legislation is more-likely-than-not consistent is contrary to the text of the provisions. Textually, the provisions do not require a report if the proposed legislation “may be inconsistent,” “could be inconsistent” or “is/are likely to be inconsistent”.

– II –

[69] Now, some additional observations concerning the text of subsection 3(2) of the *Statutory Instruments Act*.

[70] This provision requires the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, to "examine" a proposed regulation to "ensure" that it does not "trespass unduly on existing rights and freedoms" and "is not, in any case, inconsistent" with the *Canadian Bill of Rights* and the Charter.

[71] As noted by the Federal Court at para. 129, the French and English versions are worded differently. The English version states that the Clerk of the Privy Council "shall examine" the regulations "to ensure that" whereas the French version simply requires the Clerk to "procède [...] à l'examen". The French version does not contain a provision requiring the Clerk to "ensure" any result. In this case then the English version may have a broader meaning than the French version.

[72] In interpreting bilingual provisions, "where one of the two versions is broader than the other, the common meaning [favours] the more restricted or limited meaning": *Schreiber*, above, at para. 56. What, then, is the common meaning?

[73] In this case the French version does not contain a corresponding obligation to ensure any result; the only obligation imposed by the French version is to undertake an examination.

Therefore, the shared common meaning requires the Clerk of the Privy Council to undertake an examination, but does not require the Clerk to ensure any result.

[74] As with the *Canadian Bill of Rights* and the *Department of Justice Act*, the Clerk of the Privy Council is called into action if s/he, in consultation with the Deputy Minister of Justice, finds an inconsistency. However, the wording of section 3 of the *Statutory Instruments Act* is slightly different: the Clerk must examine to see if the proposed regulations "trespass unduly" and are "not … inconsistent" with guaranteed rights. Does this mean that the Clerk of the Privy Council is required to undertake a different analysis with regards to regulations than the Minister of Justice would? I think not. If the regulations are not examined by the Clerk of the Privy Council under the *Statutory Instruments Act*, then subsections 3(2) of the *Canadian Bill of Rights* and 4.1(2) of the *Department of Justice Act* are not engaged and the job falls to the Minister of Justice. As set out above, the Minister is required to examine draft bills and regulations and issue a report if there is an inconsistency with guaranteed rights. Since all three statutes deal with the same subject matter and impose complimentary obligations, the interpretation of each statute must be consistent and harmonious with the interpretation of the other statutes: *Ulybel Enterprises Ltd*., above. The job of the Clerk of the Privy Council, when examining regulations, cannot be interpreted in a different way than the job of the Minister of Justice.

(2) Context and purpose

[75] The examination provisions do not tell us expressly the threshold at which an officer should report an inconsistency. At this point we have only the textual clues that the respondent's view of the examination provisions is correct.

[76] We must proceed, as we always must, to a review of the context and purpose of the examination provisions: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 at para. 48.

[77] In the record before us, we see no analysis by the Minister and the Clerk of the Privy Council themselves concerning the context and purpose of the examination provisions. However, there is plenty of evidence that assists us in understanding the context of these provisions and their overall role. I refer to some of this evidence below.

[78] Part of the surrounding context is what the House of Commons has adopted for itself when vetting private members' bills, which are not subject to the examination provisions. The House will only pass bills that clearly do not violate the Charter: see the affidavit evidence in the appeal book, vol. 2 at pp. 457-458 and 927-928. If the appellant's interpretation of the examination provisions is correct, it would seem perverse that the House would adopt a laxer standard than the examination provisions require for government bills. More likely is that the House adopted a standard commensurate with the one in the examination provisions.

[79] Another important element of context is found in legislative history. In 1960, Parliament enacted the examination provision found in section 3 of the *Canadian Bill of Rights*. From 1960 to 1985, consistent with the high threshold for reporting an inconsistency to the House of Commons, only one report under this examination provision was made. In 1985, Parliament amended the *Department of Justice Act* to include the examination provision now found in section 4.1. If Parliament believed that the reporting threshold in section 3 of the *Canadian Bill of Rights* was too high, it could have enacted a different threshold in section 4.1 of the *Department of Justice Act*. It did not. It used wording that is virtually identical to that in section 3 of the *Canadian Bill of Rights*.

