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

- and -

CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervener

MEMORANDUM OF FACT AND LAW OF THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION

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PART I: STATEMENT OF FACTS

1. This simplified action concerns the interpretation of section 3 of the *Canadian Bill of Rights*[1] ("*Bill of Rights*"), section 4.1 of the *Department of Justice Act*[2] and sections 3(2) and (3) of the *Statutory Instruments Act*.[3] These provisions (collectively the "examination provisions") are designed to ensure that legislation and regulations are scrutinized for compliance with the *Bill of Rights* and the *Canadian Charter of Rights and Freedoms*[4] ("*Charter*") and inconsistencies with the rights guaranteed by these documents (the "rights guarantees") are brought to the attention of Parliament. The action raises vital questions that lie at the heart of our constitutional system.

2. The Parties are in agreement that the Department of Justice currently interprets the examination provisions in a way that does not require a report to Parliament (or to the Clerk of the Privy Council) unless there is no credible argument that can be made for the consistency of the legislation (or regulation) with the rights guarantees.

3. The Canadian Civil Liberties Association ("CCLA") was granted leave to intervene in this simplified action by Order of Noël J. dated August 28, 2015. The compliance of legislation with guaranteed rights and freedoms is core to the CCLA's mandate. The CCLA supports the Plaintiff's argument that the current approach to the examination provisions is contrary to the provisions themselves, but takes no position on the Plaintiff's proposed standard.[5] Rather, the CCLA's submissions articulate principles that should inform the interpretation of the

[1] SC 1960, c. 44.
[2] RSC 1985, c J-2.
[3] RSC 1985, c S-22.
[4] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[5] The Plaintiff's proposed standard is set out at paras. 64(1), (2) and (3) of his Memorandum of Fact and Law.

examination provisions and provide the Court with the perspective of those affected by the current approach to interpreting and applying the examination provisions.

4. The CCLA does not seek to adduce evidence and relies on the evidentiary record of the parties.

PART II: POINTS IN ISSUE

5. This simplified action asks this Honourable Court to consider the nature of the Minister of Justice's obligations pursuant to the examination provisions. While the obligation of the Deputy Minister with respect to regulations is also at issue, the CCLA's submissions focus on the Minister's approach to reviewing and reporting on legislation.

6. The CCLA argues that the credible argument standard does not reflect the animating purpose of the examination provisions and is contrary to both their letter and intent. In particular:

(a) the examination provisions must be interpreted in light of constitutional principles including constitutionalism and the rule of law;

(b) the Constitution's structure contemplates a meaningful role for Parliament in considering rights implications when passing legislation and requires the application of a more meaningful standard for reporting to facilitate this role; and

(c) the existing standard places the onus on ordinary Canadians to challenge legislation in the courts, often at significant cost.

PART III: SUBMISSIONS

A) The examination provisions must be interpreted in light of constitutional principles

7. The examination provisions require scrutiny of Bills by the Minister of Justice and a report to Parliament in the event of inconsistency with the *Bill of Rights* or the *Charter*. The

language of the provisions and their legislative history demonstrate their goal of inserting rights considerations into Parliament's deliberations on proposed measures.

8. In our constitutional system, it is Parliament that is responsible for passing legislation and Parliament that will have to fill the gap when legislation is declared unconstitutional by our courts. The examination provisions are one way in which Parliament can be advised of the government's position on the compliance of proposed measures with the guaranteed rights. The reporting mechanism provides a needed opportunity for debate and discussion on the issue.

9. By facilitating the work of the executive and legislative branches in upholding the Constitution, the examination provisions are fundamentally linked to the principles of constitutionalism and the rule of law. These have been recognized by the Supreme Court of Canada as unwritten constitutional principles and part of the internal "architecture" and "lifeblood" of the Constitution.[6]

10. The Supreme Court has recognized that "certain underlying principles infuse our Constitution and breathe life into it"[7] and that these principles, including constitutionalism and the rule of law, "assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, **and the role of our political institutions**".[8]

11. In describing the principles of constitutionalism and the rule of law, and their relationship to one another, the Supreme Court has said:

> The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s. 52(1) of the *Constitution Act, 1982*, which provides that "[t]he Constitution of

[6] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 51.
[7] *Ibid*., para. 50.
[8] *Ibid*., para. 52 (emphasis added).

> Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch. They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.[9]

12. With respect, the credible argument standard is not in keeping with constitutionalism and the rule of law. The standard is formulated in a way that allows the government free reign to introduce laws to Parliament that have almost no chance of succeeding a constitutional challenge, while denying there is an inconsistency with the guaranteed rights. This does not demonstrate compliance with the law, or the Constitution.

13. The Defendant argues that constitutional interpretation is fraught with difficulties and nuance, and points to the Supreme Court of Canada's jurisprudence, including dissenting opinions and disagreement with lower courts, to demonstrate that a law's consistency with the guaranteed rights is, in many cases, in the eye of the beholder. As a result, the Defendant submits that only the credible argument standard can set a clear and consistent threshold for reporting.

14. The CCLA accepts that the guaranteed rights are stated in broad terms and that determining reasonable limitations on rights is the subject of substantial and genuine disagreement, even among those well-versed in the law. However, this does not justify the credible argument standard. Rather, in light of the inherently complex, subjective and nuanced

[9] *Ibid.*, para. 72 (citations omitted).

nature of interpreting and applying rights guarantees, the credible argument standard provides no standard at all - it simply strips the reporting requirement of all meaning.

15. As a result, and as addressed further below, the credible argument standard bypasses one of the intended functions of the examination provisions, namely to bring the question of compliance with rights to Parliament for examination, consideration and debate.

B) The structure of the Charter and the role of Parliament supports a more meaningful standard for reporting

16. The Defendant's justification for the credible argument standard relies in large part on a strict separation of powers doctrine whereby Parliament enacts laws, the courts interpret them and the executive implements them. This strict separation does not reflect the realities of the Canadian constitutional system.

> The separation between the executive branch – the "government" – and Parliament is the oldest, most-settled, but…in practice most-disregarded relationship. In practice, the same people who control the executive branch usually control the legislative branch – namely the Cabinet and particularly the prime minister.[10]

17. There is no judicial monopoly on interpreting the meaning of our foundational rights documents – our supreme law. While our courts have exclusive jurisdiction over *challenges* to the constitutional validity of legislation, they are not the sole *interpreters* of law and should not be the only branch that sees itself as having a role in interpreting what the guaranteed rights require. The current approach to the examination provisions ignores the significant obligations and responsibilities that reside in both the executive and legislative branches to ensure constitutional compliance *before* legislation is passed.

[10] Craig Forcese & Aaron Freeman, *The Laws of Government*, (Toronto: Irwin Law, 2005) at 21.

18. The notion that the courts are the sole branch charged with upholding the Constitution is contradicted by our constitutional structure and, in particular, by the inclusion of sections 1 and 33 in the *Charter*. These features reveal multiple facets of Parliament's role: upholding rights; demonstrating when limitations on rights are reasonable; and having the ultimate responsibility (and exclusive jurisdiction) to enact laws notwithstanding the possible violation of constitutionally-protected rights.

i) Section 1 of the Charter

19. In establishing the judicial test for assessing reasonableness of limits on rights under s. 1, Dickson C.J. stated

> It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the *Charter* are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably" which clearly indicates that the onus of justification is on the party seeking to limit…"[11]

20. Section 1 of the *Charter* both guarantees the rights set out in it and establishes that those rights are subject to reasonable limits if those limits can be *demonstrably justified* in a free and democratic society. As the Supreme Court has held: "Section 1 itself expresses an important aspect of the separation of powers by defining, within its terms, limits on legislative sovereignty."[12] The legislature itself must be mindful of these limits and in turn requires access to meaningful information from the government about rights compliance.

