Court File No. T-2225-12

FEDERAL COURT

SIMPLIFIED ACTION

B E T W E E N:

EDGAR SCHMIDT

Plaintiff

- and -

ATTORNEY GENERAL OF CANADA

Defendant

REPLY SUBMISSIONS OF THE PLAINTIFF

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The following shall constitute the submissions in reply on behalf of the Plaintiff.

I. The committee examination of private bills as comparator

1. The Defendant argues that the standard used by the House of Commons committee that screens private members' bills is a good analogy for the statutory examinations by the Minister. However, the issue before the committee is very different and the difference in the issue explains the standard used.

2. The issue before the House committee is whether a private member's bill is to be killed without being given any debate or opportunity for approval (i.e. a vote). This is similar to what a court decides with regard to a claim on a motion for summary judgment. And the standard is similar — only cases that present no possibility of success are struck out and only bills that have no possibility of being constitutional are prevented from proceeding.

3. By contrast, the court, when deciding whether to actually give judgment for a claimant uses a different standard. It does not ask whether the claimant has an argument, but whether, on balance, the claim should succeed. Likewise, Parliament, when deciding whether to actually enact a law (the context in which section 3 of the *Canadian Bill of Rights* and section 4.1 of the *Department of Justice Act* operate), has not required an examination as to whether a bill has at least some possibility of being consistent with the constitution, it has asked whether it is entirely consistent with the constitution (and therefore fit, as regards its human rights compliance, to be enacted as presented) or not (i.e. has some inconsistency in it).

II. On the question of "deterrence"

4. The Defendant argues that the examinations are not intended to result in reports but rather to serve a deterrent purpose.

5. The first thing to note is that the s.3 Bill of Rights and s.4.1 Department of Justice Act examinations are conducted on the bill as introduced. Therefore, at the time of examination deterrence is no longer of relevance with regard to the particular bill in question. The only question when these examinations take place is whether the **end product** of the drafting/policy development process — the bill that has actually been introduced — contains any provision that is not consistent with the Bill of Rights or the Charter. That is, even if deterrence is an intention, what has actually been achieved is at issue at the point of examination: Is the final result Charter and Bill of Rights consistent?

Canadian Bill of Rights, s. 3, *Department of Justice Act*, s. 4.1

6. Furthermore, during the drafting/policy development stage, a duty **to report** will only deter policy or drafting choices that are considered **reportable**.

7. Since virtually nothing is considered to be reportable under the standard used by the Minister and those acting in his name, virtually nothing is deterred.

8. Therefore, if the examinations are to serve a deterrent purpose, a much more rigorous standard is required.

9. In the examination provisions, Parliament's objective is clearly to have bills that are fully consistent with the Charter and Bill of Rights. The only standard that aligns with that objective, whether it has its effect through "deterrence" or through having an informed Parliament, is a standard of inconsistency simple, not **manifest** inconsistency.

III. The role of the Minister of Justice in relation to the state

10. The Defendant argues that the "client" of the Minister of Justice is the executive cadre of the Canadian state (the "government"), and therefore the Minister owes his duty of loyal service and frank advice only to it. Because of this, the Defendant argues, the Minister cannot take into account the interests of Parliament or of the citizens of Canada in performing the statutory examinations and must prefer the political interests of the government.

11. Firstly, the question of to whom the Minister of Justice owes his duties under section 3 of the Bill of Rights and section 4.1 of the Department of Justice Act is a diversion, rather than a question that should determine anything in this case. Since Parliament's directions given in a statute prevail over everything other than the constitution, its directions must be given effect and upheld however one conceives of the relationship between minister and state.

12. Secondly, to the extent that the question is of interest in this case, it is a question of law, not of evidence. What the role of the Minister of Justice is in the democratic, constitutional Canadian state is a question of law. Whatever opinions Ms. MacNair or any other witness may have on the subject cannot determine the question for the court.

13. The Plaintiff submits that Parliament's enactments are primary in understanding the Minister's role. It is an enactment of Parliament — the *Department of Justice Act* — that creates the office of Minister of Justice and the department of the federal public administration over which the Minister presides.

Department of Justice Act, section 2

14. It is the same Act of Parliament that sets out the duties of the Minister. The Act provides that the Minister shall, *inter alia*,

- see that the administration of public affairs is in accordance with law;
- have the superintendence of all matters connected with the administration of justice in Canada, not within the jurisdiction of the governments of the provinces;
- ... generally advise the Crown on all matters of law referred to the Minister by the Crown; and
- examine every [registered] regulation ... 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.

All of these duties (and the others not listed) are duties assigned to the Minister by the body that created the office, the Parliament of Canada. Since it is Parliament of Canada that created the role, it is implicit that it created that role in the interests of Canada, not primarily in the interests of the office itself or in the interests of the minister's fellow executive officers (i.e. the government).

