Court File Number: 38179

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

EDGAR SCHMIDT

Applicant
(Appellant)

-and-

ATTORNEY GENERAL OF CANADA

Respondent
(Respondent)

RESPONDENT'S MEMORANDUM OF FACT AND LAW

(Pursuant to rule 27 of the *Rules of the Supreme Court of Canada*)

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PART I-STATEMENT OF FACTS

A. OVERVIEW

1. The purported issue of public importance raised in this application is based solely on the applicant's view that the standard of pre-legislative scrutiny of proposed legislation by the Department of Justice and the Minister of Justice is inadequate. Successive Ministers and Deputy Ministers of Justice, as well as Parliament itself, have found the existing level of scrutiny of proposed legislation to be appropriate and in accordance with the governing statutes. The applicant's honestly held belief of the opposite view is not a basis for an issue of public importance.

2. Pre-legislative scrutiny of legislation is mandated by three statutes: section 3 of the *Canadian Bill of Rights*, section 4.1 of the *Department of Justice Act* and section 3 of the *Statutory Instruments Act* (the "examination provisions"). The examination provisions require the Minister or the Deputy Minister of Justice to ascertain whether any provisions of draft legislation "are inconsistent" with rights guaranteed by the *Charter* or the *Canadian Bill of Rights*. Where they ascertain that an inconsistency exists, they must "report any such inconsistency" to the appropriate law-maker: the House of Commons in the case of the Minister and the Clerk of the Privy Council for the Deputy Minister.

3. To facilitate the application of the examination provisions, the Department of Justice developed the "credible argument" standard which provides that the duty to report is triggered only when no argument that is reasonable, *bona fide* and capable of being raised before and accepted by the courts can be advanced. By definition, an inconsistency can only exist when no credible argument in favour of consistency exists.

4. After a review of the basic principles of statutory interpretation set out by this Court, the Federal Court concluded that the credible argument standard is an "appropriate and lawful" interpretation of the examination provisions. It respects both the plain meaning of the words chosen by Parliament and the constitutional and institutional context within which Parliament understood the examination provisions would operate. The Federal Court of Appeal agreed. In dismissing the

appeal, that Court held that the Department's interpretation of the examination provisions is not only reasonable but also correct.

B. GENERAL BACKGROUND

5. The applicant started an action seeking only declaratory relief that the Department of Justice's interpretation of the examination provisions - the credible argument standard - is unlawful and that his "more likely than not" interpretation of the examination provisions should prevail.[1]

6. Upon the coming into force of the *Charter* in 1982, the Department of Justice employed a "no reasonable argument" test to gauge when lawyers should inform the Minister of a reportable inconsistency between draft legislation and guaranteed rights.[2] The "no reasonable argument" approach resulted in an analysis that allowed for the necessary consideration of evolving jurisprudence and novel policy objectives.[3] This approach was used consistently from its development until the credible argument standard was formalized in 1993.[4]

7. As a result of consultations across the Department and deliberation by the Executive Committee, the Department's most senior committee, the "no reasonable argument" approach was replaced by the "credible argument" standard which essentially expresses, using different words, the same concept.[5] Pursuant to the credible argument standard, the duty to report is triggered only when no argument that is reasonable, *bona fide* and capable of being raised before and accepted by the courts can be advanced in support of the consistency of legislation.[6] Senior Committees in the Department of Justice specifically considered the applicant's view that the examination

[1] Statement of Claim, Application Record, vol II, at 163 para 27.
[2] Decision, Application Record vol I at 92 paras 166-167.
[3] Decision, Application Record vol I at 120 paras 242-243.
[4] Decision, Application Record vol I at 120-121 paras 243-244.
[5] Decision, Application Record vol I at 121 paras 244.
[6] Decision, Application Record vol I at 121 paras 245.

standard should be "more-likely-than-not" inconsistent with guaranteed rights.[7] However, they confirmed that the "credible argument" standard was the appropriate one.[8]