[80] An important part of the context that affects the interpretation of the examination provisions is the relationship between the executive, Parliament, and the judiciary—in other words, the separation of powers, a fundamental part of our constitutional arrangements: *Ref. re Remuneration of Judges of the Prov. Court of P.E.I.; Ref. re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R. 3, 150 D.L.R. (4th) 577; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3 at para. 54. The examination provisions were enacted against this backdrop and must be interpreted in a manner consistent with it.

[81] I agree with the Federal Court's description of this backdrop (at paras. 277-278):

> To each his own obligation: the Executive governs and introduces bills to Parliament; Parliament examines and debates government bills and, if they are acceptable to Parliament, enacts them into law; the Judiciary, following litigation or a reference, determines whether or not legislation is compliant with guaranteed rights. Each branch of our democratic system is responsible for its respective role and should not count on the others to assume its responsibilities.

> As Deputy Minister of Justice Pentney said in his affidavit at paragraph 84 and during his testimony before the Court:
>
> > The examination standard must therefore reflect the role of Parliament in our constitution. Elected governments shape policy and introduce legislation as they think best, while remaining mindful of the outer boundaries set by the *Constitution* and by guaranteed rights. Parliament debates and enacts legislation, including giving consideration to its consistency with the *Constitution* and the *Bill of Rights*; Courts have the ultimate responsibility to decide whether legislation is constitutional. The credible argument standard is intended to allow each Branch of Government to perform its appropriate role in ensuring that guaranteed rights are respected.
>
> This system is referred to as "checks and balances". The actions of each branch, when they assume their respective roles, create multiple checks and balances, all of which aim to ensure that our laws are compliant with the rights guaranteed by the *Charter* and the *Bill of Rights*. As Professor emeritus Peter W. Hogg was referred to saying previously [Peter Hogg, *Constitutional Law of Canada*, 5th ed., vol. 2 (Scarborough: Carswell, 2007), referred to at para. 189 of the Federal Court's reasons], the main safeguards of civil liberties in Canada are the democratic character of Canadian political institutions, the independence of the judiciary, and a legal tradition of respect for civil liberties. Each component has a vital role to play in ensuring our laws are properly enacted and respect our rights.

[82] It is no part of the formal job of the Minister of Justice and the Attorney General of Canada to give legal advice to Parliament regarding whether or not proposed legislation is constitutional. Neither the Minister of Justice nor the Attorney General of Canada are legal advisors to Parliament.

[83] This is seen in sections 4 and 5 of the *Department of Justice Act*. These sections read as follows:

4. The Minister is the official legal adviser of the Governor General and the legal member of the Queen's Privy Council for Canada and shall

(a) see that the administration of public affairs is in accordance with law;

(b) have the superintendence of all matters connected with the administration of justice in Canada, not within the jurisdiction of the governments of the provinces;

(c) advise on the legislative Acts and proceedings of each of the legislatures of the provinces, and generally advise the Crown on all matters of law referred to the Minister by the Crown; and

(d) carry out such other duties as are assigned by the Governor in Council to the Minister.

4. Le ministre est le conseiller juridique officiel du gouverneur général et le jurisconsulte du Conseil privé de Sa Majesté pour le Canada; en outre, il :

a) veille au respect de la loi dans l'administration des affaires publiques

b) exerce son autorité sur tout ce qui touche à l'administration de la justice au Canada et ne relève pas de la compétence des gouvernements provinciaux;

c) donne son avis sur les mesures législatives et les délibérations de chacune des législatures provinciales et, d'une manière générale, conseille la Couronne sur toutes les questions de droit qu'elle lui soumet;

d) remplit les autres fonctions que le gouverneur en conseil peut lui assigner.