Department of Justice Act, sections 4 and 4.1

15. The Minister of Justice is an officer of the Crown. The Defendant argues that the Crown, in this context, means only the aggregate of executive officers of the Canadian state, i.e. the government of the day. But this is much too small a conception of the Crown. The Crown represents the entirety of the democratic, constitutional Canadian state.

McAteer v. Canada (Attorney General), 2014 ONCA 578 at paragraph 62

16. While every minister of the Crown serves **in** the executive branch of the state, it is an error to think that the executive branch itself is the object of his or her loyalties or of his duties. Any executive officer of a collective endeavour (whether that be a business corporation, a university, or a health or arts organization) owes his or her duties of loyal service to the **organization**, **not to its executive**. So also every minister of the Crown is a minister of the democratic, constitutional Canadian state and fundamentally owes his duty of loyal service to it, not to its executive.

17. The entity to which the Minister of Justice owes his duty of loyal service must be one with legal personality. It is the state that has legal personality (whether this is expressed as "Canada" or the "Crown"). The executive offices in the Canadian state, whether individually or as an aggregate (i.e. an individual minister or the ministers taken together as the "government"), do not possess independent legal personality. This is evident from the following:

- Both the offices and the office-holders are temporary. Parliament creates and uncreates various ministries as it sees fit. It is the democratic, constitutional Canadian state that endures, not any particular office and certainly not any particular holders of those offices.
- The aggregation of ministers (what we commonly call the "government") are clearly office-holders who serve only while they have the confidence of the House of Commons.
- A "government" has only powers that are derivative.
- The party to criminal litigation is Her Majesty, i.e. the state, not the "government" of it. It is, in fact, an important feature of our criminal law that the Attorney General, when acting in criminal proceedings, must act only in the public interest, not in the interest of the executive officers of the state, no matter that the commencement, continuation or abandonment of a prosecution might be in their interest(s) in a personal or political sense.

- The employer of the public service is not the "government". Rather, the employer is "Her Majesty, as represented by ...". In the UK, a country with whose political structure Canada's has definite similarities, many statutes refer to the public service as the "civil service of the state". This confirms that both ministers and public servants serve the Crown, i.e. the state as an entirety, not merely the executive of the state.

- The language we use for the executive is telling: we refer to the executive officers of the state, together with the administrative staff of the state, as the "executive branch". Now clearly a branch is not a tree, an entity capable of independent life. It is the state that is the tree of which the executive officers and administration together form a branch.

See the principle set out in the Report of Mr. Stilborn at page 10, under the heading "1. Parliamentary Supremacy"; *Attorney-General (NT) v Kearney* [1985] HCA 60 at paragraph 10; *Superannuation Act 1972* (UK) at paragraph 1(4)(a); *Commissioners for Revenue and Customs Act 2005* (UK) at subsection 1(4); *Transport Act 2000* (UK) at subsection 215(7).

18. The law, with regard to other organizations, has made it clear that officers serve their organization and have no interests of their own that ought to be acted on by the officers. Rather, their duty is always to the organization. This is expressed in various ways, among them, by speaking of officers of organizations as owing fiduciary obligations to the organization.

Canada Not-for-profit Corporations Act, s. 148; *Canada Business Corporations Act*, s. 122; *Code of Professional Conduct*, Law Society of Manitoba, sections 3.2-3 and 3.2-8; *Enron and Internationally Agreed Principles for Corporate Governance and the Financial Sector*, Andrew Cornford, especially at pages 8 and 9.

19. The democratic, constitutional Canadian state, too, is an organization whose healthy functioning requires that its officers understand their duty and loyalty to be owed to **it**, not to themselves.

20. It is self-evidently a path to corruption and tyranny for state officers to think that they owe their duties to themselves, rather than to the state as whose officers they serve, whose resources they have been entrusted to administer, and whose powers they have been given to exercise by reason of state decisions such as the constitution and statutes, (or for that matter, by reason of votes of confidence in the state legislative assembly and ensuing appointment by the head of state as state officers). They do not administer their own resources nor exercise their own inherent powers. All the resources used by the state officers and the powers exercised by them derive from the state and are to be used and exercised in the public interest, that is, in interests of the state expressing the collective interests of its citizens.

21. From the evidence of Mr. Pentney, we learned that the only risks or interests that the department takes into account in its legal risk management are those to "government operations".

22. But the examination provisions are not concerned with government operations. From their very texts, it is clear that they have been put in place by Parliament with a view to two interests:

- The interest of Parliament in acting constitutionally and in protection of human rights and freedoms, infringing them only transparently and advertently when Parliament considers it to be in the public interest (*Constitution Act, 1982*, s. 33);
- The interest of citizens in having their rights and freedoms protected or, if infringed, then transparently so that they could participate in the democratic debate as to balance and justification.