8. On at least eight different occasions since 1993, the Minister, or a departmental official, has articulated the credible argument standard before various committees of the House of Commons. The House never questioned the appropriateness of the credible argument standard.[9]

C. Legislative Underpinning of the Pre-Legislative Review

9. The examination provisions are set out in three statutes: section 3 of the *Canadian Bill of Rights*, section 4.1 of the *Department of Justice Act* and section 3 of the *Statutory Instruments Act*. The provisions create two consecutive, but related, duties. First, the Minister must "ascertain" or "ensure" whether («rechercher» or «vérifier si») any of the provisions of draft legislation "are inconsistent" («est incompatible») with guaranteed rights. Where she reaches that conclusion, the Minister must "report any such inconsistency" («signaler toute semblable incompatibilité») to the appropriate law-maker.

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

[7] Decision, Application Record vol I at 121 paras 244; Statement of Claim Application Record, vol II, at 164 para 27d) to f).
[8] Decision, Application Record vol I at 122 paras 247.
[9] Affidavit of JM Keyes Application Record, vol III, at 66 para 69.

House of Commons at the first convenient opportunity.	**semblable incompatibilité à la Chambre** des communes dès qu'il en a l'occasion.
Department of Justice Act, s. 4.1(1)	***Loi sur le Ministère de la Justice, par. 4.1(1)***
Subject to subsection (2), the Minister shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration 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.	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.
Statutory Instruments Act, s. 3(1)(c)	***Loi sur les textes réglementaires*, al. 3(1)(c)**
On receipt by the Clerk of the Privy Council of copies of a proposed regulation pursuant to subsection (1), the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, shall examine the proposed regulation ***to ensure*** *that*	À la réception du projet de règlement, le greffier du Conseil privé procède, en consultation avec le sous-ministre de la Justice, à l'examen des points suivants :
. . .	[…]
(c) it does not trespass unduly on existing rights and freedoms and **is not**, in any case, **inconsistent** with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*;	c) il n'empiète pas indûment sur les droits et libertés existants et, en tout état de cause, **n'est pas incompatible** avec les fins et les dispositions de la *Charte canadienne des droits et libertés* et de la *Déclaration canadienne des droits*;

(emphasis added)

10. While the process through which government bills are examined is not the same as the process employed for draft regulations, the object of the examination is the same. The differences in process are immaterial to this application for leave.

D. FORMAL REVIEW IS AT THE END OF A COMPREHENSIVE PROCESS

11. Introducing a bill in Parliament represents the culmination of two processes: policy development and legislative drafting.[10] The formal review mandated by the examination provisions occurs at the end of these processes. Where government bills are concerned, this happens only after a bill has been introduced in the House of Commons. In the case of regulations, the formal review takes place before they are transmitted to the Clerk of the Privy Council for registration. The review relates to the draft in that form.[11]

12. The Department of Justice's Legal Service Unit (LSU) counsel are typically consulted at the outset of a policy proposal initiated by a government department and assist by identifying *Charter* and other legal issues and by providing legal advice on questions arising from the policy development and legislative drafting processes.[12]

13. The advice of Department of Justice Human Rights Law Section (HRLS) lawyers is sought throughout the policy development and legislative drafting processes where risks of inconsistency with guaranteed rights have been identified by LSU or legislative counsel. HRLS counsel advise on the risks that a proposed measure infringes a guaranteed right, and if so, the likelihood of successfully defending an infringement.[13]

14. Legislative counsel in the Legislative Services Branch (Branch) are specialized lawyers responsible for drafting legislation and are responsible for examining legislation and regulations for consistency with guaranteed rights. If legal concerns arise during the drafting process, legislative counsel consult with the subject matter experts in the HRLS and departmental officials responsible for the policy. Potential inconsistencies with guaranteed rights can thus be addressed by requests for changes in policy, modifications to the draft or by considering proposed justifications under section 1 of the *Charter*.[14]

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[10] Decision, Application Record vol I at 114 paras 229.
[11] Decision, Application Record vol I at 25-27 paras 25-31.
[12] Decision, Application Record vol I at 19, 22, 115 paras 18, 231.
[13] Decision, Application Record vol I at 19, 24, 115 paras 14, 22, 232.
[14] Decision, Application Record vol I at 25, 116 paras 24, 233.

