Court file No. T-2225-12

FEDERAL COURT

SIMPLIFIED ACTION

BETWEEN:

EDGAR SCHMIDT

Plaintiff

- and -

ATTORNEY GENERAL OF CANADA

Defendant

AFFIDAVIT OF D. MARTIN LOW

I, D. Martin Low, of the City of Ottawa, in the Province of Ontario, **MAKE OATH AND SAY:**

1. I was employed in the Human Rights Law Section ("HRLS") of the Department of Justice of Canada ("Justice") from the establishment of that section in 1982 until 1991. As a result of my employment with Justice Canada, I have knowledge of the matters to which I hereinafter depose.

2. In this affidavit, I describe my recollection of the approach for examining government bills and regulations used by Justice between 1982 and 1991 and how it was administered.

3. This examination is required by section 3 of the *Canadian Bill of Rights* and section 4.1 of the *Department of Justice Act,* in the case of government bills, and by section 3 of the *Statutory Instruments Act* in the case of draft regulations to be adopted by the Governor in Council (the "examination

provisions"). While s 4.1 came into effect only in 1985, the review that it required was applied from the time the *Canadian Charter of Rights and Freedoms* (the "*Charter*") came into force.

4. Where government bills are concerned, the examination provisions impose a duty on the Minister to ascertain whether any of the provisions of a proposed legislative measure is inconsistent with the purposes and provisions of the *Canadian Bill of Rights* or the *Charter* (the "guaranteed rights"). In the case of draft regulations, essentially the same obligation is imposed on the Deputy Minister of Justice. Where either of these officials forms the opinion described by the examination provisions, they must report the inconsistency – the Minister, to the House of Commons after first reading; the Deputy Minister, to the Clerk of the Privy Council for Canada.

5. Despite some slight formulation and process variations, the language used in the examination provisions to state the object of the examination is constant. Consequently, the approach employed by Justice lawyers to support the Minister or the Deputy Minister in the discharge of these responsibilities must be the same for all of the examination provisions. To simplify my affidavit, I will therefore refer to the Minister's obligation as shorthand for the obligation imposed either on the Minister or on the Deputy Minister.

I. <u>My background</u>

6. I obtained my B.A. and LL.B. from the University of in Toronto and an LL.M. from Cambridge University. I was called to the Bar in 1974, as a member of Law Society of Upper Canada. I remained a member in good standing until 2013, when I retired from the practice of law.

7. From 1974 to 2001, I was employed as legal counsel in Justice. From 1982 to 1991, I was employed as general counsel and, subsequently, senior general counsel in HRLS. I was appointed to that position in HRLS early in 1982,

when it was created. I worked there until August 1991, when I was seconded to the United Nations Centre for Human Rights in Geneva, in conjunction with the impending United Nations World Conference on Human Rights.

8. I was appointed a federal Queen's Counsel in 1988.

9. After I retired from the public service, I continued to practice law. I became a partner in the law firm of McMillan Binch LLP (now McMillan LLP) and practiced in the firm's Toronto and Ottawa offices. I retired from the partnership of that firm in June 2013.

II. The role of HRLS

10. In 1982, in anticipation of the coming into force of the *Charter*, Justice created a new unit called the Human Rights Law Section. The mandate of the HRLS was to serve as the centre of expertise in Justice about all human rights issues, including the *Charter,* the *Canadian Bill of Rights*, the *Canadian Human Rights Act* and Canada's international human rights obligations.

11. One of my responsibilities as the General Counsel of HRLS was to supervise that section's work on the examination of government bills and regulations to ascertain whether any of the provisions thereof are inconsistent with the guaranteed rights and to approve the legal opinions of HRLS lawyers on these (and other) issues.

12. I reported to the Assistant Deputy Minister, Public Law, and through the ADM, to the Deputy Minister of Justice, for the authoritative position of Justice on controversial questions of law. This reporting relationship sought to ensure that Justice would "speak with one voice" on the guaranteed rights.