23. The examination provisions are in some ways a kind of human rights quality inspection or audit. An audit in a business corporation is intended to allow the governing board and the shareholders to have confidence that the finances of the corporation are being honestly and accurately reported so that they can each fulfil their duties and exercise their rights and powers. Audits are for the benefit of both of these groups and the laws governing corporations almost inevitably require that the auditor's report be

provided to shareholders together with the financial statements and require shareholder approval for the appointment of an auditor.

For example, *Canada Business Corporations Act*, section 135

24. In other words, an auditor serves the purposes of the governing board and the shareholders/members of a business corporation. The board requires accurate financial information to effectively carry out its overall direction of the affairs of the corporation. Shareholders require accurate financial information to exercise in an informed way their powers to elect board members or to adopt shareholder resolutions. It is the shareholders' money that has been invested and that is at risk in the corporation, and the audit recognizes this interest.

25. When one looks at the examination provisions, they are similar. The interests at risk are those of the citizens of Canada and those of the governing body. From the point of view of citizens, it is their human rights and fundamental freedoms that are at stake. As for the governing body, their due diligence in acting constitutionally in accordance with their duty is at issue. These provisions should be seen as intended to serve and protect the interests of Parliament and of Canadian citizens, not the interests of the government. A standard that is based on and considers only the interests of the government therefore completely misses the mark. It does not serve the provisions' purposes or the appropriate interests, that is, those of Parliament and of Canadian citizens.

26. Consider again the statement of then Minister of Justice Fulton when section 3 of the Bill of Rights was under consideration in committee:

> But what our bill of rights does do is to ensure that no subsequent parliament can override the bill of rights without that fact being clearly in its mind and out in the open, as it were, so that it cannot be done inadvertently or by concealment, either from parliament or from the country. [Joint Book of Authorities, Vol 4, Tab 59 page 573]

27. The then Minister referred to "inadvertently". The positive duty to examine and report justifies the Justice Minister's use of this word. Careful examination and reporting of inconsistencies will protect against inadvertence. He also speaks to "concealment".

Were a government ever to wish to infringe rights without being open about it with Parliament or the public, again, the Minister suggests, the examination provision by making it the duty of the Minister of Justice to examine and then to report any inconsistency, will protect also from intentional but concealed infringements.

28. When the very officer on whom the statutory duty is to fall speaks to Parliament about the meaning and purpose of that duty, surely his words deserve to be taken seriously, especially when the text of the enactment fully supports his words. His statement can be seen as confirmatory of the examination provisions' purpose in protecting the interests of Parliament and of the citizens of Canada.

IV. The question of democratic mandate

29. The Defendant argues that a standard of ordinary inconsistency would improperly interfere with the implementation by the executive officers of the state of their democratic mandate and of their own perception of what is in the public interest.

30. However, the Defendant's argument fails to take adequate account of the structures and processes of the democratic, constitutional Canadian state for taking decisions. The interests of the state are decided in accordance with its governance structures and processes.

31. The democratic, constitutional Canadian state has structures and procedures in place for adopting, amending or repealing it most fundamental rules, i.e. its constitution. The public interest can be known from the outcome of these processes. The constitutional provisions that have been so-adopted and remain in force represent the "public interest" or the state interest because they are the result of the processes for the establishment of constitutional rules.

32. The state also has structures and procedures in place for making other high-level decisions such as statutes. Statutes — enacted after consideration, debate and votes in Parliament — like the constitution, represent crystallizations of the public interest.

33. Now consider the process of elections:

- Candidates campaign on many issues — which one or ones should an election be considered to have endorsed?
- Electoral platforms are expressed in generalities — how can one draw a straight line from that generality to a specific legislative text?
- Our first-past-the-post system can generate a majority of members in the House of Commons with a popular vote that is substantially less than a majority — how can one draw a straight line from majority in House to a popular mandate?
- The result of the 2015 federal election will be a House of Commons with 338 members representing their constituencies. These members ultimately decide in whom they have confidence and these persons are appointed by the Governor General to serve as the executive officers (ministers/government) of the state. This is true whether there is a majority of members from one party or not. In a minority situation, which policies are to be considered to have been endorsed by the citizenry?

34. Surely it is evident that the election process cannot substitute for or override the processes earlier described for arriving at constitutional or statutory decisions.

35. In sum, the Defendant's argument is fundamentally anti-democratic and mistaken as to the structures and processes by which state decisions are taken. No mere election or even appointment to office in any way alters the laws governing Canada. If the government wishes to depart from statutes and the constitution, what it has the right to do is to **propose** statutory measures to Parliament or to **initiate** the processes by which the constitution may be amended. But it is contrary to the rule of law for the government to **presume** to act as if statutes or the constitution were already altered before they have, in fact, been amended in accordance with the processes and structures of governance of the democratic, constitutional Canadian state.

36. That is why regulations must be made within the authority Parliament has given. If the government believes the relevant statute does not authorize a regulation it believes to be in the public interest, it must go back to Parliament to seek an amendment that would authorize the regulation. Only then is it consistent with the rule of law (and with the public interest) for the regulation to be made.