15. Where a legal risk is significant, including a risk that would not trigger the Minister's duty to report, concerns are brought to the Chief Legislative Counsel and the Deputy Minister.[15] These concerns will then be discussed and the appropriate remedial steps raised with the appropriate departments.[16]

16. The formal review mandated by the examination provisions happens at the end of the policy development and legislative drafting processes. At that point in time, legislative counsel from the Branch sends the Chief Legislative Counsel a memorandum indicating that they have examined the bill, in the form in which it was introduced in Parliament, for any inconsistencies with guaranteed rights.[17] The Chief Legislative Counsel formally confirms to the law-makers that the review mandated by the examination provisions has been performed.[18] In the case of draft regulations, the same end is achieved by "blue-stamping", which signifies that the proposed legislation has been examined by legislative counsel before it is transmitted to the Clerk of the Privy Council.[19] In addition, any significant legal concerns, including inconsistency with guaranteed rights, can be discussed in Cabinet where the Minister of Justice performs a critical advisory role as Cabinet's exclusive source of legal advice.[20]

17. In the case of draft regulations, inconsistencies would be reported to the Deputy Minister, for his assessment. Where the Deputy Minister ascertains that there is an inconsistency, he would so inform the Clerk of the Privy Council. The Clerk, in turn, is required to advise the regulation-making authority of any such inconsistency.[21]

E. ADDITIONAL REVIEW OF LEGISLATION IN PARLIAMENT

[15] Decision, Application Record vol I at 23 paras 21.
[16] Decision, Application Record vol I at 114 paras 229-230.
[17] Decision, Application Record vol I at 25-26, 116 paras 25-28, 234.
[18] Decision, Application Record vol I at 26 paras 29.
[19] Decision, Application Record vol I at 27, 30 paras 31, 37.
[20] Decision, Application Record vol I at 24, 116 paras 23, 235.
[21] Decision, Application Record vol I at 14, 118 paras 3, 238.

18. As noted, by the trial judge, scrutinizing and approving bills is Parliament's main task and forms a substantive basis for holding the government accountable for its legislative proposals.[22] Before a bill becomes law, Parliament will have many stages of debate and review. Consideration of a bill by the House of Commons normally requires five stages, including a clause-by-clause examination and approval before the appropriate House committee; the process before the Senate is similar.[23]

19. The committee stage is the mechanism enabling detailed scrutiny and analysis of bills. Not only can the parliamentary committee hear from the sponsoring minister or officials, it may hear from other witnesses the committee believes can provide useful advice—outside experts, lawyers, organizations, law professors, the Law Clerk and Parliamentary Counsel from both Houses, and subject-matter specialists at the Library of Parliament. In this exchange, witnesses provide expertise, present their views and respond to committee members' questions.[24]

F. DECISION OF THE FEDERAL COURT

20. The trial judge undertook a thorough analysis of the examination provisions taking into consideration the meaning of the text of the provisions, the legislator's intention, and the broad constitutional and institutional context within which the examination provisions operate. The Court concluded that the Department of Justice's credible argument standard was correct and that the "more likely than not" standard advanced by the applicant was not consistent with the plain meaning of the examination provisions.[25]

21. The Court found that the plain language of the examination provisions was clear and unambiguous. The provisions call for certainty; a report to Parliament is only required if there is no credible argument to justify the inconsistency. Put another way, there can only be an assurance