21. In assessing justification under s. 1 our courts frequently look to legislative intent and parliamentary debates, in addition to evidence adduced purely for the purposes of litigation. The

[11] *R. v. Oakes*, [1986] 1 S.C.R. 103 at 137.
[12] *Newfoundland (Treasury Board) v. N.A.P.E.*, para. 104.

justification aspect of s. 1 is not confined exclusively to litigation, but implies a role for the executive and legislative branches prior to and during the process of passing laws. As Hogg notes:

> Who is to decide whether a law satisfies the requirements of s. 1? Initially, decisions will be made by the government that introduces a bill in derogation of a Charter right, and by the legislative body that enacts the bill into law.[13]

22. There is no doubt that the judiciary makes the final determination about the validity of a section 1 justification – if the matter is the subject of litigation – but this should not detract from the obligations on the other branches to take their roles in interpreting and applying the *Charter* seriously. Having a frank discussion and vigorous debate in Parliament about the government's objectives in enacting the law will assist a reviewing court in conducting a section 1 analysis and may serve to demonstrate the government's justification for proposing a rights-limiting measure and, eventually, Parliament's justification for passing such a measure.

23. Moreover, the section 1 test developed by the Supreme Court in *R. v. Oakes*, and elaborated on in subsequent cases, builds in opportunities for giving deference to parliamentary judgment, with the level of appropriate deference varying depending on the social context in which the limitation on rights is imposed.[14] Where it is evident that the question of consistency with rights guarantees has been raised and meaningfully canvassed with members of Parliament, curial deference may be more forthcoming.

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[13] Peter Hogg, *Constitutional Law of Canada*, 5th ed.(Toronto: Carswell, 2007) at §36.4(c).
[14] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, para. 135.

ii) Section 33

24. In addition to the frequently invoked and litigated reasonable limits clause of the *Charter* (s. 1), the notwithstanding clause (s. 33) serves as a strong reminder that our courts need not always have the final say on matters related to guaranteed rights.

25. Section 33 states:

> **33.** (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
>
> (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
>
> (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
>
> (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
>
> (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

26. While never invoked by the federal Parliament, the notwithstanding clause was included in the *Charter* as part of the constitutional compromise at the time of patriation. It recognizes that, in some situations, Parliament may deliberate and determine that certain policy objectives are sufficiently pressing that overriding constitutionally protected rights or freedoms (or the courts' interpretation of those rights/freedoms) is warranted.

27. The notwithstanding clause is a tool for Parliament, and is not dependent on a court's interpretation of what the guaranteed rights require. Neither the language nor the purpose of the clause indicates that a successful constitutional challenge is a condition precedent to invoking s. 33. Rather, as one scholar explains:

> Legislative action taken under the notwithstanding clause is simply a declaration of the inapplicability of some of the rights provisions found in the Constitution. *As a matter of form, although not always as a matter of legislative motive, an exercise of the notwithstanding clause is a suspension of the rights listed in a named section of the Charter and is not a legislative act taken to correct a rights determination made by a court*. Neither is it legislative pre-emption of a future court's rights determination, prompted by the fear that there will be mistaken or imprudent judicial protection of a right affected by legislation.[15]

28. There are different theories about when the notwithstanding clause may be legitimately invoked, and certainly many who argue that it is never legitimate to suspend rights. However, the very inclusion of s. 33 in the *Charter,* and its specific requirement that derogations from rights be both specific and public, anticipates that Parliament should be engaged in active consideration of the rights implications of legislation.

iii) Interpreting the examination provisions to facilitate Parliament's role

29. The examination provisions aim to make compliance with rights guarantees a site of democratic debate. The credible argument approach fails to achieve this goal, because Parliament is deprived of vital information for their discussion of whether a section 1 justification or section 33 invocation is necessary.

30. In their frequent references to legislative deference, our courts recognize the vital role that Parliament plays in our constitutional machinery. In some instances, Parliament's objectives and consideration of rights implications will be plain from the statute itself. For example, in *R. v. Ferguson,*[16] the Supreme Court held that granting individual constitutional exemptions in cases challenging mandatory minimums would go directly against Parliament's intention. The Court said:

[15] John D. Whyte, "Sometimes Constitutions are Made in the Streets: the Future of the Charter's Notwithstanding Clause" (2007) 16:2 *Constitutional forum constitutionnel* 79 at 80, emphasis added.
[16] 2008 SCC 6.