37. That is also why bills and regulations must be consistent with the Charter. The Charter is not amended or abrogated by any mere election or by an appointment to state executive office.

V. Justiciability – Whether the Defendant can raise the argument

38. Near the end of final submissions, the Defendant raised the issue of justiciability. This issue was not expressly understood to be part of the matters to be dealt with at trial. Indeed, the Defendant had raised this issue previously and ultimately decided not to pursue it. While the Defendant suggested at that time it still had the right to raise that argument later, that "right" cannot be exercised in a manner inconsistent with the requirements of natural justice.

39. Put simply, if the Defendant still wanted to raise the issue of justiciability, notice should have been given to the Plaintiff well in advance in order to properly prepare. Indeed, as appears from the judgments relied upon by the Defendant, justiciability often requires evidence of the nature of proceedings and even the process employed by the decision-maker in question. Because this argument was raised at the last minute, the Plaintiff had no opportunity whatsoever to address this issue through evidence on justiciability. For these basic natural justice reasons, the argument should not even be considered.

40. This conclusion is also strongly supported by the requirements of the *Federal Courts Rules* and the jurisprudence under those rules.

41. Under Rule 183(c)(ii) of the *Federal Courts Rules*,[1] the Defendant must plead any matter or fact that might take the Plaintiff by surprise if it were not pleaded. The

[1] SOR/98-106.

Court has interpreted this to mean that a party cannot raise a new argument at the eleventh hour if it would be prejudicial to the opposing party. The Court has been particularly critical of parties that have raised a new argument at the end of proceedings when that argument could have been raised from the outset. Ultimately, whether a late argument is considered is a matter that is solely within the discretion of the Court.

42. According to the *Federal Courts Rules*:

> **183.** In a defence or subsequent pleading, a party shall
>
> ...
>
> (*c*) plead any matter or fact that
>
> ...
>
> (ii) might take an adverse party by surprise if it were not pleaded.

43. In *Glisic v Canada*,[2] the Defendant raised a new argument after both sides had closed their cases, much like what has transpired here. The Defendant wanted to rely on provisions of the *Customs Act* that had not been pleaded. Stone J. A. of the Federal Court of Appeal held:

> ...it was not open to the respondent [Defendant] without prior amendment of the pleading to rely upon sections 18 and 180 of the statute as an alternative. To do so after evidence was in, placed the appellant [Plaintiff] in a most invidious position. He had, at that late stage, to meet an entirely new ground of defence not expressly relied upon in the respondent's pleading.[3]

44. The Court was particularly critical of the fact that the Defendant was aware of the argument early on and chose not to raise it:

> The record suggests that the respondent was aware of this possible ground of defence shortly after the seizure occurred...Had it been properly raised prior to commencement of the trial, the appellant would have been able to prepare his case accordingly...On the other hand, had it been raised earlier in the trial itself, before the parties had closed their respective cases, its

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[2] [1988] 1 FC 231 (available on QL) (FCA) [*Glisic*].
[3] *Ibid* at para 15.

> propriety could have been ruled upon in good time and the learned Trial Judge could have determined whether any prejudice to the appellant might result.[4]

45. The Court referred specifically to Rule 409(b) (Rule 183(c)(ii) of the current *Rules*):

> The rules governing pleadings are meant to assist in the proper administration of justice and to protect litigants. That purpose is not served where, as here, a Plaintiff is taken by surprise at the eleventh hour of the trial by a ground of defence not specifically pleaded. It seems to me that Rule 409(b) of the *Federal Courts Rules* [C.R.C., c.663] was designed to avoid just such a circumstance.[5]

46. Concurring with Justice Stone, Urie J.A. noted:

> One of the reasons for requiring pleadings in litigation and discovery of the parties is to ensure that no party is surprised by allegations made...In my opinion, a surprise tactic of this kind simply cannot be tolerated without safeguards for the rights of the other party...Whether or not the appellant has any likelihood of successfully defending the new allegation is irrelevant. What is relevant is that he be treated fairly.[6]

47. The Federal Court of Appeal, relying in part on *Glisic*, came to the same conclusion regarding a request to amend pleadings at a late stage of the trial in *Canderel Ltd V Canada*.[7] The court noted:

> As regards the interest of justice, it may be said that the courts and the parties have a legitimate expectation in the litigation coming to an end and delays and consequent strain and anxiety imposed on all concerned by a late amendment raising a new issue may well be seen as frustrating the course of justice.[8]

48. Citing with favour *Ketteman v Hansel Properties Ltd.*,[9] the Court observed that a distinction must be made between new arguments that clarify issues in dispute and new arguments that raise an entirely new defence:

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[4] *Ibid* at para 15. See also *Canderel, infra* note 7 at para 14
[5] *Ibid* at para 16.
[6] *Ibid* at para 1 & 3.
[7] [1994] 1 FC 3 (available on QL) (FCA) [*Canderel*].
[8] *Ibid* at para 12.
[9] [1988] 1 All ER 38 (HL).