5. The Attorney General of Canada

(a) is entrusted with the powers and charged with the duties that belong to the office of the Attorney General of England by law or usage, in so far as those powers and duties are applicable to Canada, and also with the powers and duties that, by the laws of the several provinces, belonged to the office of attorney general of each province up to the time when the Constitution Act, 1867, came into effect, in so far as those laws under the provisions of the said Act are to be administered and carried into effect by the

5. Les attributions du procureur général du Canada sont les suivantes :

a) il est investi des pouvoirs et fonctions afférents de par la loi ou l'usage à la charge de procureur général d'Angleterre, en tant que ces pouvoirs et ces fonctions s'appliquent au Canada, ainsi que de ceux qui, en vertu des lois des diverses provinces, ressortissaient à la charge de procureur général de chaque province jusqu'à l'entrée en vigueur de la Loi constitutionnelle de 1867, dans la mesure où celle-ci prévoit que l'application et la mise en oeuvre de ces lois provinciales

Government of Canada;	relèvent du gouvernement fédéral;
(b) shall advise the heads of the several departments of the Government on all matters of law connected with such departments;	b) il conseille les chefs des divers ministères sur toutes les questions de droit qui concernent ceux-ci;
(c) is charged with the settlement and approval of all instruments issued under the Great Seal;	c) il est chargé d'établir et d'autoriser toutes les pièces émises sous le grand sceau;
(d) shall have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada; and	d) il est chargé des intérêts de la Couronne et des ministères dans tout litige où ils sont parties et portant sur des matières de compétence fédérale;
(e) shall carry out such other duties as are assigned by the Governor in Council to the Attorney General of Canada.	e) il remplit les autres fonctions que le gouverneur en conseil peut lui assigner.

[84] Parliamentarians may ask the Minister and the Attorney General for their views on the constitutionality of proposed legislation and the Minister and the Attorney General may choose to answer. But Parliamentarians have access to legal advice and support from Law Clerks and other sources: see the affidavit evidence at appeal book, vol, 1 at pp. 399-421. It is not as if Parliamentarians are bereft of access to legal advice and so the examination provisions were enacted to give them that access.

[85] Under our system of government, the executive is accountable to the elected members of Parliament and, should legal proceedings be later brought, to the judiciary. The executive has the power to propose policies to Parliament in the form of bills for Parliament's consideration. It is

entitled to propose bills that may violate Charter rights and freedoms but which pursue pressing and substantial objectives and, thus, may be saved under section 1.

[86] A good example of this is seen by *An Act to Amend the Criminal Code (Production of Records in Sexual Offence Proceedings)*, S.C. 1997, c. 30, which amended the *Criminal Code* to include ss. 278.1 to 278.91, which deal with the production of records in sexual offence proceedings. Before this Act was enacted, it was known as Bill C-46. In broad measure, Bill C-46 implemented the dissenting reasons—not the majority reasons—of the Supreme Court in its Charter decision in *R. v. O'Connor*, [1995] 4 S.C.R. 411, 130 D.L.R. (4th) 235. Thus, it ran the substantial risk of being found to be unconstitutional. But Bill C-46 was found to be constitutional: *R. v. Mills*, [1999] 3 S.C.R. 668, 180 D.L.R. (4th) 1.

[87] Put bluntly, the executive is not limited to proposing measures that are *certain* to be constitutional or *likely* to be constitutional. Rather, as a constitutional matter, in the words of the Federal Court (at para. 177), it is entitled to put forward proposed legislation that, after a "robust review of the clauses in draft legislation" is "defendable in Court." As *Mills* demonstrates, this is not a standpoint unfriendly to constitutional standards. Again, as mentioned at para. 36 above, the Charter is a document suffused with balances—not unequivocal, unqualified guarantees of rights and freedoms. And it is a standpoint that recognizes that after proposed legislation is placed before Parliament, there is considerable scope for investigation, questioning and debate in Parliament as to how it may be viewed against guaranteed rights and freedoms; in particular, we see this in the proceedings and often rich deliberations of Parliamentary Committees on proposed legislation. And in the end result, courts have their constitutional role to play too.

[88] The Federal Court put it well when it stated that under our system of government, consistency with guaranteed rights is not the sole responsibility of the Executive, the Minister of Justice and the Attorney General of Canada. Rather (at para. 279), "it is an ideal to be strived for collectively and attained through the concerted efforts of the three branches of government working towards a common goal."