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[22] Decision, Application Record vol I at 128-132 paras 266-275.
[23] Decision, Application Record vol I at 130 para 270.
[24] Decision, Application Record vol I at 130 para 270.
[25] Decision, Application Record vol I at 71-72, 136-137 paras 135-136, 284-285.

of inconsistency if no credible argument exists.[26] The trial judge concluded that is not what the "more likely than not inconsistent standard" requires.[27]

22. In looking at the text of the examination provisions in both official languages, the trial judge carefully considered the words of all of the examination provisions and their dictionary definitions; he looked for the meaning shared by both versions where some discrepancies between the English and French words were possible, noting that Parliament's intent is best expressed by finding the common meaning shared by both official versions of the enactment.[28]

23. The Court concluded that the language of the examination provisions requires the Minister to identify, with certainty, whether there are inconsistencies between any of the provisions at issue and any guaranteed rights. The Minister is required to report any inconsistency to the House of Commons at the first convenient opportunity. The Court found that these obligations are clear and unambiguous, and no interpretation other than the plain meaning of the language is warranted.[29]

25. Additionally, the trial judge also concluded that the purpose of the examination provision adopted in the *Canadian Bill of Rights* was to ensure that the Executive would give serious consideration to guaranteed rights throughout the policy development and legislative drafting processes that take place entirely before the government introduces a bill in Parliament.[30]

26. This finding was underscored by the trial judge's holding that Parliamentarians understood in 1960 that the examination provision proposed ensured that the Minister would "hammer out" most inconsistencies with guaranteed rights from government bills before introduction in the House.[31] The Court also recognized that in 1971 and again in 1985, Parliament considered incorporating examination provisions into the *Statutory Instruments Act* and the *Department of*

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[26] Decision, Application Record vol I at 95-96 paras 178-180.
[27] Decision, Application Record vol I at 71-72 paras 132-137.
[28] Decision, Application Record vol I at 57 para 99.
[29] Decision, Application Record vol I at 71, 136 paras 132-133, 284.
[30] Decision, Application Record vol I at 85, 94-95, 114, 128, 133-134, 136-137, 138 paras 153, 175-177, 229, 264, 278-279, 285-286, 289.
[31] Decision, Application Record vol I at 74-79 para 142-145.

Justice Act. Those debates led the trial judge to conclude that Parliament's earlier expectation of the effect of the examination provisions was confirmed.[32] As noted by the trial judge, the Minister submitted only one report to the House of Commons between 1960 and 1985.[33]

27. Finally, the trial judge observed that unlike the other Commonwealth countries, Canada's judiciary can strike down laws that it concludes are non-compliant with guaranteed rights.[34] The trial judge concluded that Canada's mechanisms favour post-enactment review. In his words, "Canada's system of checks and balances is designed to accept less stringent checks before the legislation is enacted because we have a strong system of checks post-enactment compared to other systems."[35]

G. DECISION OF THE FEDERAL COURT OF APPEAL

28. The Federal Court of Appeal found that the Minister's interpretation of the examination provision, and in particular the threshold at which the reporting required is triggered was not only reasonable, it was correct.[36]

29. The Court of Appeal conducted a detailed analysis of the legislative text at issue and agreed with the Crown's position that by asking for the review to look for inconsistency with the *Charter*, rather than consistency, Parliament signaled that it wanted the Minister's assurance that the bill was defensible, which accords with the credible argument standard used by the Department of Justice.[37]

30. In particular, the Court engaged in a detailed statutory interpretation analysis whereby it reviewed each of the provisions and words the applicant has used to support his view of the proper

[32] Decision, Application Record vol I at 85, 87, 90 para 153, 156 and 161.
[33] Decision, Application Record vol I at 93 para 172.
[34] Decision, Application Record vol I at 100 para 193.
[35] Decision, Application Record vol I at 99 para 191.
[36] Federal Court of Appeal reasons, Application Record vol I at 168 para 41.
[37] FCA Reasons, Application Record vol I at 169 para 46.