> [T]oday it is not the practice invariably to allow a defence which is wholly different from that pleaded to be raised by amendment at the end of the trial even on terms that an adjournment is granted and that the Defendant pays all the costs thrown away. There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time.[10]

49. It is the submission of the Plaintiff that the argument of justiciability is, indeed, an entirely new defence that was not in the contemplation of the parties, certainly the Plaintiff, during the trial. As such, it is not open to the Defendant to raise it at the eleventh hour.

50. In *SMX Shopping Centre Ltd v Canada*,[11] the Federal Court of Appeal was asked to consider an argument that was raised for the first time during closing arguments before the Federal Court. The Federal Court judge had not dealt with this late argument in his reasons. In determining whether such an argument should be allowed on appeal, the Court considered any prejudice to the opposing party that would result from having had no opportunity to adduce evidence that could, if accepted, defeat the new argument.[12] The Court also considered whether the new argument raised a pure question of law that could be dealt with based upon evidence that had already been adduced.[13] Ultimately, the Court found that the argument raised a new question of mixed fact and law that could not be decided without prejudice to the opposing party. It is the Plaintiff's submission that the current circumstances are similar: namely, that the issue of justiciability raises questions of mixed fact and law that cannot be decided without prejudice to the Plaintiff.

51. Whether a party is prejudiced by new arguments raised late in the proceedings will be determined on a case-by-case basis. The Court ultimately has the discretion to accept a late argument if to do so would be non-prejudicial and would best serve the interests of justice.[14] However, the personal situation of the affected party and the

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[10] *Canderel, supra* note 7 at para 12.
[11] 2003 FCA 479 (available on QL) [*SMX*]. See also *Pret-A-Porter Orly Ltd v Canada* (1994), 176 NR 149 (available on QL) (FCA) at paras 16-18.
[12] *SMX, ibid* at para 32.
[13] *Ibid* at para 32.
[14] *Ibid* at para 9.

timing of new argument are important factors in assessing prejudice. Once again citing from *Ketteman*, the Court in *Canderel* concurred that:

> [J]ustice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore, to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful Defendant an opportunity to renew the fight on an entirely different defence.[15]

52. Again, it is the Plaintiff's submission that these principles are equally applicable to the present case. The bottom line is that the Plaintiff ought to have been advised that the issue of justiciability was going to be argued well before the trial or, at a minimum, sufficiently in advance of the trial to properly prepare.

VI. Justiciability – The matters in this litigation are clearly justiciable

53. In the alternative, the Plaintiff submits that the principles of justiciability do not assist the Defendant. The question here is whether there is any indication that the proper interpretation of the examination provisions was a matter intended to be resolved by Parliament alone. There is no evidence to indicate this whatsoever. On the contrary, the interpretation of these very provisions was raised in Parliament as a matter of privilege and the Speaker of the House unequivocally ruled that the matter was a question of law to be decided by the Courts[16]. The Defendant's position is completely inconsistent with this ruling from Parliament itself and therefore must be rejected.

54. Moreover, the jurisprudence relied upon by the Defendant does not support the Defendant's position. A careful examination of all jurisprudence on this issue confirms that the legal issue at play in this case clearly is justiciable and that there is no basis for the Court to decline to rule.

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[15] Canderel, *supra* note 7 at para 12.

Justiciability

55. Justiciability refers broadly to whether a question is suitable for judicial determination.[17] As Chief Justice Dickson noted in *Operation Dismantle*, justiciability is a "doctrine...founded upon a concern with the appropriate role of the courts as the forum for the resolution of different types of disputes."[18]

56. Justiciability is an amorphous concept and there is no legal 'test' for justiciability. However, in assessing justiciability, courts will consider: (i) the role of the court within the constitutional separation of powers, (ii) the nature of the problem before the court, (iii) and the intent of the legislature.[19]

The separation of powers

57. When a question of justiciability arises, a court will determine whether it would be appropriate to answer the question put to it in light of the courts constitutional role to interpret and apply the law.[20] The Supreme Court described this analytical approach in the following way:

> [J]usticiability is, first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue or, instead, deferring to other decision-making institutions of the polity.[21]

58. In order to determine whether it is appropriate for the courts to decide a matter, the court will examine the nature of the question the court is being asked to resolve and whether the legislature intended for courts to answer such a question.

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[17] Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999) at 2.
[18] *Operation Dismantle Inc v The Queen*, [1985] 1 SCR 441 at 459.
[19] Sossin, *supra* note 2 at 230.
[20] The function of the courts within the separation of powers was described by the Supreme Court in *Fraser v Canada (Public Service Staff Relations Board)*, [1985] 2 SCR 455 at 469-70: "In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy."
[21] *Auditor General, supra* note 1 at 90-91 [emphasis added]. Also *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 545 (available on CanLii) [*CAP*] and *Friends of the Earth v Canada*, 2008 FC 1183 at para 25 (available on CanLii) [*Friends of the Earth*].