[89] Another contextual factor supporting the respondent's interpretation of the examination provisions is the nature of the public service and the conventions surrounding it. To administer and implement laws and to prepare legislative proposals that ministers wish to put to Parliament, the executive relies on the public service: *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, 23 D.L.R. (4th) 122 at p. 470 S.C.R. In Canada, public servants are subject to a convention of political neutrality: *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, 82 D.L.R. (4th) 321 at p. 86 S.C.R.; preamble to the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13. This neutrality supports the threshold for reporting that the respondent urges upon us: one that supports the Minister in performing her duties and not one that purports to dictate how she should exercise her powers: see the evidence at appeal book, vol. 3 at pp. 1128-1129.

[90] In my view, the respondent's view of the examination provisions is also supported by the nature of constitutional law and the giving of advice concerning it. Constitutional law is a variable, debatable and frequently uncertain thing.

[91] Constitutional authorities are not necessarily good precedent in later cases. Courts can now depart more readily from earlier constitutional precedents: *Carter v Canada (Attorney*

General), 2015 SCC 5, [2015] 1 S.C.R. 331; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101.

[92] The constitutional law can change. A few examples will suffice to show this. In section 15 of the Charter, compare *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; 170 D.L.R. (4th) 1 with *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 and *Quebec (Attorney General) v. A.*, 2013 SCC 5, [2013] 1 S.C.R. 61 at para. 346. On subsection 24(2) and the exclusion of evidence, compare *R. v. Stillman*, [1997] 1 S.C.R. 607, 144 D.L.R. (4th) 193 and *R. v. Collins*, [1987] 1 S.C.R. 265, 38 D.L.R. (4th) 508 with *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. On the territorial scope of the Charter, compare *R. v. Cook*, [1998] 2 S.C.R. 597, 164 D.L.R. (4th) 1 at paras 25 and 46-48 with *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 at paras. 103-113. On the meaning of "detention" under section 10, compare *R. v. Therens*, [1985] 1 S.C.R. 613, 18 D.L.R. (4th) 655 with *Grant*, above. On the use of Charter values, compare *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416 with *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 and with *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613. On the scope of language rights, compare *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549, 27 D.L.R. (4th) 406 with *R. v. Beaulac*, [1999] 1 S.C.R. 768, 173 D.L.R. (4th) 193. On subsection 11(*b*) of the Charter, compare *R. v. Askov*, [1990] 2 S.C.R. 1199, 74 D.L.R. (4th) 355 with *R. v. Morin*, [1992] 1 S.C.R. 771, 71 C.C.C. (3d) 1 with *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. Many more examples can be cited.

[93] Adding to the uncertainty is the fact that the Supreme Court sometimes overrules its own constitutional authorities. Recent examples include *Carter*, above (effectively overruling *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, 107 D.L.R. (4th) 342); *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3 (overruling *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, 176 D.L.R. (4th) 513); *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245 (overruling *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161); *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504 (overruling *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, 140 D.L.R. (4th) 193).

[94] Sometimes, the methodology of analyzing a constitutional issue can change drastically or a different outcome is reached by characterizing the problem differently: for example, compare the analysis of so-called "positive rights" in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, 119 D.L.R. (4th) 224, *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673 and *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295. While section 7 of the Charter does not protect economic rights or a right to a job (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577; *Walker v. Prince Edward Island*, [1995] 2 S.C.R. 407, 124 D.L.R. (4th) 127), sometimes section 7 can have the effect of allowing a person to keep her job and the economic

interests associated with it (*Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, 152 D.L.R. (4th) 577).

[95] Sometimes definitive constitutional statements end up being not so definitive. In 2007, we all thought that the doctrine of interjurisdictional immunity could not apply to new situations and was restricted to those already covered by precedent: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3. But in a few short years, we were proven to be wrong: *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467.

[96] Sometimes, despite decades of silence in the case law, constitutional rights, statuses and entitlements—never before imagined—simply pop up with little advance warning: see, *e.g.*, *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31; *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433. Sometimes rights are given exactly the meaning their framers intended: see, *e.g.*, *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, 40 D.L.R. (4th) 18. But sometimes not: see, *e.g.*, *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536.

[97] And sometimes there is a stalemate on points of constitutional law: see *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, 67 D.L.R. (4th) 161 where the Court split 1-1-1-1-1; *R. v. Rahey*, [1987] 1 S.C.R. 588, 39 D.L.R. (4th) 481, where the Court split 2-2-2-2; *Committee for*

the Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139, 77 D.L.R. (4th) 385 where six separate reasons were written by seven Justices.