> In granting a constitutional exemption, a judge would be undermining Parliament's purpose in passing the legislation: to remove judicial discretion and to send a clear and unequivocal message to potential offenders that if they commit a certain offence, or commit it in a certain way, they will receive a sentence equal to or exceeding the mandatory minimum specified by Parliament. The discretion that a constitutional exemption would confer on judges would violate the letter of the law and undermine the message that animates it.[17]

31. In other instances, it is the work that Parliament does prior to and in passing legislation that the courts may consider as evidence of contemplation of the rights implications and balancing done in light of policy objectives. In *R. v. Mills,*[18] the Court was asked to opine on the constitutionality of legislation allowing for the production of third-party records in sexual assault cases, following the Court's earlier decision in *R. v. O'Connor.*[19] The latter case had articulated a scheme that would meet constitutional requirements. Although the regime enacted by Parliament differed substantially from the one the majority laid out in *O'Connor,* the Court in *Mills* upheld its constitutionality, stating:

> The respondent and several supporting interveners argue that Bill C-46 is unconstitutional to the extent that it establishes a regime for production that differs from or is inconsistent with that established by the majority in O'Connor. However, it does not follow from the fact that a law passed by Parliament differs from a regime envisaged by the Court in the absence of a statutory scheme, that Parliament's law is unconstitutional. Parliament may build on the Court's decision, and develop a different scheme as long as it remains constitutional. **Just as Parliament must respect the Court's rulings, so the Court must respect Parliament's determination that the judicial scheme can be improved. To insist on slavish conformity would belie the mutual respect that underpins the relationship between the courts and legislature that is so essential to our constitutional democracy.**[20]

32. In its decision in *Mills,* the Court noted that "Courts do not hold a monopoly on the protection and promotion of rights and freedoms; Parliament also plays a role in this regard and

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[17] *Ibid*., para. 55.
[18] [1999] 3 S.C.R. 668.
[19] [1995] 4 S.C.R. 411.
[20] *R. v. Mills,* [1999] 3 S.C.R. 668, para. 55 (citations omitted, emphasis added).

is often able to act as a significant ally for vulnerable groups."[21] The Court in *Mills* could look at the process that Parliament undertook prior to passing the legislation, noting that Parliament had "enacted the legislation following a long consultation process that included a consideration of the constitutional standards outlined by this Court in *O'Connor"*[22] and that it had the benefit of examining how the *O'Connor* scheme had been working since it had been in place.[23] *Mills* demonstrates the role that Parliament may undertake to 'fix' something that appears to be broken; Parliament need not wait for the Court to determine when our laws are in need of repair.

33. The examination provisions should be interpreted in a way that facilitates Parliament's role in engaging in meaningful discussion on rights questions *before* legislation is passed and *before* court challenges are commenced. As Janet Hiebert writes:

> One of the objectives of the statutory responsibility to report to Parliament where Bills are inconsistent with protected rights is to ensure that Parliament is sufficiently knowledgeable about the implications of Bills for protected rights so that it can compel the government to explain and justify legislative priorities where rights may be adversely affected. But reporting procedures have not evolved in a manner that is helpful to facilitate this objective…
>
> …In Canada, the practice of non-reporting to the House of Commons that Bills are inconsistent with the Charter occurs because the Minister of Justice has concluded that a credible Charter argument can be made in support of the claim that the Bill is reasonable. But this denies Parliament the information or assumptions that led to this conclusion. The absence of any explanation also denies Parliament relevant information for assessing whether or not the government has been overly risk-averse or cautious in its legislative decisions**. Parliament should not be placed in the untenable position of having to either pass legislation that may have a high degree of risk of subsequently being declared invalid or, alternatively, having insufficient information to assess decisions that avoid ambitious objectives or comprehensive means because of governmental and bureaucratic attempts to manage or avoid Charter risks**.[24]

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[21] *Ibid*., para. 58.
[22] *Ibid*., para. 59.
[23] *Ibid*., para. 125.
[24] Janet L. Hiebert, "Rights-Vetting in New Zealand and Canada: Similar Idea, Different Outcomes" (2005) 3 NZJPIL 63 at 97-98 (emphasis added).