13. "Speaking with one voice" means that any differences of opinion on any legal issue are resolved within Justice to ensure that a consistent legal position on

any point of law is provided to all the departments and agencies it serves. Justice lawyers practice in areas that are complex, and some diversity of opinion is to be expected. But it was recognised that there could only be one departmental position on any question of law in order to provide coherent advice to all the departments and agencies of the executive branch of government on behalf of the Minister of Justice and the Attorney General. It was the responsibility of senior officials in Justice, up to and including the Deputy Minister, to resolve any differences that might occur.

III. The examination approach

14. HRLS was tasked with advising on how Justice would perform the examination mandated by the examination provisions. This eventually led to the development of an examination approach Justice would employ.

15. It was not until 1993, after I had left HRLS, that Justice formalized the examination approach. At that time, as I understand it, the approach became known as the "credible argument" standard: the Minister ascertains that there is an inconsistency between a proposed legislative measure and the guaranteed rights only where there is no credible argument to support the proposed measure – that is, an argument that is reasonable, *bona fide* and capable of being raised before and accepted by the courts.

16. Prior to 1993, HRLS would, in consultation with more senior officials in Justice, advise the Minister to make a report to the House where there was no reasonable argument that a proposed law was consistent with the guaranteed rights. In other words, a report would be recommended where there was no reasonable prospect of successfully defending the legislation against a foreseeable challenge under the Charter or the *Canadian Bill of Rights*. While we did not refer to this approach as "the credible argument standard", I believe it was essentially the same concept.

17. To ensure consistency and coherence in the application of our approach, I reviewed all legal opinions in HRLS on the guaranteed rights, often in

consultation with more senior Justice officials. In particular, because of the significance of advising the Minister to report an inconsistency between a government bill or regulation and the guaranteed rights, any such advice would have been prepared for the signature of the Deputy Minister.

IV. The development of the examination approach

18. Several factors led HRLS to adopt the "no reasonable argument" approach between 1982 and 1991: the language of the examination provisions themselves; the consultative process inherent in the legal drafting process; and the implications of the Minister reporting an inconsistency with guaranteed rights.

19. The text of the examination provisions appears to call for a determination that the measure in question is unequivocally inconsistent with the guaranteed rights. The novelty and complexity of those rights tended to support the approach adopted by HRLS. Any specific issue which may have been reviewed by HRLS at the time, pursuant to the examination provisions, is a matter of legal opinion which remains protected by the solicitor-client privilege.

20. The overall governmental context provides two other important factors. First, the Minister's examination occurs at the culmination of the legislative drafting process. Second, the context within which the Minister must discharge his or her obligation to the House includes both the Minister's role under sections 4 and 4.1 of the *Department of Justice Act*, and his role as a member of the Cabinet.

A. The legislative drafting process

21. The Privy Council Office has published guides explaining the detail of the legislative drafting process - *A Drafter's Guide to Cabinet Documents* and *Guide to Making Federal Acts and Regulations*. Both of these documents are public. Rather than discussing the detail of the legislative process they describe, I will address in my affidavit the way the government consultation process

provided a channel for the resolution of possible concerns about the risk of inconsistency with the guaranteed rights.

22. The examination process was dynamic, iterative and ongoing. It involved three inter-related but separate components: an advisory component, a confirmation and the reporting obligation.

1. The advisory component

23. The advisory component took place throughout the legislative policy development process, from the initial stages of developing a Memorandum to Cabinet up to and including the introduction of a government bill or adoption of a regulation. Justice would typically be consulted at the outset of interdepartmental consideration of a policy proposal initiated by a government department. Advice on the guaranteed rights continued to be provided as the proposal was refined, as options were developed and put before Ministers, and throughout the legislative drafting process. All through the advisory component of the examination process, the proposed policy was normally adjusted as required to exclude or minimise any risk of inconsistency with the guaranteed rights.