The nature of the problem

59. The court will assess whether the nature of the question is purely political or whether it includes a sufficient legal component.[22] The court will not answer a purely political question. However, the court may still answer a legal question even if the question is, in part, political. In *Reference Re Canada Assistance Plan* ("*CAP*"), the Supreme Court acknowledged that the question before the court had political implications but this was not enough to bar the court from answering the question. The Court cited the *Patriation Reference* for the proposition that if a question, "even if in part political, possesses a constitutional feature, it would legitimately call for our reply."[23] The Court then went a step further and found that:

> While the passage [in the *Patriation Reference*] speaks to a 'constitutional feature', it is equally applicable to a question which possesses a sufficient legal component to warrant a decision by a court.[24]

60. In *CAP*, the Court found that the question posed possessed a significant legal component, partly because the issue involved a question of statutory interpretation:

> I am of the view that both of the questions posed have a significant legal component. The first question requires the interpretation of a statute of Canada...[25]

61. Despite the ruling in *CAP*, the fact that question before the court is one of statutory interpretation will not automatically lead a court to the conclusion that there is a sufficient legal component to make the matter justiciable. For example, in *Canadian Union of Public Employees v Canada (Minister of Health)*[26]("*CUPE*") the court found that:

> [t]he determination of what constitutes 'all relevant information' for the purpose of the reporting requirement is appropriately determined by the Minister...and is subject to policy and political concerns.[27]

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[22] *CAP, ibid* at 545.
[23] *Ibid* [emphasis added].
[24] *Ibid* at 546 [emphasis added].
[25] *Ibid* [emphasis added].
[26] *Canadian Union of Public Employees v Canada (Minister of Health)*, 2004 FC 1334 (available on QL) [*CUPE*].
[27] *Ibid* at para 42.

62. In order to determine which body has the authority to interpret certain statutory provisions, the court will look at the overall context and intent on the legislature.

The intent of the legislature

63. Although it is the role of the courts to interpret, apply and enforce the law, the Supreme Court in *Auditor General v Minister (Energy, Mines and Resources)* ("*Auditor General*") noted that:

> [i]t is the prerogative of a sovereign Parliament to make its intention known as to the role the courts are to play in interpreting, applying and enforcing statutes.[28]

64. As a result, courts will look at the applicable statute holistically to determine whether the issue is one the legislature intended the courts to resolve. This was the approach taken by the Federal Court in *Friends of the Earth v Canada* ("*Friends of the Earth*"):

> The justiciability of all of these issues is a matter of statutory interpretation directed at identifying Parliamentary intent: in particular, whether Parliament intended that the statutory duties imposed upon the Minister and upon the GIC by the KPIA be subjected to judicial scrutiny and remediation."[29]

65. In both *Friends of the Earth* and *Auditor General*, the statutory duties under review were non-justiciable, largely because the legislation in question provided alternative and sufficient political (i.e. parliamentary) remedies. The courts interpreted these alternative remedies to mean that the legislature intended for the dispute to be resolved by Parliament.

66. *Auditor General* involved an intra-governmental dispute over the remedies available to the Auditor General when the government refused to make statutorily mandated disclosures. The Court found that the Auditor General's statutory obligation to report these deficiencies to Parliament was an adequate remedy. In other words, the provision in the *Auditor General Act* requiring the Auditor General to report annually to

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[28] *Auditor General,* [1989] 2 R.C.S. at 91.
[29] *Friends of the Earth, supra* note 6 at para 31.

Parliament was implicitly the only remedy for the government's violation of its disclosure obligations under the Act.[30]

67. In *Friends of the Earth*, the content of the Minister's Climate Change Plan was not justiciable because the *Kyoto Protocol Implementation Act* ("*KPIA*") created elaborate reporting and review mechanisms within the Parliamentary sphere. The Court noted that the internal measures created by the Act "are directed at ensuring compliance with Canada's substantive Kyoto commitments through public, scientific and political discourse."[31] Consequently, Parliament impliedly meant for remediation under the Act to be political rather than judicial.

68. Considering the constitutional role of the courts, the nature of the question before the court, and the intent of the legislature. There is no doubt that the Plaintiff's claim is justiciable.

The constitutional role of the court

69. The Plaintiff's case goes to the heart of what is considered to be the constitutional role of the court: to interpret and apply the law. The Plaintiff is asking the court to provide clarity and certainty on the correct interpretation of the examination provisions. This is appropriately within the scope of the Court's authority.

