

Why the FCA Decision in *Schmidt v Canada (Attorney General)* is Clearly Erroneous

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I. INTRODUCTION

The case of *Schmidt v Canada (Attorney General)*¹ concerned the meaning in law of three provisions – section 3 of the *Statutory Instruments Act* (the SIAct), section 3 of the *Canadian Bill of Rights* (the Bill of Rights), and section 4.1 of the *Department of Justice Act* (the DoJAct) – requiring examinations of legislation on issues of legality, primarily at the stage at which the legislation is being proposed.

In this paper, I intend to demonstrate that the interpretation that the Federal Court of Appeal (the FCA) supported in its decision and reasons is erroneous.

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¹ *Schmidt v Canada (Attorney General)*, 2018 FCA 55 [Schmidt FCA]; for trial reasons see *Schmidt v Canada (Attorney General)*, 2016 FC 269 [Schmidt FC]; for decision on leave application to SCC see Docket, “38179 Edgar Schmidt v. Attorney General of Canada” (accessed 6 July 2020), online: *Supreme Court of Canada* <<https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=38179>> [<https://perma.cc/L2ZB-HNGU>].

II. THE PROVISIONS AT ISSUE

While there are minor differences between them, section 3 of the Bill of Rights and section 4.1 of the DoJAct are very similar, so for the sake of economy of space, I will present only the later provision, section 4.1 of the DoJAct. The other provision at issue was section 3 of the SIAct. I present only the most pertinent subsections.

Subsections 3(2) and (3) of the SIAct ²	
<p>Examination</p> <p>[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, <u>shall examine the proposed regulation to ensure that</u></p> <p>(a) <u>it is authorized</u> by the statute pursuant to which it is to be made;</p> <p>...</p> <p>(c) it does not trespass unduly on existing rights and freedoms and <u>is not</u>, in any case, <u>inconsistent with</u> the purposes and provisions of the <i>Canadian Charter of Rights and Freedoms</i> and the <i>Canadian Bill of Rights</i>; and</p> <p>...</p>	<p>Examen</p> <p>[3.] (2) Au reçu des copies d'un projet de règlement en application du paragraphe (1), le greffier du Conseil privé <u>doit</u>, en collaboration avec le sous-ministre de la Justice, <u>examiner le projet de règlement afin de s'assurer</u></p> <p>a) <u>qu'il est autorisé</u> par la loi en application de laquelle il doit être établi;</p> <p>...</p> <p>c) qu'il ... <u>n'est, en aucun cas, incompatible avec</u> les fins et les dispositions [de la <i>Charte canadienne des droits et libertés</i> et] de la <i>Déclaration canadienne des droits</i>;</p> <p>[Note: above is French text as enacted by Parliament after debate and the essential form these provisions took from 1974 to 1987, when a Statute Revision Commission revised the wording of the French version. After the revision, the text became the following:]</p> <p>(2) À la réception du projet de règlement, le greffier du Conseil privé procède, en consultation avec le sous-ministre de la</p>

² The first French version is from SC 1970-71-72 c 38; the current text is found at *Statutory Instruments Act*, RSC 1985, c S-22.

<p>Advise regulation-making authority (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 <u>any matter referred to in paragraph (2)(a), (b), (c) or (d)</u> 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.</p>	<p>Justice, à l'examen des points suivants :</p> <p>a) le règlement est pris dans le cadre du pouvoir conféré par sa loi habilitante;</p> <p>...</p> <p>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;</p> <p>More on the significance or non-significance (!) of these changes later.</p> <p>Avis à l'autorité réglementante (3) L'examen achevé, le greffier du Conseil privé en avise l'autorité réglementante en lui signalant, parmi <u>les points</u> mentionnés au paragraphe (2), ceux sur lesquels, selon le sous-ministre de la Justice, elle devrait porter son attention.</p>
<p>Section 4.1 of the DoJAct³</p>	
<p>Examination of Bills and regulations 4.1 (1) ... the Minister shall ... examine every regulation transmitted ... for registration ... and every [government] Bill ... , <u>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</u></p>	<p>Examen de projets de loi et de règlements 4.1 (1) ... le ministre examine les règlements transmis ... pour enregistrement... ainsi que les projets ou propositions de loi [du gouvernement] ..., <u>en vue de vérifier si l'une de leurs dispositions est incompatible avec les fins et dispositions de la Charte canadienne des</u></p>

³ RSC 1985, c J-2.

<p>and the Minister shall report any such <u>inconsistency</u> to the House of Commons at the first convenient opportunity.</p> <p>Exception</p> <p>(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 <i>Statutory Instruments Act</i> <u>to ensure that it was not inconsistent</u> with the purposes and provisions of the <i>Canadian Charter of Rights and Freedoms</i>.</p>	<p><u>droits et libertés, et fait rapport de toute incompatibilité</u> à la Chambre des communes dans les meilleurs délais possible.</p> <p>Exception</p> <p>(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 <i>Loi sur les textes réglementaires</i> <u>et destiné à vérifier sa compatibilité</u> avec les fins et les dispositions de la <i>Charte canadienne des droits et libertés</i>.⁴</p>
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[all underlining in the above texts is added]

III. WHAT WERE THE COMPETING INTERPRETATIONS BEFORE THE FCA?

A. The historic interpretation

The historic interpretation⁵ of the examination provisions is the following: the examinations require the formation of an opinion as to the lawfulness or unlawfulness and the consistency with the Bill of Rights and *Charter* or inconsistency with them, of the legislative provisions being examined. A report or comment is required in any case where the examiner arrives at the opinion that

- as between authorized and not authorized, the better view is that some provision of a proposed regulation being examined is not authorized; and
- as between consistent and not consistent, the better view is that some legislative provision being examined is not consistent with the *Bill of Rights* or the *Charter*.

⁴ RSC 1985, c S-22.

⁵ Refer to companion article Edgar Schmidt, “Lawyers Serving the State: Ethical Issues When Administrative Directions Conflict with the Client-State’s Interests” (2020) 43:2 Man LJ 115 at 124-27 and note 38 for examples of statements by ministers and in federal public administration documents confirming that this was the historic understanding of the provisions.

This is the interpretation for which the plaintiff advocated. I will refer to this interpretation as the “historic interpretation.”

B. The later interpretation of the Department

Around 1992, the Department of Justice formally adopted a different interpretation of what the examinations required. For convenience I will refer to this as the “later interpretation.”

A clear understanding of this later interpretation can be arrived at by considering the key relevant practice guidance for the Public Law Sector of the Department of Justice (which included the Human Rights Law Section). Here is the most relevant excerpt:

In accordance with the recommendations of the working group, the following terminology should be employed by PLS counsel when advising on whether a proposed government measure or action is is consistent with law. It is based on an assessment of whether or not a legal challenge to the measure will be successful.