34. The challenges for Parliament are compounded as a result of the concentration of legal expertise in the Department of Justice and the fact that advice on Charter consistency is considered confidential and not accessible to Parliament. The Defendant's argument that Parliament has other tools at its disposal is of little comfort, as the examination provisions explicitly require that *the Minister of Justice* report to Parliament. Since it is the Department of Justice that will be defending a case in the event of a constitutional challenge, it is the Minister's opinion that may be most useful to Parliament.

35. The credible argument standard might be appropriate if the legal advice that the government receives from the Department of Justice were not shielded by privilege, because the advice itself could form the basis for discussion and debate in the House of Commons. In light of the confidential nature of such opinions, however, the examination provisions must be interpreted in a way that promotes meaningful debate and discussion in Parliament, rather than hinders it.

36. Prof. Hiebert highlights the problem:

> …Parliament is entirely unaware of the nature of the legal advice on Charter consistency rendered, whether or how often a government ignores or disagrees with its legal advisors' evaluations of Charter compatibility, or the likelihood that legislation could be subject to judicial invalidation if subsequently litigated. This lack of parliamentary awareness for how legislation implicates the Charter raises the serious concern that Parliament will regularly pass legislation without knowing whether the legislation has significant Charter problems.[25]

37. Put simply, the credible argument standard fails to ensure that any limitations on, or departures from, the guaranteed rights are passed by Parliament in full recognition of Canada's

[25] Janet L. Hiebert, "Parliamentary Engagement with the Charter: Rethinking the Idea of Legislative Rights Review" (2012), 58 S.C.L.R. (2d) 87 at 101.

constitutional commitments. Such a standard does not serve the best interests of Parliament or the public.

C) Consequences of the credible argument standard

38. In bypassing the significant role of Parliament and interpreting the examination provisions as requiring such a high threshold for reporting, the burden of ensuring constitutional compliance is placed squarely on the shoulders of ordinary Canadians and in the hands of our overburdened courts. It is the public who must challenge unconstitutional legislation in court or who may be subject to unconstitutional laws for years before the matter is ever litigated.

39. This approach is costly and can be subject to significant delay. Legislation may also be reviewed piecemeal or not reviewed at all, if issues of standing or ripeness pose barriers.

40. In Annex B to its pre-trial memorandum, the Defendant includes a list of cases where federal legislation was challenged as being contrary to the *Charter*. The numbers of cases where a violation was found or where legislation was upheld tell only part of the story. The human beings behind the cases must also be considered.

41. For example, in *Canada v. Whaling,*[26] Parliament passed legislation that changed the timing of parole eligibility retroactively. The three plaintiffs in the case (and no doubt many other individuals) had their parole eligibility delayed. The retroactive change was found to violate s. 11(h) of the *Charter*, as it had the effect of punishing the plaintiffs a second time by forcing them to endure longer prison sentences. As a result, one of the plaintiffs spent an additional three months in prison, another faced an additional nine months, and the third was

[26] 2014 SCC 20.

imprisoned for an additional twenty-one months. Significantly, every court that examined the statute found it unconstitutional.