The nature of the question

70. The Plaintiff's question has both a significant legal component and a constitutional feature. The question before the court is one of statutory interpretation. In *CAP*, this was considered to be a significant legal component.[32] Furthermore, as the Supreme Court indicated in the *Patriation Reference* and *CAP*, the fact that the question possesses a constitutional feature is further evidence that the question ought to be resolved by the court.[33] The correct interpretation of the examination provisions has implications both in terms of upholding the unwritten constitutional principle of the rule of

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[30] *Auditor General, supra* note 1 at 103.
[31] *Friend of the Earth, supra* note 6 at para 42-43.
[32] *CAP, supra* note 6 at 546.
[33] *Ibid* at 546.

law and safeguarding Charter protected rights. The fact that the question has political implications is not a reason for the court to refuse to answer the question.[34]

71. The question before the Federal Court in this case is fundamentally different from the questions before the Federal Court in *Friends of the Earth* and *CUPE*.[35] In *CUPE* and *Friends of the Earth*, the court was asked to interpret the Minister's statutory duties in a manner than interfered with the substance of the Minister's reporting obligations.[36] The Plaintiff in this case is asking the court to interpret the Minister's statutory duties to determine when the duty to report arises in the first place. The court is not being asked to interfere with the content of the Minister's reports to Parliament. Rather, it is being asked to inform the Minister of when his statutory duty to report is triggered. In *Friends of the Earth* the Court acknowledged the importance of this distinction and found that, while an evaluation of the contents of the Minister's Climate Change Plan was not justiciable, "the failure of the Minister to prepare a Climate Change Plan may well be justiciable."[37]

72. The question of when the Minister's statutory duty to report to Parliament arises under the examination provisions is a question of statutory interpretation that Parliament has left to the courts. In March 2013, a member of Parliament ("MP") Pat Martin raised this very issue in the House of Commons.[38] Mr. Martin alleged that the Minister's interpretation of his duties under the examination provisions was a breach of MP privileges.[39] In response, the Government argued that Mr. Martin was asking the Speaker to deal with a matter of law that must be dealt with by the courts.[40] The Speaker ultimately ruled that it was not within the purview of the Chair to interpret legal

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[34] *Ibid* at 545.

[35] During closing arguments before the Federal Court, the Defendant relied on *Friends of the Earth* and *CUPE* for the proposition that the courts should not overstep their constitutional role by interpreting and enforcing a Minister's statutory obligations when the enforcement of those obligations clearly rests with Parliament.

[36] "Allegations of informational deficiencies with such reports are...to be addressed and dealt with by that branch of government and not, in my view, by the judiciary": *CUPE*, *supra* note 11 at para 41. "While the failure of the Minister to prepare a Climate Change Plan may well be justiciable, an evaluation of its content is not": *Friends of the Earth, supra* note 6 at para 34.

[37] *Friends of the Earth, supra* note 6 at para 34.

[38] *House of Commons Debates*, 41st Parl, 1st Sess, No 220 (6 March 2013) at 1710-1730 (Pat Martin).

[39] *Ibid* at 1710

[40] *House of Commons Debates*, 41st Parl, 1st Sess, No 220 (6 March 2013) at 1730 (Hon. Peter Van Loan).

provisions of statutes and, consequently, he could not comment on the adequacy of the approach taken by the government to fulfill its statutory obligations under the *Canadian Bill of Rights*, the *Department of Justice Act* and their relevant regulations.[41]

73. Given the fact that Parliament has chosen to defer to the court on this question of statutory interpretation, it would be reasonable for the court decide the matter in order to resolve the dispute. In *CAP*, the court acknowledged that is has an important role to play in resolving legal controversies that cannot be resolved by other means. Justice Sopinka noted that:

> [a] decision on these questions will have the practical effect of settling the legal issues in contention and will assist in resolving the controversy. Indeed, there is no other forum in which these legal questions could be determined in an authoritative manner.[42]

74. Indeed, the approach adopted by the Defendant is fundamentally consistent with the rule of law and the overall role of the courts. Assuming the Plaintiff is correct, the Department of Justice is clearly engaged in unlawful activity. There should be some remedy for this unlawful activity. If the Speaker has declined to deal with the lawfulness, only this Court can.

75. Lastly, there is little evidence that Parliament intended for the examination provisions to be interpreted and enforced by Parliament alone. In fact, much of what is at issue in this case is about the examination, an activity which is clearly conducted outside the sphere of Parliament and mostly carried out by public service employees acting on behalf of either the Minister or the Deputy Minister.

76. To what questions are the examinations to be addressed? What questions are the examinations to investigate/research/explore?

a. the question of whether a bill or regulation is wholly consistent with the Charter and Bill of Rights or whether one or more provisions are not so consistent;

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[41] *House of Commons Debates*, 41st Parl, 1st Sess, No 230 (27 March 2013) at 1605 (Hon. Andrew Sheer).
[42] *CAP, supra* note 6 at 546.

b. the question of whether a proposed regulation is wholly authorized or not;

c. the question of whether a proposed regulation is wholly consistent with the Charter and Bill of Rights or whether one or more of its provisions are not so consistent;