...

In making this assessment, consideration should be given to factors such as: (1) the strength of the legal arguments supporting the government's proposed measure, including the relevance and level of supporting judicial, quasi-judicial or international decisions, and (2) whether there is evidence that exists, or can be developed, to support the arguments in support of the measure.

...

Risk Levels to be used in Public Law

1. Very Low - The likelihood of a successful challenge to the measure is remote. In other words, the likelihood of a successful challenge runs from non-existent to insignificant.

2. Low - Proceeding with the measure entails some likelihood of a successful challenge, but the measure is likely to be sustained in the event of a challenge. The likelihood is beyond the minimal range but, in terms of probabilities, the measure is more likely than not to survive the challenge.

3. Medium - The likelihood falls into the middle zone where the prospects of a successful vs. unsuccessful challenge are evenly balanced. This may be due to uncertainty in the law or missing facts. Alternatively, it may occur where it is difficult to determine the weight that a court or tribunal would give to the evidence or where the strengths and weaknesses of the case appear relatively evenly balanced.

4. High - It is more likely than not that the challenge to the measure will be successful. Connotes a condition of probable invalidity or illegality of the measure.

5. Very High - The likelihood of a successful challenge is almost certain.

5(a). Minister's Statutory Obligation (for the Human Rights Law Section only) - This is engaged where the level of likelihood is at the far end of the fifth range and is due to manifest inconsistency between proposed legislation or regulations

and the *Charter*.¹⁴ In such a case, the measure is manifestly unconstitutional, and no credible (i.e., reasonable and bona fide) argument exists in support of it, such that the Minister's statutory obligation to issue a report to the House of Commons, or the Clerk of the Privy Council's statutory obligation to advise a regulation-making authority, is engaged. Situations of this nature are very unusual and require distinct treatment by HRLS counsel and managers (alongside other implicated DOJ counsel).

14. As described *supra* at note I, this obligation also applies respecting the *Bill of Rights*, but given the extremely limited application of the *Bill* since 1982 it is highly unlikely ever to arise.

...
Public Law Sector
November 26, 2007⁶ [underlining added]

Concerning the above document and its companions which were attachments to the Statement of Agreed Facts in the court proceeding, the Attorney General of Canada and the plaintiff agreed in the Statement of Agreed Facts as follows:

The parties agree that the credible argument standard used by the Minister, Deputy Minister and departmental lawyers is set out in the extracts from the five internal Justice publications appended to this statement of agreed facts. The parties further agree those five appended documents are sufficient to set out what standard is used and that no further evidence on this point is required.⁷

Under this later interpretation of the examination provisions, the essential question the examinations ask is whether any argument can be made on the side of the examined provisions' lawfulness. If such an argument exists, the provision is treated as not reportable.

Note further the description in the quoted text of such an argument as "reasonable", "bona fide" and "credible". It is important to understand that those terms as used by the Department of Justice in connection with its examinations have virtually no content – they do not increase the level of

⁶ Department of Justice Canada, "Legal Risk Management in the Public Law Sector", internal document (appended document B to the Statement of Agreed Facts), online (pdf): of the Department of Justice Canada, <<https://www.charterdefence.ca/uploads/3/4/5/1/34515720/statement-of-agreed-facts.pdf>> [https://perma.cc/4WW2-VRKR] at 11-13.

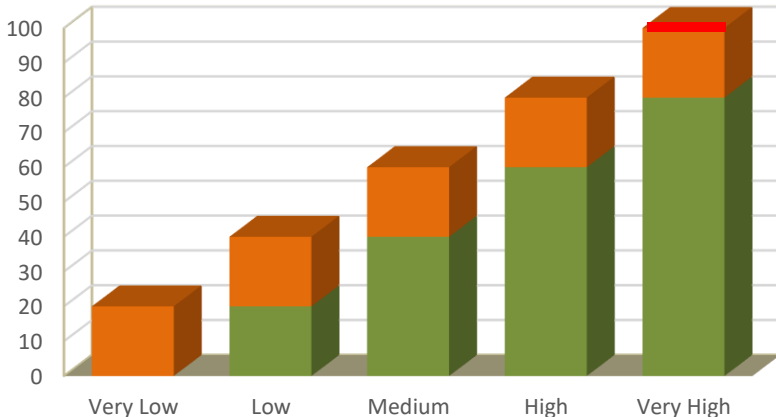
⁷ *Schmidt v Canada (Attorney General)*, 2016 FC 269 at para 9 (Statement of Agreed Facts), online (pdf): <<https://www.charterdefence.ca/uploads/3/4/5/1/34515720/statement-of-agreed-facts.pdf>> [https://perma.cc/DAR8-2FLF].

likelihood of legality in any measurable way, since the so-called reasonable, *bona fide*, and credible argument is any argument that reduces the likelihood of a successful challenge just enough that the assessed likelihood of illegality is not quite at the “far end” of the Very High (almost certainly illegal or unconstitutional) range. The later interpretation can be described accurately in either of 2 ways:

- From the point of view of what is not reportable after such examinations, it is everything for the lawfulness of which any (even weak) argument can be made;
- From the point of view of what is reportable, it is only provisions that have not even the slightest hope of being lawful – not even one argument in favour of their lawfulness.

For visual people, one of the documents appended to the Statement of Agreed Facts included a graph substantially reproduced here⁸ (the red zone at the “far end” of the 5th range is the writer’s addition).

Risk Levels:



The actual graph included, below the category names, a series of 20% wide ranges of percentage for each bar (0-20%, 21-40%, etc.). The Public Law Sector did not ultimately choose to use those percentages and the AG

⁸ Department of Justice Canada, “Effective Communication of Legal Risk”, internal document (appended document C to the Statement of Agreed Facts), online (pdf): <<https://www.charterdefence.ca/uploads/3/4/5/1/34515720/statement-of-agreed-facts.pdf>> [<https://perma.cc/8DVN-6CLV>] at 12.

submitted in the litigation that this was important. However, the very highest probability is necessarily 100% whether any intervening percentages appear on the graph – or are used – or not. And thus, the later interpretation necessarily means that only provisions considered to be at or very near the point of 100% certainty of illegality or unconstitutionality are reported.

IV. WHAT IS THE APPROPRIATE INTERPRETATION OF THE STATUTORY PROVISIONS IN QUESTION?

A. Introduction

The FCA supported the later interpretation of the examination provisions.

But the later interpretation, endorsed by the FCA, is erroneous. Not one aspect of legislative interpretation task supports the later interpretation of the examination provisions and the additional arguments upon which the FCA based its decision do not withstand scrutiny either.