level of scrutiny of proposed legislation.[38] The Court then rejected the applicant's interpretation of the governing standard as being not in accordance with the language of those provisions:

> 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.[39]

31. In turning to the context and purpose of the various examination provisions, the Court of Appeal noted that an important part of the context that impacts on the interpretation of the examination provisions is the relationship between the Executive, the judiciary and Parliament. It held that examination provisions were "enacted against this backdrop and must be interpreted in a manner consistent with it."[40] It was also observed that it was not the "job" of the Attorney General to give advice to Parliament.[41] It was with this background that the Court was able to conclude that:

> 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 clauses in the draft legislation "is defensible in court".[42] (Emphasis in the original)

32. The Court of Appeal noted that the context includes the standard adopted by the House of Commons for private members bills. Since the House will only pass bills that do not "clearly violate" the *Charter*, it would be perverse for the House to adopt a "laxer standard than the examination provisions require for government bills". Rather, the Court of Appeal concluded that

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[38] FCA Reasons, Application Record vol I at 169-174 paras, 48-68.
[39] FCA Reasons, Application Record vol I at 172 para 58.
[40] FCA Reasons, Application Record vol I at 178 para 80.
[41] FCA Reasons, Application Record vol I at 179 para 82.
[42] FCA Reasons, Application Record vol I at 182 para 87.

it is more likely that the House adopted a standard commensurate with the one in the examination provisions. [43]

33. The Court of Appeal also found that the nature and role of the public service and the conventions surrounding it as a supporting contextual factor in favour of the Crown's interpretation of the examination provisions.[44] It referred to various other contextual factors in favour of the Crown's approach including the broad nature of the judicial system in which a challenge to legislation may arise[45] and the unknown nature of any future constitutional claims to specific legislation.[46]

PART II. ISSUES

33. The issue in this application is whether the applicant's disagreement with the prevailing standard of pre-legislative *Charter* scrutiny of proposed legislation raises an issue of public importance.

PART III -STATEMENT OF ARGUMENT

A. APPLICATION OF EXISTING PRINCIPLES OF STATUTORY INTERPRETATION RESOLVE THE MATTER

34. At its core, this is a statutory interpretation case. This Court has noted many times that legislation (here the examination provisions) must "be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act,

[43] FCA Reasons, Application Record, vol I at 177 para 78.
[44] FCA Reasons, Application Record vol I at 183 para 89.
[45] FCA Reasons, Application Record vol I at 187 para 99.
[46] FCA Reasons, Application Record vol I at 187 para 100.

and the intention of Parliament."[47] The Courts below did exactly that, undertaking a thorough analysis of the examination provisions considering the meaning of the legislative text, the legislator's intention, and the broad constitutional and institutional context within which the provisions operate.[48]

35. Although the applicant quarrels with the resulting standard to be applied in reviewing proposed legislation for constitutional compliance,[49] the principles used and the process of their application are uncontroversial. That the applicant disagrees with the resulting standard, is not an issue of public importance.

i) Wording of Examination Provisions Properly Interpreted by Courts Below

36. As noted by the Courts below, the applicant's proposed standard misapprehends the plain meaning of the words and the context in which the examination provisions operate. When considering the text of the provisions, his argument mainly rests on an illogical proposition: ascertaining whether a provision is "inconsistent" really means the opposite—ascertaining whether a provision is "consistent".[50]

37. A review of the examination provisions demonstrates that they create two consecutive, but related, duties. First, the Minister must "ascertain" or "ensure" whether ("rechercher" or "vérifier si") any of the draft legislation's provisions "are inconsistent" ("est incompatible") with guaranteed rights. Where she reaches that conclusion, the Minister must "report any such inconsistency" ("signaler toute semblable incompatibilité") to the appropriate law-maker. The duty to report qualifies the duty to examine because the duty to report arises when, and only when, the Minister is certain that an inconsistency does indeed exist.