42. In another case, *R. v. Smith*,[27] a medical marihuana regulation which limited lawful possession to dried marihuana was found to be unconstitutional. This regulation forced patients to smoke marihuana instead of ingesting it through food. While the accused was acquitted at trial (and the acquittal was upheld at all levels), he underwent the uncertainty and significant cost of challenging the law all the way to the Supreme Court. In addition, the Court's decision considered the rights of medical marihuana users, noting that their choice was between a legal but inadequate treatment and an illegal but more effective one. Further, the Court found that the regulations "subject the person to the risk of cancer and bronchial infections associated with smoking dry marihuana, and precludes the possibility of choosing a more effective treatment."[28]

43. In every case where the constitutionality of legislation is challenged, the individuals bringing those challenges suffer significant financial costs and devote extraordinary amounts of time to the task. In some cases, those individuals are also facing serious criminal penalties. The process of a constitutional challenge can take several years to wind its way through our courts, with the consequences for individuals hanging in limbo. The uphill battle faced by litigants will also frequently dissuade individuals from challenging potentially unconstitutional legislation. As a result, an unconstitutional law may be left "on the books" simply because of the time and resources required to mount an effective challenge.

44. Employing the credible argument standard and leaving individuals to initiate court challenges also costs the government, who must defend against a challenge. The precious and

[27] 2015 SCC 34.
[28] *Ibid.*, para. 18.

limited time and resources of our courts are also implicated in this process. While we can reasonably expect that some constitutional challenges will occur regardless of the laws passed by Parliament or the process they employ, some cases could certainly be avoided if a more meaningful standard for reporting was in place.

D) Conclusion

45. If the statutory examination provisions are approached from the perspective of the Canadian public, a more robust standard and approach to interpretation is clearly called for. The credible argument standard is not in keeping with Canada's unwritten constitutional principles, it is out of step with our existing constitutional structures, and it denies Parliament meaningful opportunities for engagement with rights considerations *before* legislation is passed.

46. Moreover, by focusing almost exclusively on the courts as the site of engagement on rights issues, the credible argument standard burdens Canadians – often those who are already in conflict with the law – with costly and time-consuming litigation.

47. The credible argument standard does not serve Parliament, it does not serve the government, and it does not serve the public interest.

PART IV: ORDER SOUGHT

48. The CCLA asks that this Honourable Court interpret the examination provisions in line with the principles articulated above and declare that the existing approach does not comply with the law.

All of which is respectfully submitted,

September 3, 2015

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PART V: AUTHORITIES

A. CASES

Canada v. Whaling, 2014 SCC 20

Newfoundland (Treasury Board) v. N.A.P.E

Reference re Secession of Quebec, [1998] 2 S.C.R. 217

RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199

R. v. Ferguson, 2008 SCC 6.

R v. Mills, [1999] 3 S.C.R. 668

R. v. Oakes, [1986] 1 S.C.R. 103

R. v. O'Connor, [1995] 4 S.C.R. 411

R. v. Smith, 2015 SCC 34

B. SECONDARY SOURCES

Craig Forcese & Aaron Freeman, *The Laws of Government,* (Toronto: Irwin Law, 2005)

Janet L. Hiebert, "Parliamentary Engagement with the Charter: Rethinking the Idea of Legislative Rights Review" (2012), 58 S.C.L.R. (2d) 87

Janet L. Hiebert, "Rights-Vetting in New Zealand and Canada: Similar Idea, Different Outcomes" (2005) 3 NZJPIL 63

Peter Hogg, *Constitutional Law of Canada,* 5th ed.(Toronto: Carswell, 2007) at §36.4(c).

John D. Whyte, "Sometimes Constitutions are Made in the Streets: the Future of the Charter's Notwithstanding Clause" (2007) 16:2 *Constitutional forum constitutionnel* 79

C. STATUTORY AUTHORITIES

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*
Charte canadienne des droits et libertés, partie I de la *Loi constitutionelle de 1982*

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

33. (1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte.

(2) La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte.

(3) La déclaration visée au paragraphe (1) cesse d'avoir effet à la date qui y est précisée ou, au plus tard, cinq ans après son entrée en vigueur.

(4) Le Parlement ou une législature peut adopter de nouveau une déclaration visée au paragraphe (1).

(5) Le paragraphe (3) s'applique à toute déclaration adoptée sous le régime du paragraphe (4).

***Canadian Bill of Rights*, S.C. 1960, c. 44**
***Déclaration canadienne des droits*, S.C. 1960, ch. 44**

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.