B. The context for the legislative interpretation task

1. A democratic state

In Canada, as a democratic state, the will of the people as determined and expressed through the enactments of the people's elected representatives prevails. We commonly refer to this as the "supremacy of Parliament." It means that Parliament's will is to prevail over any preferences of the state's executive officers or of its judicial officers.

2. A principled democratic state

The Canadian legislative assemblies acted together to amend the constitution of Canada to include the *Charter*. This addition amounts to a state commitment to respect the fundamental human rights set out in the *Charter* in whatever the state does. The *Charter* applies only to state actors; its entire purpose is to limit state action so as not to infringe the fundamental human rights set out in the *Charter*.

Thus, Canada is not only a democratic state, but a principled democratic state where citizens have certain fundamental rights that

prevail over any policy preference of ministers of the moment and even of a majority of elected representatives of the moment.

3. A state where people are subject only to laws that their elected representatives have either adopted or authorized

In the evolution of the Westminster state, one of the key developments was the limitation of the monarch's power of legislating and the requirement that the people's representatives in Parliament must consent to any Act. In the modern Westminster state, it is clear that Parliament does not have the time to directly enact all laws. However, the principle of democratic legitimacy is maintained through the rule that subordinate law-making must be authorized by an Act of Parliament. There are very minor exceptions in Canada such as the *Canadian Passport Order*⁹, where Parliament has forborne to enact any legislation and left it to the state executive to make the relevant rules under its customary or implied powers (what legal scholars who prefer metaphor to plain speaking refer to as the "royal or Crown prerogative"). But in general, every regulation must be authorized by statute to be legally valid and effective.

4. A state where the standard process of parliamentary enactment includes careful study of the text of the enactment

In Canada, the parliamentary process ordinarily includes committee study of each bill, including the receipt of representations from the public as to the proposed bill and its text and clause-by-clause consideration of the bill.

This process has utility only if the text of a statute as finally enacted is given serious weight in the determination of its meaning.

We will see later in this paper how these four (and other) contextual factors are important for the interpretation of the examination provisions.

C. The legislative interpretation task itself

Let me begin with Elmer Driedger's oft-cited summary of the legislative interpretation task, not because it is the only thing to be said on the subject, but because it is a useful summary that includes all of the main factors that people use to understand a communication (and that is

⁹ SI/81-86.

what legislative interpretation is: the effort to understand the meaning of the communications used by Parliament for its decisions).

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.¹⁰

As one expects with the understanding of a communication, one begins with the text used and a consideration of what meaning that text would have in the context of the usage and grammatical conventions of the language. But one considers also all relevant contextual or related information, including information as to related texts, the place of this communication in any larger scheme, and the purpose the communicator had in mind.

Driedger's summary refers expressly or implicitly to the following elements:

1. The text in its grammatical and ordinary sense
2. A consideration of the entire context of the communication including
 - a. the surrounding or related texts,
 - b. the scheme of the legislation,
 - c. the purpose of the legislation and whether a particular interpretation would foster Parliament's purposes or frustrate them,
 - d. Parliament's intention,
 - e. any other part of the "entire context" that might assist in understanding the intended meaning.

I will consider the examination provisions in the order in which (in some form) they first appeared on the federal legislative scene. The first to appear was a form of the SIAct provision¹¹; the next was the examination

¹⁰ Elmer A. Driedger, *The Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87.

¹¹ A form of the SIAct provision (essentially what is now s.3(2)(d)) already appeared in the Consolidated Regulations of Canada 1955, in *Regulations under section 9 of the Act*, P.C. 1954-1787 (p 2676), where section 4 provided as follows:

4. Two copies of every proposed regulation shall, before it is made, be submitted in draft form to the Clerk of the Privy Council who shall, in consultation with the Deputy Minister of Justice, examine the same to ensure that the form and draftsmanship thereof are in accordance with the established standards.

provision in the *Bill of Rights*¹²; and the last to appear was the examination provision in the *DoJAct*¹³.

D. Interpretation of the SIAct provisions

Subsection 3(2) of the SIAct opens with words requiring an examination of proposed regulations by the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, “to ensure that/*afin de s’assurer [que]* and continues with 4 paragraphs setting out the desired state of affairs or outcomes. The key ones for our purposes are paragraphs (a) and (c). In English those paragraphs read as follows:

(a) it [the proposed regulation] is authorized by the statute 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

What I want to point out first is something that I submit is incontestable: the paragraphs set out the objectives or desired outcomes for the proposed regulations.¹⁴ Parliament is indicating that it wants the regulations

- to be authorized;
- not to be inconsistent with the *Charter* or *Bill of Rights*;

Given that these are the desired outcomes, how does the later interpretation align with these?

Desired outcome	What later interpretation achieves
Proposed regulation is authorized	Deputy Minister of Justice may be of the opinion that a proposed regulation is almost certainly <u>not</u> authorized, but if any, even weak, argument for authority can be made, no

¹² Enacted as part of the *Canadian Bill of Rights* in 1960.

¹³ Enacted by RSC 1985, c 31 (1st Supp) s 93.

¹⁴ This is admitted by the Department in the document “Statutory Examination Responsibilities and Legal Risk Management in Drafting Services”, internal document (appended document to the Statement of Agreed Facts), at 3, where one finds the following statement: “This examination is for the purposes of ensuring that each proposed regulation satisfies the following criteria identified in subsection (2)...” which then continues in setting out the text of paragraphs (a) to (d) of subsection 3(2). [underlining added].

	comments are provided to the Clerk of the Privy Council. Thus, in such a case, if the proposed regulation is made, it will be one that the DM believes is almost certainly not authorized.
Proposed regulation is <u>not to be</u> inconsistent with the <i>Charter</i> or <i>Bill of Rights</i>	The DM may believe that a proposed regulation <u>is</u> almost certainly, in some respect, inconsistent with the <i>Charter</i> or the <i>Bill of Rights</i> , but if any, even weak, argument for consistency can be made, no comments are provided to the Clerk of the Privy Council. Thus, in such a case, if the proposed regulation is made, it will be one that the DM believes almost certainly <u>is</u> inconsistent with the <i>Charter</i> or <i>Bill of Rights</i> .