24. It was typical in the policy development process for a government department to consult its Justice legal services unit for legal advice where a legislative policy proposal might have potential implications for the guaranteed rights. The legal services unit would normally refer the issue to HRLS for advice on any potential risks to guaranteed rights in the proposed legislation.

25. In other cases, a departmental policy centre could contact HRLS directly, requesting its assistance in the early stages of policy development. HRLS would then work directly with the client department (and other relevant departments and agencies) to discuss legal policy considerations and/or provide written advice on potential risks under the guaranteed rights. In most cases, any concerns about the risk of inconsistency would be resolved in this consultative

process.

26. Where there were concerns regarding consistency with guaranteed rights, HRLS would work with the client department and central agencies, informing them of the law and providing assistance as needed.

27. Risk of inconsistency with guaranteed rights was assessed and communicated to clients on a continuum that, at the one end, expressed a low risk and, at the other, advised that the proposed legislation would entail an unacceptable risk of being found to be inconsistent with the guaranteed rights. At no time that I can recall was the assessment of risk based on numerical odds or fixed percentages.

28. Where a risk was identified, officials of the initiating department would normally attempt to resolve it by adjusting the proposed policy in conjunction with HRLS advice in an effort to achieve the policy objective with less risk. Where the client department's position was not compatible with HRLS advice, officials would report their concerns up their respective reporting chains, for resolution by more senior officials.

29. Senior officials, up to and including the Deputy Minister and the Minister of Justice and of the client department, were thus briefed about proposed government legislation which might pose a risk of inconsistency with the guaranteed rights. Such briefings could well include risks identified as something lower than that which could trigger the Minister's obligation to report an inconsistency under the examination provisions.

30. HRLS was also involved with legislative proposals later in the legislative drafting process. Early in my time with HRLS, in conjunction with the Chief Legislative Counsel, it provided the final examination of all government bills for consistency with guaranteed rights. More routinely, however, if a legislative drafter identified a potential inconsistency with guaranteed rights, the drafter

would consult HRLS early in the drafting process.

31. The Cabinet consultation process thus afforded the opportunity to ensure that Ministers were informed of relevant impacts on guaranteed rights. As the legal member of the Cabinet, the Minister performed a critical advisory role in those discussions as the exclusive source of legal advice to Cabinet.

2. The confirmation

32. The examination of government bills for consistency was undertaken by government officials. Formally, this took place after the government bill was introduced in the House of Commons. Confirmation occurred when Chief Legislative Counsel wrote to the Clerk of the House and confirmed that the requisite examination of the legislation for consistency had taken place.

33. In the case of regulations, this confirmation took place when counsel in the Legislative Services Branch of Justice "blue-stamped" the draft regulations as having been examined.

3. The reporting obligation

34. The reporting obligation for a government bill is triggered only when the Minister formed the opinion that some aspect of the bill is, at the time of introduction, inconsistent with guaranteed rights. Similarly, the reporting component for a draft regulation occurred only if the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, formed the opinion that it is inconsistent with guaranteed rights.

35. In either case, the reporting obligation resided with the Minister or Deputy Minister alone. Neither I nor any other lawyer in the HRLS could do more than offer advice for the consideration of the Deputy Minister and then the Minister.

36. By law, the Minister and the Deputy Minister have the authority to determine the position of the Minister or the Department on any legal issue within federal jurisdiction. Neither official is bound by advice they received from Justice. Both were legally trained and both had access to legal advice from outside Justice. Both were called upon to form a definitive opinion about the consistency of government policy initiatives with complex and, at the time, largely untested constitutional provisions creating guaranteed rights in a period of rapidly evolving jurisprudence. Both officials had to reach the level of legal certainty required of them by the examination provisions.

B. The consequences on the Minister

37. Unless a government bill were to invoke the relevant notwithstanding clause (either section 2 of the *Bill of Rights* or s. 33 of the *Charter*), a report to Parliament that the Minister concluded that a government bill is inconsistent with guaranteed rights would have serious and uncertain implications.