[98] And so far, only for convenience, I have restricted myself to Supreme Court jurisprudence, the jurisprudence at the top of the judicial apex. Much more fodder can be found in the jurisprudence of courts of appeal, to say nothing of first-instance courts. They also frequently revise, adjust and tweak their jurisprudence. And conflicts in their jurisprudence frequently arise and remain unresolved. This adds to the uncertain terrain the Minister must explore when she assesses proposed legislation under the examination provisions.

[99] Parliament must be taken to have drafted the examination provisions knowing the practical nature of the Minister's task. Under the examination provisions, the Minister has to assess proposed legislation against the case law of many different jurisdictions: four federal courts, thirteen jurisdictions' courts of appeal, superior courts and provincial/territorial courts all supervising the vast and variable terrains of federal provincial, and territorial law. Obviously, the law may not be the same across Canada. In the absence of guidance from the Supreme Court on a point, courts of appeal may differ. Even where there is a controlling authority from the Supreme Court of Canada, courts of appeal may interpret and implement the authority differently. The outcome of a constitutional case may well depend on where the constitutional challenge is brought, something that simply cannot be predicted.

[100] It also must be appreciated that under the examination provisions the Minister is assessing only proposed legislation. She does not know the nature of a constitutional challenge

that might be brought against a provision with any degree of certainty. As is well-known, the outcome of constitutional litigation often turns on the facts of the case (*Mackay v. Manitoba*, [1989] 2 S.C.R. 357, 61 D.L.R. (4th) 385) but at the time she assesses proposed legislation, the Minister does not know the facts that may be offered in support of a challenge. She can only imagine possible challenges and speculate. This is a very difficult environment in which to make constitutional assessments with any certainty and to give any estimates of the probability of a finding of unconstitutionality.

[101] One thing, however, is perfectly clear: even in this difficult, uncertain, speculative environment, some proposed legislation may be so deficient that the Minister can conclude with confidence that no credible arguments can be made to support it.

[102] In the examination provisions, Parliament must be taken to have imposed an obligation on the Minister that the Minister can practically meet, not one that is impossible to meet.

[103] So in conclusion, I ask this question: given the nature of constitutional law and litigation and the practical obstacles facing the Department of Justice, what is more likely? That the examination provisions require the Minister to reach a definitive view, settle upon probability assessments and report when she concludes that proposed legislation is “likely” unconstitutional? Or that the examination provisions require the Minister to report whenever there is no credible argument supporting the constitutionality of proposed legislation?

[104] I would suggest the latter. Given the uncertain, difficult jurisprudential terrain of constitutional law and the time when the Minister is expected to assess proposed legislation, the only responsible, reliable report that could be given under the examination provisions is when proposed legislation is so constitutionally deficient, it cannot be credibly defended. I consider the Minister's view of what the examination provisions require to be acceptable and defensible. Indeed, as I have said earlier, I consider the Minister's view to be correct.

[105] As mentioned at the outset of these reasons, in support of this conclusion I also agree substantially with the reasons of the Federal Court.

H. Conclusion

[106] Therefore, for the foregoing reasons, I conclude that the "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 a reasonable reading of what this legislation requires.

[107] In its formal judgment, the Federal Court chose to make its own declarations about the meaning of the examination provisions. As a matter of remedial discretion, I would have issued a judgment simply dismissing the appellant's request for a declaration and let my reasons in support of the dismissal speak for themselves. However, in this respect I cannot say that the Federal Court committed reversible error.

I. Proposed disposition

[108] Therefore, I would dismiss the appeal. Given the novel nature of the issues raised by the appellant in this proceeding, I would make no order as to costs.

"David Stratas"
J.A.

“I agree
D. G. Near J.A.”

“I agree
Donald J. Rennie J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-105-16
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE NOËL DATED MARCH 2, 2016, NO. T-2225-12	
STYLE OF CAUSE:	EDGAR SCHMIDT v. ATTORNEY GENERAL OF CANADA *et al.*
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 8, 2017
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	NEAR J.A. RENNIE J.A.
DATED:	MARCH 20, 2018

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