It is entirely obvious that the later interpretation fails to achieve the desired outcomes. If the examiner is of the opinion that the proposed regulation is almost certainly not authorized or is almost certainly inconsistent with the *Charter*, the examiner cannot simultaneously be satisfied that the proposed regulation IS authorized and is NOT inconsistent with the *Charter*. And just to confirm its intentions, Parliament confirmed in two other provisions what the SIAAct examinations were intended to achieve as concerns the Bill of Rights and *Charter*. Here are subsections 3(2) of the Bill of Rights and 4.1(2) of the DoJAct:

Subs 3(2), Bill of Rights ¹⁵	
Exception (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 <i>Statutory Instruments Act</i> to ensure that it was not inconsistent with the purposes and provisions of this Part [that is, the Bill of Rights].	Exception (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 <i>Loi sur les textes réglementaires</i> et <u>destiné à vérifier sa compatibilité avec les fins et les dispositions de la présente partie</u> [c.a.d. la <i>Déclaration</i>].
Subs 4.1(2), DoJAct ¹⁶	
Exception (2) A regulation need not be examined in accordance with subsection (1) if prior	Exception (2) Il n'est pas nécessaire de procéder à l'examen prévu par le paragraphe (1) si le

¹⁵ SC 1960, c 44 [*Bill of Rights*].

¹⁶ RSC 1985, c J-2.

<p>to being made it was examined as a proposed regulation <u>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.</u></p> <p>[underlining added]</p>	<p>projet de règlement a fait l'objet de l'examen prévu à l'article 3 de la <i>Loi sur les textes réglementaires</i> et <u>destiné à vérifier sa compatibilité avec les fins et les dispositions de la <i>Charte canadienne des droits et libertés.</i></u></p>
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Parliament confirms in these provisions that the desired outcome of the examinations under paragraph 3(2)(c) of the SIAAct is a regulation that is “not inconsistent” with the *Charter* and Bill of Rights. Also, through the French version, Parliament confirms that it understands the logical relationship between a condition and its negation by using the positive form as the equivalent of the English double negative – instead of “not inconsistent” the French version goes directly to the positive form *sa compatibilité*.

Now, what did the FCA rely on in arriving at its endorsement of the later interpretation of the SIAAct provisions? It paid little heed to the desired outcomes set out in the paragraphs and focused instead on the opening words of the French version of subsection 3(2) in the form they had after a statute revision commission changed their wording. This post-statute-revision wording in the French version did not contain any wording that was the equivalent of English version’s “ensure that”, even though the version adopted by Parliament in its regular legislative process included equivalent language (*afin de s’assurer [que]*).

But this was a significant error on the part of the FCA. First, the opening words of subsection 3(2) of the SIAAct do not set out the intended outcomes. They indicate the duty to examine and merely lead into the desired outcomes that are set out in paragraphs (a) to (d). So even without any words paralleling “ensure that” in the opening words, both the English and French versions lead into and point toward the outcomes set out in the paragraphs. Both versions indicate that the examination is intended to assess the outcomes specified in paragraphs 3(2)(a) to (d). This is confirmed by subsection 3(3) which directs the Clerk of the Privy Council (in a communication to the regulation-maker) to

... 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.¹⁷

The French version refers to the “points” of subsection (2) which are clearly the same paragraphs.

Beyond giving the statute-revision version of the opening words a significance that was unwarranted, the FCA’s reliance on the statute-revision change to the opening words in the French version was also a legal error.

1. The errors in law made on this point by the FCA

The change in wording of the French version of subsection 3(2) came about through the 1985 statute revision. There are two important things to note about a statute revision: first, it is effected under legislation authorizing such a project and is subject to the limits in that legislation; and second, Parliament itself has directed how the revision is to be read and interpreted.

The *Legislative Revision and Consolidation Act* sets out the powers of the Commission in preparing a revision in section 6. The only paragraphs that authorize a revision to make a change in wording of statutes are the following:

6 In preparing a revision, the Commission may

...

(e) make such alterations in the language of the statutes as may be required to preserve a uniform mode of expression, without changing the substance of any enactment;

(f) make such minor improvements in the language of the statutes as may be required to bring out more clearly the intention of Parliament, or make the form of expression of the statute in one of the official languages more compatible with its expression in the other official language, without changing the substance of any enactment;

(g) make such changes in the statutes as are required to reconcile seemingly inconsistent enactments; and

(h) correct editing, grammatical or typographical errors in the statutes.¹⁸
[underlining added]

¹⁷ *Statutory Instruments Act*, RSC 1985, c S-22, subs 3(3).

¹⁸ *Legislation Revision and Consolidation Act*, RSC 1985, c S-20. At the time of the revision, it was called the *Statute Revision Act*.

Changes to the wording of legislation must not change any substance of the enactment unless a change is required to “reconcile seemingly inconsistent enactments” or to “correct editing, grammatical or typographical errors”.

Clearly the changes made to the French version of subsection 3(2) of the SIAct were not to reconcile seemingly inconsistent enactments, as before the revision occurred, the two language versions of section 3 of the SIAct were well-aligned in meaning: the paragraphs specified essentially the same outcomes (and they still do!) and the opening words also were in agreement (ensure that, *s’assurer que*).

Paragraph (f) authorizes changes in the wording of legislation to “make the form of expression in one of the official languages more compatible with its expression in the other official language.” One can, therefore, assume that the Commission, in proposing the changes to the opening words of subsection 3(2) did not consider that it was creating any discrepancy between the language versions. Since the Commission left the English version exactly as it was, it can be assumed that the Commission considered the English version to express correctly the intended meaning and only the French version warranted change.

Further, the background to the 1985 revision suggests that the reason for the change to the French version of subsection 3(2) had nothing to do with creating a better equivalence in meaning between the versions, but rather was concerned with improving the quality of the French version alone. It was a concern of the Commission that the French version of the statutes was often more of a transliteration of the English version than an expression in idiomatic French of the same substance. That is, the French version too frequently used linguistic structures and expressions that were somewhat awkward in French and mirrored the English style of expression rather than using a style more native to the French language.¹⁹

¹⁹ When testifying before the Standing Committee on Justice and Solicitor General of the House of Commons, then Acting Chairman of the Statute Revision Commission and Assistant Deputy Minister of Justice, Public Law stated:

Presumably in making such changes, the Commission relied on the power at the outset of paragraph (f) which authorizes “such minor improvements in the language of the statutes as may be required to bring out more clearly the intention of Parliament.”

On whatever basis the changes were made, the French version ought to be read as having been intended to express exactly the same meaning as the English version and should never be read as making a substantive change from the before-revision wording.²⁰

We have really put a heavy emphasis this time on bringing the French version up to snuff. In the legislation section [of the Legislative Services Branch of the Department of Justice], in about the mid- to late 1970s there was an associate chief legislative counsel appointed with a view to making sure both language groups were well looked after in the preparation of legislation. It is in the same spirit that, when we did the revision this time, we really put a heavy emphasis on making sure the French version was a good representation of the French language [underlining added]. So I would say the real emphasis was on the French version this time around. House of Commons Committees, 33rd Parliament, 2nd Session: Standing Committee on Justice and Solicitor [sic] General, Vol 1 No 1-18 (5-2-1987), online (pdf): <https://parl.canadiana.ca/view/oop.com_HOC_3302_57_1/355?r=0&s=2> [<https://perma.cc/E2UE-BJ28>] at 8:7.