(2) A regulation need not be examined in accordance with subsection (1) if prior to being made it was examined as a proposed regulation in accordance with section 3 of the *Statutory Instruments Act* to ensure that it was not inconsistent with the purposes and provisions of this Part.

3. (1) Sous réserve du paragraphe (2), le ministre de la Justice doit, en conformité de règlements prescrits par le gouverneur en conseil, examiner tout règlement transmis au greffier du Conseil privé pour enregistrement, en application de la *Loi sur les textes réglementaires*, ainsi que tout projet ou proposition de loi soumis ou présentés à la Chambre des communes par un ministre fédéral en vue de rechercher si l'une quelconque de ses dispositions est incompatible avec les fins et dispositions de la présente Partie, et il doit signaler toute semblable incompatibilité à la Chambre des communes dès qu'il en a l'occasion.

(2) Il n'est pas nécessaire de procéder à l'examen prévu par le paragraphe (1) si le projet de règlement a fait l'objet de l'examen prévu à l'article 3 de la *Loi sur les textes réglementaires* et destiné à vérifier sa compatibilité avec les fins et les dispositions de la présente partie.

***Department of Justice Act*, R.S.C. 1985, c. J-2**
***Loi sur le ministère de la Justice*, L.R.C. 1985, ch. J-2**

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.

(2) A regulation need not be examined in accordance with subsection (1) if prior to being made it was examined as a proposed regulation in accordance with section 3 of the *Statutory Instruments Act* to ensure that it was not inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms*.

4.1 (1) Sous réserve du paragraphe (2), le ministre examine, conformément aux règlements pris par le gouverneur en conseil, les règlements transmis au greffier du Conseil privé pour enregistrement, en application de la *Loi sur les textes réglementaires* ainsi que les projets ou propositions de loi soumis ou présentés à la Chambre des communes par un ministre fédéral, en vue de vérifier si l'une de leurs dispositions est incompatible avec les fins et dispositions de la *Charte canadienne des droits et libertés*, et fait rapport de toute incompatibilité à la Chambre des communes dans les meilleurs délais possible.

(2) Il n'est pas nécessaire de procéder à l'examen prévu par le paragraphe (1) si le projet de règlement a fait l'objet de l'examen prévu à l'article 3 de la *Loi sur les textes réglementaires* et destiné à vérifier sa compatibilité avec les fins et les dispositions de la *Charte canadienne des droits et libertés*.

***Statutory Instruments Act*, R.S.C. 1985, c. S-22**
***Loi sur les textes réglemntaires*, L.R.C. 1985, ch. S-22**

3. (2) On receipt by the Clerk of the Privy Council of copies of a proposed regulation pursuant to subsection (1), the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, shall examine the proposed regulation to ensure that

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

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

(*c*) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*; and

(*d*) the form and draftsmanship of the proposed regulation are in accordance with established standards.

(3) When a proposed regulation has been examined as required by subsection (2), the Clerk of the Privy Council shall advise the regulation-making authority that the proposed regulation has been so examined and shall indicate any matter referred to in paragraph (2)(*a*), (*b*), (*c*) or (*d*) to which, in the opinion of the Deputy Minister of Justice, based on that examination, the attention of the regulation-making authority should be drawn.

3. (2) À la réception du projet de règlement, le greffier du Conseil privé procède, en consultation avec le sous-ministre de la Justice, à l'examen des points suivants :

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

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

c) il n'empiète pas indûment sur les droits et libertés existants et, en tout état de cause, n'est pas incompatible avec les fins et les dispositions de la *Charte canadienne des droits et libertés* et de la *Déclaration canadienne des droits*;

d) sa présentation et sa rédaction sont conformes aux normes établies.

(3) L'examen achevé, le greffier du Conseil privé en avise l'autorité réglementaire en lui signalant, parmi les points mentionnés au paragraphe (2), ceux sur lesquels, selon le sous-ministre de la Justice, elle devrait porter son attention.