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[47] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ont: LexisNexis Canada, 2014) at para 2.1; *Rizzo & Rizzo Shoes Ltd (Re)*, [1987 1 SCR 27 at para 21, citing Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87.
[48] Decision, Application Record vol I at 55-60 paras 92-104; FCA Reasons Application Record vol I at 168-189 paras 42-105.
[49] Applicant's factum, Application Record vol II at 10-17 paras 29-53.
[50] FCA reasons, Application Record vol I at 171-172 paras 56-58.

38. The ordinary meaning of the words used by Parliament is plain: the Minister is to reach a definite view of whether an inconsistency exists. While the French version of these acts uses different verbs - «rechercher» and «vérifier si», both of these verbs share the same meaning as "ascertain" and "ensure".[51] Each of these verbs requires a person to reach a definite conclusion concerning a matter, to be satisfied that a specified state of affairs exists.[52] This is the shared, and therefore the presumed, meaning of those terms.

39. The Minister must ascertain that the provisions "are inconsistent" ("est incompatible") with guaranteed rights. Thus, the result expected by the examination provisions is one of two results: either it is possible to assert that a provision is "inconsistent" or it is not possible to make that assertion.

40. Despite the applicant's affirmation to the contrary, ascertaining "inconsistency" ("incompatibilité") is not the same thing as ascertaining "consistency" ("compatibilité").[53] 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. Going beyond and requiring the Minister to assure law-makers that the draft legislation is actually "consistent" would be contrary to the examination provisions' wording and Parliament's expectation. A determination of whether or not legislation is inconsistent with the guaranteed rights falls to the courts to make.

ii) Parliament Content with Level of Review

41. The credible argument standard does not operate in a vacuum. It is based on an understanding of the day-to-day workings of government and the roles our Constitution assigns to

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

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

[53] Applicant's factum, Application Record vol II at 13 para 39.

each branch of the government. Rather than being a "last opportunity" for review before draft legislation becomes law, as suggested by the applicant, the examination provisions are part of an integrated and continuous system of review by the government of draft legislation before it is presented to the law-makers.

42. If Parliament is not satisfied with the quality or number of reports it receives, Parliament has the power to amend the underlying legislation. Between the moment the first examination provision was enacted in 1960 and the adoption of section 4.1 of the *Department of Justice Act* in 1985, only one report was submitted to the House of Commons.[54] That history was known to Parliamentarians when they considered the amendment of the *Department of Justice Act* in 1985. Section 3 of the *Canadian Bill of Rights* was used to draft s. 4.1 of the *Department of Justice Act*. At that time, Parliament was aware that there was no practice of regular reporting to the House under the *Canadian Bill of Rights*.[55]

43. The applicant's suggestion that Parliamentary debates support his view of the proper interpretation of the examination provisions,[56] and that an issue of public importance is therefore raised in this matter, is belied by the fact that Parliament could have enacted a different examination standard by choosing different language, but did not. A variant of the "more likely than not inconsistent" standard was proposed to the last Parliament, prior to its dissolution; it was not adopted.[57]

44. Parliament is taken to intend that the legislation it enacts will be effective in achieving its objectives.[58] If Parliament had concerns that the low number of reports made under s. 3 of the *Canadian Bill of Rights* indicated a lack of rigorous analysis, it would have imposed a heightened duty in s. 4.1 of the *Department of Justice Act*. It did not, presumably because it was satisfied that

[54] Decision, Application Record vol I at 93 para 172.
[55] *House of Commons Debates*, 33rd Parl, 1st Sess, Vol 3 (27 March 1985) at 3422 (Hon John C Crosbie) ; Senate, *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, 33rd Parl, 1st Sess, No 15 (12 June 1985) at 15:8 (DM Low, General Counsel, Human Rights Law Section, Department of Justice).
[56] Applicant's factum, Application Record, vol II at 19-21 paras 62-65.
[57] Bill C-537 at cl 3 and 5.
[58] *Canada (Attorney General) v Celgene Corporation*, 2009 FCA 378 at para 45.

the duty to report was an effective measure of deterrence—always at the ready, yet rarely if ever used.