²⁰ That the Commission intended – and thought – that its French version remained the equivalent of the English and did not change the law is clear from its report. In its Explanatory Brief submitted to the Justice and Solicitor General Committee of the House of Commons, the Statute Revision Commission stated that approximately 200 Acts had been “revised thoroughly” and went on to say:

2. Improving the French version

In the case of the approximately 200 statutes that were both consolidated and thoroughly revised, a heavy emphasis was put on redrafting the French version in accordance with the rules of drafting that have prevailed in the drafting of the French version of all new pieces of legislation enacted by Parliament in the last decade or so. Those rules are intended to ensure that the French version of the Acts will no longer be a literal translation of the English version, as had been the case until 1978, but that, as one of the two official versions, it will be given equal status with the English version by being drafted as an authentic French version.

4. No changes made to the law

As pointed out earlier, the Statute Revision Commission’s mandate does not enable it to change the substance of the enactments to be included in the next revision. Therefore, in preparing the revision drafts..., the Commission took care to ensure that the law would not be affected by the changes made to the language of the statutes in the process of revising...

The FCA's reliance on the statute revision's inconsequential change in the French version's opening words to support a meaning that the English version of both opening words and paragraphs, the continuing French version of the paragraphs, and the original French version of the opening words cannot support fails to take into account the purposes and limitations of a statute revision.²¹

In addition to ignoring the limitations for a revision in the authorizing Act, the FCA ignored an express direction given by Parliament as to how this particular revision was to be read. In section 4 of the *Revised Statutes of Canada, 1985, Act*, (the Act adopting the revision), Parliament directed as follows:

Operation of Revised Statutes

4 The Revised Statutes shall not be held to operate as new law, but shall be construed and have effect as a consolidation of the law as contained in the Acts and portions of Acts repealed by section 3 and for which the Revised Statutes are substituted.²² [underlining added]

The FCA's reliance on the statute-revision wording in preference to both the original French wording and the continuing English wording was a serious legal error.

2. Summary

In sum, with regard to the ordinary meaning of section 3 of the SIAct, the FCA

- a. ignored 6 clear statements by Parliament in both official languages of its intended outcomes (a regulation was to be authorized and

House of Commons Committees, "Explanatory Brief of the Committee Proceedings", 33rd Parl 2nd Sess, online: *Parliament of Canada* <http://parl.canadiana.ca/view/oop.com_HOC_3302_57_1/373?r=0&s=1> [<https://perma.cc/3HH3-S4E7>].

²¹ Incidentally, the rationale for the special treatment of changes effected by a statute revision arises from the fact that the text of the revision is not considered and debated in detail in Parliament: because the revision is to be a consolidation of existing law, not involving any policy shifts or substantive changes, the parliamentary process does not involve the sort of debate that a substantive bill would involve. So, there is a perfectly reasonable foundation for treating changes effected by a statute revision differently from amendments enacted through a substantive bill.

²² RSC 1985, c 40 (3rd Supp).

not inconsistent (i.e., consistent) with the *Charter* and Bill of Rights;

- b. ignored the limits of authority for a revision;
- c. acted contrary to Parliament's direction as to how a revision was to be interpreted as a consolidation (non-substantive) only;
- d. arrived at an interpretation that is incapable of achieving the outcomes Parliament clearly specified.

It is fair to say that the FCA attributed a meaning to the SIA Act provisions that they cannot have.

It is time to come back to the points made earlier about the context for legislative interpretation. A direction that examiners satisfy themselves that a proposed regulation is authorized is fully consistent with and flows logically from the contextual point 3: that essentially all laws that affect citizens must be either made by their elected representatives or authorized by them. It is also consistent with contextual point 1: in a democratic Westminster state, it is Parliament's will that is to prevail (including its will as to the permitted scope of regulations). Further, it is consistent with contextual point 2: in a principled democratic state that has, in its constitution, undertaken to respect fundamental human rights, the only appropriate standard for state action is action that is believed to be consistent with those rights.

By contrast, the later interpretation is wholly inconsistent with these, flies in the face of them, assumes that the regulation-maker is free to disregard the limits of Parliament's authorization, to disregard the state's undertaking to respect fundamental human rights, and presumes to imbue the regulation maker with powers to make laws without authorization from the citizens' elected representatives.

E. Interpretation of s. 3 of the Bill of Rights and s. 4.1 of the DoJ Act

The *Bill of Rights* provision was the next to appear in the federal statute book in 1960.

1. Some history as to the text

The first version of this provision appeared in a bill presented to the House of Commons in 1958. It was then section 4 and read

4. The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine ... every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the *Regulations Act* and every Bill introduced in the House of Commons, to ensure that the purposes and provisions of this Part in relation thereto are fully carried out.²³ [underlining added]

That bill was not enacted and it was revised before being introduced in a later session of Parliament. The later version read

4. The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine ... every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the *Regulations Act* and every Bill introduced in the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part.²⁴ [underlining added]

Justice Minister E. Davey Fulton testified before the Commons committee studying the new bill as to the reasons for the change in wording. He said

When we drafted it first in 1958, the word was "ensure". Then we looked at that ourselves and felt that word was a rather questionable one, because we felt: does that mean that the Minister of Justice, who is to ensure, must, by necessary implication, have the power to ensure? Does this give him some power of dictation over his colleagues in the cabinet or, indeed, over the rights of private members to introduce bills into the house? If the Minister of Justice is to ensure, how is he to do this, unless you give him the power to do it? We felt that parliament would not want to give a single minister of the government the right to say in what form bills should, or should not, be introduced.

With respect to government bills, the matter is easier, because it goes through cabinet and presumably the views of the Minister of Justice as to the form of a bill would be accepted. But even there it is not desirable to give the Minister of Justice dictatorial powers over cabinet.

But when you came to private members in parliament, we felt we were against a real difficulty. If you give the minister the responsibility to ensure, you must then

²³ Bill C-60, 1st Sess, 24th Parl, 1958.