OR

a. the question of whether any provision of a bill or regulation is so hopelessly inconsistent that not even one argument can be advanced in favour of its consistency;

b. the question of whether a proposed regulation is so hopelessly without authority that not even one argument can be advanced in favour of authority for its making;

c. the question of whether a proposed regulation is so hopelessly inconsistent that not even one argument can be advanced in favour of its consistency;

77. These questions are matters which the Court can and should address.

78. The Plaintiff's case is distinguishable from cases where the court ruled that the statute in question provided adequate alternative political (i.e. parliamentary) remedies to a decision by the court. In *Auditor General*, the court was clear that the ruling narrowly applied to a unique statute applicable to the Auditor General.[43] The court found that "in the normal course (that is, in a suit by a citizen) a political remedy would not meet the adequacy test."[44] In *Friends of the Earth*, there was both an absence of mandatory language attached to the Minister's reporting requirements and numerous alternative remedies provided for in the *KPIA*.[45] In contrast, the language of the examination provisions contain the imperative "shall" and do not include elaborate

[43] *Auditor General, supra* note 1 at 110.
[44] *Ibid* at 97 [emphasis added].
[45] *Friends of the Earth, supra* note 6 at paras 42 & 34.

reporting and review mechanisms within the Parliamentary sphere akin to those in the *KPIA*.

79. It is also relevant that the guidance sought from the court relates primarily to

- the action of examining which is carried out, at the first level, entirely by public servants, and in all except rare cases, ends at that level. The evidence shows that only rarely will a bill at its examination by legal counsel in the Department of Justice be considered to fail to meet the standard used and all examinations except those rare ones end at the level of that first examination and the ensuing certification by the Chief Legislative Counsel that the examination has been completed; and

- the standard to be used in examinations.

80. Parliament is not generally the appropriate forum for deciding what public servants are to do in carrying out Parliament's statutes. This is a function typically performed by the courts — that of interpreting and applying legislation.

81. To summarize, justiciability concerns whether the court is the correct forum to address the question brought before it. When ruling on justiciability, a judge will typically consider the constitutional role of the court, the nature of the question being asked and the intent of the legislature. The question before the court in the Plaintiff's case is one of statutory interpretation with a clear constitutional feature. Although the Supreme Court has acknowledged that it is within the authority of Parliament to reserve for itself the power to interpret, apply and enforce a given statute,[46] there is no indication of any such parliamentary intent in this case. The court is not being asked to rule on the content of the Minister's duty to report. Rather, the Plaintiff is asking the court to interpret the examination provisions to determine when the Minister's duty to report arises. This question was raised in Parliament and the Speaker of the House ruled that the Minister's duties under the examination provisions are a question of statutory interpretation to be resolved by the courts.

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[46] *Auditor General, supra* note 1 at 91.

82. The Defendant relies upon comments made by Mr. Drieger in an article entitled "The meaning and effect of the Canadian Bill of Rights: A draftsman's viewpoint". The Plaintiff submits that the comments of Mr. Drieger actually support the Plaintiff's position. Specifically, Mr. Drieger writes:

> All government bills are drafted in the Department of Justice and the officials there will ensure that every bill is consistent with the Bill of Rights. The Minister of Justice does not certify that a regulation or bill is 'clean', but if he finds one that is not, he must report to the House of Commons. [emphasis added]
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> Drieger article, Compendium of the Defendant, tab 2, at p. 306

83. The above emphasized passages, in the submission of the Plaintiff, support his position that the examination provisions require Justice officials to determine whether every bill is consistent with the Bill of Rights (and the Charter). The question is whether it is consistent or not as contrasted with the actual standard employed by the Department.

84. The Defendant similarly relied upon the comments from Mary Dawson in an article entitled "The impact of the Charter on the public policy process in the Department of Justice". With respect, the comments from this article do not squarely support the Defendant's position. We note, however, that ultimately, Ms. Dawson concluded "nevertheless, Justice lawyers have to be prepared to give a frank and realistic assessment and to state when a proposed law is not likely to be acceptable". This is precisely the standard urged by the Plaintiff but resisted by the Defendant.

> Mary Dawson, "The impact of the Charter on the public policy process in the Department of Justice", Compendium of the Defendant, tab 26 at p. 598

85. With respect to the standard of review, the Defendant relies upon a decision of the Public Sector Integrity Commissioner dated September 4, 2012. With respect, this decision can have no bearing upon the standard of review to be adopted by the Court. First, the decision arises in a completely difference context and concerns the discretion of the Commissioner to deal with disclosures of wrongdoing. Second, it does not and cannot purport to address the standard of review the Court should apply to the

interpretation of the examination provisions in the present case. The decision says nothing about the relationship of the Court to the examination provisions or the Minister of Justice in the context of this action.

86. Finally, there is no doubt that the Defendant's argument on this point cannot apply to the proper interpretation of section 3 of the *Statutory Instruments Act*. That provision involves only non-parliamentary actors and reports to them. As such, the litigation still requires the Court's ruling, at the very least, in respect of section 3 of the *Statutory Instruments Act*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

October 9, 2015

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