45. The fact that Parliament is content with the credible argument examination standard used in the pre-legislative *Charter* scrutiny underscores that the characterization of the issues by the applicant in this matter as being of public importance is not shared by Parliament.

B. Examination Provision Interpretation Does Not Raise a Constitutional Issue

46. Simply because constitutional law and the jurisprudence surrounding the *Charter* can be complex, does not lend support for the argument that a "higher level" of pre-legislative scrutiny is required, or, more importantly, that an issue of public importance is raised in this application.

47. The point made by the Court of Appeal was that because of the ever changing jurisprudence precise predictions of the constitutional validity of proposed legislation can be difficult to ascertain.[59] There is nothing controversial in that observation.

48. Nor does that observation support the notion that a higher standard, as advocated by the applicant, is needed.[60] All the Court said was predicting the course of future constitutional jurisprudence, and how proposed legislation will stack up against it is not something that can be done with unfailing precision.

49. However, the law surrounding the application of the *Charter* and the constitution more generally, is not so indeterminate that it is impossible for Department of Justice counsel to make practical opinions on whether proposed legislation will be found to be consistent with the constitution and the *Charter*. The point is that the reporting obligation in the examination provisions is not intended to further debate in Parliament or to inform Parliament's debate of legislation, but rather to avoid the introduction into Parliament of clearly unconstitutional draft legislation.

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[59] FCA Reasons, Application Record vol I at 183-189 paras 90-105.
[60] Applicant's factum, Application Record vol II at 17-18 paras 54-57.

50. Consideration of guaranteed rights by Parliament will take place regardless of a report from the Minister. Other jurisdictions in Canada do not have legislation imposing a reporting obligation analogous to s. 4.1 and yet the legislatures of those provinces and territories are able to fulfill their mandate to debate issues and pass laws.

51. That distinction is why much of the applicant's argument is without merit and why no issue of public importance is raised in this matter. The applicant's attempt to link the role the examination provisions play in proposed legislation before legislation is introduced in Parliament, and the debates in Parliament of a bill is wrong.[61]

52. Where the Minister does not issue a report, the legislation's constitutionality may still figure prominently in parliamentary considerations: debate occurs, witnesses testify and the parliamentary proceedings themselves may generate evidence and discussions relevant to Parliament's decision whether to amend or adopt the bill. Those debates will also inform a court's subsequent consideration of the law's constitutionality. The standard employed by the Minister thus helps foster a vigorous and open debate about a bill's constitutionality, which is consistent with the broader constitutional context within which the examination provisions operate. Frequent reports from the Chief law officer of the Crown based on the standard the applicant proposes may stifle such debate and does not respect the foundational principles of separation of powers and democracy.

53. Rather than "shift the burden of compliance to citizens" as suggested by the applicant,[62] the credible argument standard allows the government to function as intended: the Executive decides policy and introduces legislation; Parliament debates and enacts legislation and the courts adjudicate on challenges to the legislation.[63] The Executive is drawn from Parliament and is accountable to it.[64] A democratically elected government is entitled to make policy choices and

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[61] Applicant's factum, Application Record vol II at 18 para 59.
[62] Applicant's factum, Applicants Record vol II at 19 para 61
[63] FCA Reasons, Application Record Vol I at 178 para 81.
[64] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 65-67.

propose them to both Houses of Parliament. There remains considerable scope for debate as to how a proposed law may be viewed when measured against guaranteed rights and the Constitution more generally. Those choices can be debated and discussed by law-makers and the public over the course of the legislative process.