²⁴ Bill C79, 3rd Sess, 24th Parl, 1960, as it read on introduction or first reading.

give him the power to ensure and then he may be too powerful; and that is why we changed the word to "ascertain."²⁵

A week later he also spoke of this provision to the same Committee in the following words:

The Department of Justice has certain responsibilities now, as you know, in respect of the drafting of government bills and in respect of the drafting of any regulations and the further supervision of all regulations. This imposes upon us in any event the obligation of ensuring that they are in conformity with the existing statutes and existing constitutional provisions. In addition, now, we will have the function of ensuring they all are in conformity with the bill of rights.²⁶ [underlining added]

It is clear from Mr. Davey's testimony that the change from "ensure that the purposes and provisions of this Part in relation thereto are fully carried out" to "ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part" had nothing to do with reducing the standard of examination from an assessment as between *consistency* and *inconsistency* to an assessment as between *having a faint hope of being consistent* and *having no hope of being consistent*. It is also clear that Mr. Davey understood that "inconsistent" was simply the negation of "consistent", and that the duty of assessing and reporting any inconsistency was part of the process by which Parliament would be assisted to make laws that were consistent with the *Bill of Rights*.

2. *The later interpretation's reliance on "ascertain"*

The next interpretive issue I will explore is common to both the *Bill of Rights* and the DoJAct provisions. It is a particular textual argument (though based solely on the English version) to the following effect: since the provision calls for the Minister to examine "in order to ascertain whether any provision is inconsistent with the [*Bill of Rights* or *Charter*]", the Minister can't have ascertained that any provision is inconsistent so long as some argument can be mounted that it is.

This is an argument that does not withstand scrutiny because it ignores the grammatical function of the verb, is not supported by the

²⁵ Minutes of Proceedings and Evidence of the Special Committee on Human Rights and Fundamental Freedoms (Wednesday, 20 July 1960), at 332-33.

²⁶ Minutes of Proceedings and Evidence of the Special Committee on Human Rights and Fundamental Freedoms (Wednesday, 27 July 1960), at 575.

French language equivalents of that verb, and does not adequately take into account the function of the conjunction whether/si.

First as to the grammatical function of the verb, remember that Driedger suggested one must, in the legislative interpretation task, consider the grammatical and ordinary meaning of the text.

Consider two sentences: 1. The cow ate the grass. 2. The grass ate the cow. The words are the same: it is only their order, the grammatical function with which information is associated that changes in the sentences. But their meaning is quite different. Both the English and French languages rely on conventions regarding the structure of a communication (i.e. grammar) in fostering shared meaning between the sender and recipient of a communication. Both sides of the communication, if either of those two sentences were communicated, would understand, instinctively if not consciously knowing why, that in the first sentence the cow is doing the eating and in the second the grass is (apparently!) doing the eating.

Consider a third sentence: 3. The brown cow ate the grass. People who are familiar with English know that the quality of brownness in this sentence is connected only to the cow; they know that the sentence communicates nothing about the grass being brown. That is, English users know that the three grammatical units in that sentence are independent of each other. Any one could be altered without affecting the others. The sentence could become “The black cow ate the grass.” Or “The brown cow trampled the grass.” Or “The brown cow ate the corn.” Or any other variation. The information contained in any particular grammatical unit does not affect the information in any other.

Now let us consider the text in question: “to ascertain whether any of the provisions thereof are inconsistent with the [Bill of Rights or the Charter]”.

There are 3 major grammatical elements in this passage: the verb, the conjunction, and the clause setting out the issue. It parses as follows:

Verb	Conjunction	Issue
ascertain	whether	any of the provisions thereof are inconsistent with the [<i>Bill of Rights</i> or the <i>Charter</i>]

Now, just as in the sentence with the cow and the grass, the grammatical elements are independent of each other. This can be easily

demonstrated. Note from the following table how each of the three can be independently changed without affecting the others.

Verb	Conjunction	Issue
Changing the verb		
ascertain	whether	any of the provisions thereof are inconsistent with the [Bill of Rights or the Charter]
wildly guess	whether	any of the provisions thereof are inconsistent with the [Bill of Rights or the Charter]
estimate after at least a casual read	whether	any of the provisions thereof are inconsistent with the [Bill of Rights or the Charter]
Changing the conjunction		
ascertain	whether	any of the provisions thereof are inconsistent with the [Bill of Rights or the Charter]
ascertain	that	any of the provisions thereof are inconsistent with the [Bill of Rights or the Charter]
ascertain	how	any of the provisions thereof are inconsistent with the [Bill of Rights or the Charter]
Changing the issue		
ascertain	whether	any of the provisions thereof are inconsistent with the [Bill of Rights or the Charter]
ascertain	whether	all of the provisions thereof are inconsistent with the [Bill of Rights or the Charter]
ascertain	whether	any of the provisions thereof are manifestly inconsistent with the [Bill of Rights or the Charter]
ascertain	whether	any of the provisions thereof have any possibility of being inconsistent with the [Bill of Rights or the Charter]

So, the argument that the verb “ascertain” affects the proposition at issue is incorrect. In reality, the verb has no effect whatsoever on the matter at issue. The issue that the examination is to consider remains simply whether any provision is inconsistent with the *Bill of Rights* or the *Charter*.

Now, how, in law, is inconsistency assessed? Well, a question of whether any provision of a statute is inconsistent with the *Charter* is determined by the courts on the civil standard, i.e. the balance of probabilities. Whenever it is concluded that the better view is that a provision is not consistent with the *Charter*, the consequences set out in subsection 52(1) of the *Constitution Act, 1982* apply – the provision is of

no force or effect to the extent of the inconsistency. The existence of an argument on the side of consistency does not determine that the provision is in law consistent with the *Charter*. Inconsistency is a question of weighing, of preponderance, of determining the better view as between consistency and its negation, inconsistency.

A consideration of the French language verbs corresponding to “ascertain” is also instructive. The French versions of the two provisions use the verbs “rechercher” and “vérifier”. Both are about investigation/diligent examination with a view to arriving at the truth on a question. Neither involves any suggestion of a level of certainty that requires all the arguments or evidence to be found on one side only of the issue under consideration. When one looks for the common or shared meaning of “ascertain”, “rechercher” and “vérifier”, one can see that they are all about diligence and looking for truth. To ascertain/rechercher/vérifier something is to consider it with sufficient care and rigour that one is satisfied, to the extent possible, that one has arrived at the truth of the matter.²⁷

Between the verb and the proposition at issue we find the conjunction “whether” in English, and its correlative “si” in the French version.²⁸ It is

²⁷ Incidentally, there are 17 instances in the federal statutes of the use of the phrase “ascertain whether” and it is clear from them that this phrase does not have a meaning that alters the probability of whatever is being considered. Consider, for example, subsection 23(1) of the *Plant Breeders’ Rights Act*, SC 1990, c 20, which provides

Consideration of applications

23 (1) After the publication under section 70 of the particulars of an application, the Commissioner shall, in order to ascertain whether it conforms to this Act, consider the application and all documents and any other material that are submitted to the Commissioner in connection with the application. [underlining added]

If “ascertain whether” means that the issue that follows must be determined on the basis that not a single argument can be made to the contrary, it would mean that a plant breeder’s application could only be considered to “conform to the Act” if not even the tiniest doubt as to conformity existed. But clearly this question is also one to be decided on the ordinary civil standard.