38. The precise implications of a report under the examination provisions were quite unknown, but were expected to be controversial. To my knowledge, this was never an issue that was invoked in the government consultation process and there was no reason to dwell on the hypothesis.

C. Adopting the examination approach

39. The examination approach was the subject of significant and ongoing consideration within HRLS and with other senior Justice officials.

40. The consensus was that, for an acknowledged assessment of legal risk in a novel legal environment, the approach would be qualitative and not quantitative.

41. The examination approach took into account that reviews under the examination provisions could not always be conducted with absolute precision or

certainty even though, on the language of the examination provisions, a very high degree of certainty appeared to be required. While rigorous, the approach allowed for the necessary consideration of evolving jurisprudence and novel policy objectives.

42. This is particularly important since it reflects values which are part of the architecture of our Constitution - the authority of an elected government to shape policy and legislation as it thinks best and the duty of the public service to provide objective and impartial service to the government of the day.

43. HRLS took its role seriously. We examined policy initiatives, draft bills and regulations rigorously, considering all of the legal and policy issues that might apply and evaluating potential legal challenges that might plausibly be brought. Where required, our views were advanced quite forcefully. However, we were also careful not to interfere unnecessarily with the policy process.

44. As developments in *Charter* law occurred, our application of the examination approach also evolved to incorporate the course of *Charter* jurisprudence. Despite its lack of formalization, the examination approach we developed – no reasonable prospect of successful defence - was consistently used during my time at HRLS.

V. The effect of the examination approach

45. The intended effect of the examination provisions does not lie in the making of a report to the House. Rather, the acknowledged value of the examination provisions is that they provide Justice with considerable influence in the policy development process, to ensure that the extent or degree of a potential risk of incompatibility is given weighty consideration at senior levels of government well in advance of policy adoption.

46. That examination mechanism operates within the strictures of confidentiality created by law. The lawyers involved in providing advice about

draft legislation are bound by their professional obligation to keep confidential all that their clients entrust to them. They are also bound by their oath of office to keep confidential that which the government says is confidential. In addition to solicitor-client privilege, parliamentary immunity extends to the drafting process, where laws are concerned, while the immunity protecting Cabinet confidences protects the development of Memoranda to Cabinet and the advice tendered to the Governor-in-Council about draft regulations. As a result, the administration of the examination process was not exposed to much public consideration, or beyond the knowledge of the officials involved in it.

47. But the mechanism operated efficiently and effectively, in a number of ways. It affirmed Justice's role as a quasi-central agency which was to be involved from the outset both in legislative policy development and in the drafting of legislation and regulations. HRLS was seen as a one-stop shop on guaranteed rights for these purposes, which ensured that the government had the benefit of expert legal advice in an area of considerable complexity and novelty. This had the effect of promoting coherence and consistency across the government on these and other questions of law.

48. Furthermore, it provided Justice counsel with a means to get the attention of senior stakeholders to address issues of potential incompatibility at an early stage, and to work out a legally viable adjustment, where possible. And where it was not, more senior levels of decision-making in Justice and in the government more broadly could be engaged quickly and efficiently to resolve the matter.

49. Clearly, of course, the consequences of a possible determination of inconsistency and a report thereon by the Minister are portentous. The examination process accordingly required an approach that was commensurate: an approach that would provide for the most careful consideration of the implications of the guaranteed rights and a measured response to the risk

assessment adopted by the Department of Justice.

SWORN before me at the City of Ottawa, in the judicial district of Ottawa-Carleton, in the province of Ontario, this 22nd day of May, 2015

Commissioner for Taking Affidavits in the Province of Ontario

D. Martin Low

Tania Teresa Tooke, a Commissioner, etc., Province of Ontario, for the Government of Canada, Department of Justice. Expires February 17, 2016.