54. As important as constitutional effects are, they are not the sole legitimate consideration for parliamentarians. Legislators must consider other public policy objectives and weigh whether that legislation remains defensible despite a risk of possible unconstitutionality. That is precisely what occurred in *Mills*, where this Court accepted that Parliament could validly enact a regime that differed from an approach the Court had previously indicated was constitutionally sound.[65]

55. Therefore, in attempting to create an issue of public importance, the applicant misconceives what the examination provisions are intended to achieve and how they fit into the broader review of proposed legislation. The credible argument standard permits each branch of government to perform its appropriate role in ensuring that guaranteed rights are respected.

56. As this Court stated in N.A.P.E., there seems to be little controversy "…that the courts and the legislatures have different roles to play, and that our system works best when constitutional actors respect the role and mandate of other constitutional actors…".[66] The applicant's approach would have the effect of appearing to limit Parliament's ability to consider and debate draft legislation.

PART IV- SUBMISSION ON COSTS

57. There is no basis to depart from the usual course of awarding costs to the successful party.

PART V- ORDER SOUGHT

58. The Respondent requests that this application be dismissed with costs.

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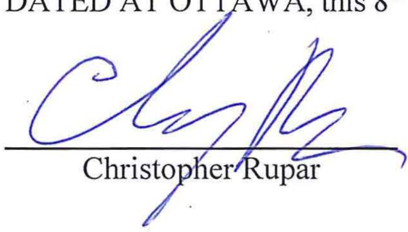
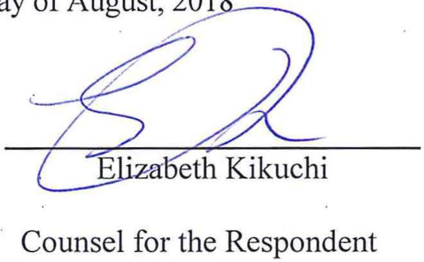
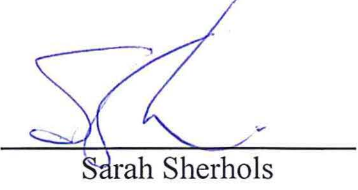
[65] *R v Mills*, [1999] 3 SCR 668 at para 55.
[66] *Newfoundland (Treasury Board) v N.A.P.E.*, 2004 SCC 66 at para 104.

DATED AT OTTAWA, this 8th day of August, 2018







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Counsel for the Respondent

PART VI LIST OF AUTHORITIES

I. Case Law

Case Name	Cite
Canada (Attorney General) v Celgene Corporation, 2009 FCA 378	45
Newfoundland (Treasury Board) v N.A.P.E., 2004 SCC 66	104
R v Mills, [1999] 3 SCR 668	55
Reference re Secession of Quebec, [1998] 2 SCR 217	65-67
Rizzo & Rizzo Shows Ltd (Re), 1987 1 SCR 27	87

II. Secondary Sources

Secondary Source	Cite
House of Commons Debates, 33rd Parliament, 1st Session, Volume 3 (27 March 1985)	3422
Le Petit Robert 1, Dictionnaire Le Robert, Paris, 1986	1623, 2078
M Bastarache et al, *The Law of Bilingual Interpretation* (Markham, Ont: LexisNexis Canada Inc, 2008)	32-34
Ruth Sullivan, *Sullivan on the Construction of Statues*, 6th ed (Markham Ont LexisNexis Canada, 2014)	2.1
Senate, *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, 33rd Parl, 1st Sess, No 15 (12 June 1985)	15:8
Webster's Ninth New Collegiate Dictionary, Merriam-Webster Inc, Springfield 1986	107, 414

III. Legislation

Secondary Sources and other Materials	Cite
Bill C-537: *An Act to ensure legislative compliance with the Canadian Bill of Rights and the Constitution Acts, 1867 to 1982, including the Canadian Charter of Rights and Freedoms*	4-5

PART VII LEGISLATION

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

(c) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*;	c) il n'empiète pas indûment sur les droits et libertés existants et, en tout état de cause, n'est pas incompatible avec les fins et les dispositions de la *Charte canadienne des droits et libertés* et de la *Déclaration canadienne des droits*;