²⁸ While it is always true that “whether” and “if” imply their negative forms (or not, if not), there is one context that is particularly rigorous where this is very clearly understood – the world of programming. Every programmer knows that an “If, then” programming structure can also take an expanded form of “If, then... something; else/if not, then ... something else”.

the “whether”, the “if”, that is to be researched/verified/ascertained. This means that the examiner is to arrive at either of two conclusions: that the proposition that follows is true, or that the proposition that follows is not true. The researching/verifying/ascertaining is being done whichever of the two conclusions is arrived at. A conclusion that no provision is inconsistent with the *Charter* or *Bill of Rights* is as much the result of ascertaining/researching/verifying as the other conclusion. Thus, the argument based on the English verb “ascertain” fails also because it fails to relate the verb to each of the two possible conclusions.

Finally, if the legislative drafter or Parliament had wished to implement a not-even-a-faint-hope standard, it could easily have been drafted. The grammatical location in which a different standard would be expressed is in the “proposition at issue.” Any good legislative drafter could have written “ascertain whether any provision is so hopelessly inconsistent with the *Charter* or *Bill of Rights* that not even a single argument can reasonably be made for its consistency” and we would have had the standard of examination that the later interpretation advocates. But that is not what was drafted or enacted.

In sum,

- the FCA erred in transferring meaning from the verb to the proposition at issue, the verb and proposition at issue being grammatically independent;
- the FCA erred in considering only the English verb and not the corresponding French verbs; and
- in any case, the relation between the verb and the proposition at issue applies to both of the two alternative (but necessary) conclusions of the examination, not only to one of them. That is, the examiner has equally ascertained/researched/verified that there is no inconsistency (if no provision is reported) as that there is an inconsistency (where a report is made).
- it would have been easy for the provision to express a no-hope standard for examination and reporting and the fact that this was not done suggests it was not intended.

3. *The use of the present indicative “is”*

The FCA states that the DoJAct provision uses “is” and its French-language equivalent “est” as the verb connecting the subject of the clause setting out the question to be examined to the predicate adjective

(“whether any of the provisions [of the text being examined] are inconsistent with [the Charter]”).²⁹ The court concludes, without further explanation, “This language requires certainty as to the inconsistency.”³⁰

If that were so, why would the present indicative of “to be” require certainty here, but not in subsection 3(2) of the SIAct where we read,

... to ensure that

(a) it [the proposed regulation] is authorized by the statute pursuant to which it is to be made;

...

(c) it [the proposed regulation] ... is not ... inconsistent with [the Charter and Bill of Rights]

If “is” requires certainty, then the examinations under the SIAct would require certainty as to the lawfulness of the proposed regulation.

But the use of the present indicative never has that meaning, not in ordinary usage and not in legislation. The present indicative is simply the default tense for legislation. This is confirmed by section 10 of the *Interpretation Act*

Law always speaking

10 The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.³¹ [underlining added]

It is further confirmed by the Legislative Drafting Conventions of the Uniform Law Conference of Canada³² and the Department of Justice’s

²⁹ *Schmidt FCA*, *supra* note 1 at para 67.

³⁰ *Ibid.*

³¹ *Interpretation Act*, RSC 1985, c I-21, s 10.

³² “Report of the Committee Appointed to Prepare Bilingual Legislative Drafting Conventions for the Uniform Law Conference of Canada” Online: *Uniform Law Conference of Canada* <<https://www.ulcc.ca/en/uniform-acts-en-gb-1/546-drafting-conventions/66-drafting-conventions-act>>, where one finds

Verbs in present indicative

24. (1) Verbs should appear in the present tense and indicative mood unless the context requires an exception.

own guidance for drafters and others involved in the preparation of legislative texts as this guidance is set out in *Legistics*.³³

The present tense in legislation has nothing whatsoever to do with certainty as to any state of affairs; it indicates only existence of that state of affairs at the time that the legislation is to be applied.

4. *The foundations for reason*

There is one failure of fundamental logic in the FCA's reasoning that causes it to go astray. The court's decision fails to understand the logical complementarity of two classes of provisions – those that are consistent with the *Charter* and *Bill of Rights* and those that are not (and therefore are inconsistent with them) – and the implications of that complementarity for the examination/reporting standard.

What I refer to is a foundation for logic, language, and reasoned discourse since at least the time of Aristotle. Millennia ago, Aristotle articulated three principles of reason, of which I will focus on the first two.³⁴ They are sometimes referred to as 1) the law of contradiction; and 2) the law of the excluded middle.

These “laws” state that for any context where p is relevant or applicable,

³³ *Legistics* is a collection of drafting guidance for legislative counsel, created by the Legislative Services Branch of the Department of Justice and made public for the assistance of legislative counsel everywhere. It includes guidance on using the present indicative tense at Department of Justice, “Legistics Present Indicative” (last modified 1 June 2020), online: *Government of Canada* <<https://www.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/p2p3.html>> [<https://perma.cc/JGY4-AT9Y>]. It cites the statement at paragraph 24 of the Legislative Drafting Conventions of the Uniform Law Conference of Canada and concludes

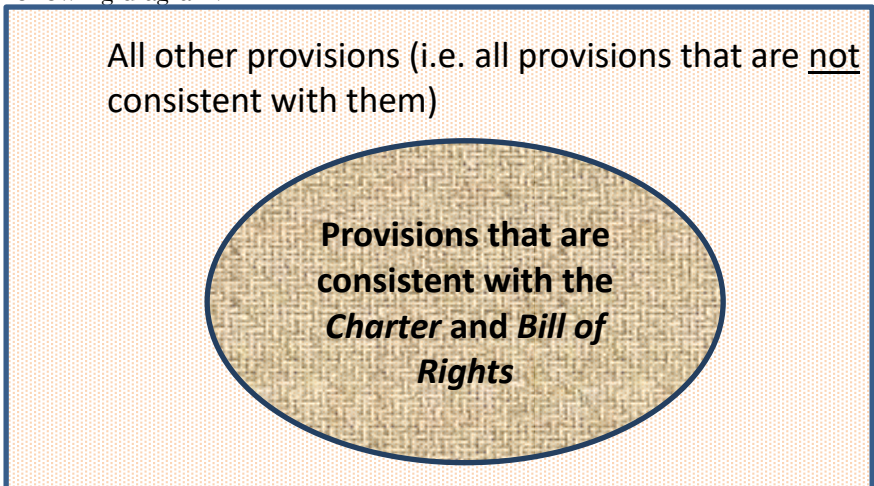
“The present indicative is the normal tense and mood of verbs in legislation, subject to a major exception for rules of conduct, which generally take modal verbs such as **may**, **must** and **shall**. Future and past tenses should only be used for subordinate clauses describing events occurring before or after the action in the main clause.”

³⁴ Here is one illustrative article that refers to where Aristotle set out his thinking and what it means: Laurence R. Horn, “Contradiction” (August 29, 2019) online: *Stanford Encyclopedia of Philosophy* <<https://plato.stanford.edu/entries/contradiction/#LEMLNC>> [<https://perma.cc/8XPJ-RGC8>].

1. it is impossible for both p and $\text{not } p$ to be true (that is, they are exclusive of each other); and
2. either p or $\text{not } p$ must be true, there being no third or middle true proposition between them or outside them (that is, they are exhaustive of all possibilities).

That is, p and $\text{not } p$ are logical complements, exclusive of each other and exhaustive of all possibilities³⁵.

For those readers with a more visual learning style, consider the following diagram:



“Not” is essentially a residuary concept. One begins with the positive quality (in this case “consistency with the *Charter and Bill of Rights*”) and the “not” class is everything else. Since the “not” class is everything else, the 2 classes are necessarily complementary.

There is no doubt that in law these fundamental principles of reason and logic continue to apply. Law is often about the attaching of consequences to a state of affairs or a set of facts, and the relevant consequences either attach or do not attach (even in the preceding sentence, the utility and necessity of this fundamental logic is evident: it speaks of consequences attaching or not attaching. They do or they do not.)

³⁵ It is easy to understand also why this is so. Think for a moment about the basic meaning of “not” which essentially it means “other than.”

The *Charter* applies to every legislative provision. Every provision either may be able to coexist with the *Charter* without conflict (be consistent with it) or may not be able to do so (be inconsistent with it). The law attaches to the condition of inconsistency with the *Charter* the consequence of being “of no force or effect”. This consequence either attaches to the provision or does not attach to it. It is similar with regard to whether a regulation is authorized or not authorized, in that in the latter case, the consequence of legal invalidity attaches.

And, of course, the complementarity of a thing and its negation applies in many other legal contexts too: a person is guilty of an offence or not guilty of it. A plaintiff is given judgment in her or his claim or is not given judgment. An act is legal or illegal.

And the important implication of this complementarity is this: Every provision that the Minister does not report as “inconsistent” with the *Charter* or *Bill of Rights*, she or he must necessarily believe to be consistent with them.

In a paper by then Professor Grant Huscroft (now a judge of the Ontario Court of Appeal), he confirmed this aspect of the examination provisions:

The Attorney General is only required to report to the House in the event that a provision in a government bill is inconsistent with the purposes or provisions of the *Charter*. Now, in the absence of a report it can be inferred that the Attorney General considers that a bill is consistent with the *Charter*,³⁶ [Underlining added. Footnote in the quoted passage omitted.]

The trial judgment, with which the FCA substantially agrees³⁷, includes paragraphs where the justice appears to understand that the examinations must arrive at either a conclusion of consistency or a conclusion of inconsistency.³⁸ At paragraph 121, the judgment reads “In both versions, the Minister of Justice is being asked to verify or search whether or not draft legislation is, or is not, in conformity with guaranteed rights [underlining added]”³⁹. And at paragraph 122 “Whether in French

³⁶ Grant Huscroft, “Reconciling Duty and Discretion: The Attorney General in the *Charter* Era” (2009), 34 *Queen’s LJ* 773-811 at 782-83.

³⁷ *Schmidt FCA*, *supra* note 1 at para 5.

³⁸ *Schmidt FC*, *supra* note 1.

³⁹ Note that in this statement, Justice Noël implicitly recognizes that because of the complementarity of conformity/non-conformity or consistency/inconsistency, it really

or in English, both adjectives [incompatible and inconsistent] call for a binary result, for opposites, for contradictions. The question asked is: “Is it [the provision being examined] breaching or not a guaranteed right; yes or no?” In both languages, the vocabulary used calls for an identical outcome.”

Unfortunately, Justice Noël did not pursue or fully understand the implications of his own insight – that if consistent and inconsistent are complementary (and all inconsistent provisions are to be reported), the place of transition from non-reportable provisions to reportable provisions must therefore necessarily lie at the line where “consistent” meets “inconsistent.” And that line is not located at the boundary between the zones where some argument exists and that where no argument at all can be made, but rather at the boundary between the zone where “the better view is that this provision is consistent (including any point or zone of equilibrium)” and the zone where “the better view is that this provision is not consistent”.

The transition from an opinion of consistency to one of inconsistency lies at the line that corresponds, in law, with the standard for a finding of inconsistency – the civil standard, or the balance of probabilities.

And therefore, the later interpretation under which reports are made only for provisions without a single argument in their favour – and provisions that are believed to be almost certainly inconsistent with the *Charter* and the Bill of Rights are not reported – is in manifest error. It locates the point of transition from consistent (non-reportable) to inconsistent (reportable) at the line between so hopelessly unlawful that not a single argument can be made in its favour and not-quite-that-hopelessly unlawful, instead of where that line is actually, in law, located.

Let me provide you with the relevant key paragraphs from the FCA decision.

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

Despite the appellant’s affirmation to the contrary, ascertaining *inconsistency* (“*incompatibilité*”) is not the same thing as ascertaining “consistency”

makes no difference whether one describes the examination as being about consistency or not or between inconsistency or not, since he uses the first formulation in paragraph 121 and substantially the second in paragraph 122.

(“*compatibilité*”). By choosing not to ask the Minister to ascertain “consistency”, Parliament signals that it expects the Minister to offer her assurance that the bill is defensible; the credible argument standard matches this expectation.

...

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

[57] I disagree.

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

...

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

[64] This submission is not compelling.

[65] Had Parliament intended to require the Minister to ensure that the draft provisions are consistent with guaranteed rights, Parliament could have used that word. It did not. Both subsection 3(1) of the Canadian Bill of Rights and subsection 4.1(1) of the Department of Justice Act use the word “inconsistent”. The plain meaning of these provisions is not changed by the French version of a subsequent section which exempts the Minister from examining draft regulations if that job was already done by the Clerk of the Privy Council.⁴⁰

⁴⁰ Schmidt FCA, *supra* note 1.

It is hard to fathom how the FCA could fail to understand that *consistent* and *inconsistent* are logical complements, as are *authorized* and *not authorized*. Necessarily, inherently, when one is assessing whether or if a provision is *inconsistent* with the *Charter*, one is simultaneously assessing whether it is *consistent* with it (not because that is the express question one is asking, but because they are complementary concepts and a conclusion as to one necessarily implies a conclusion as to the other).

The reason why Parliament would specify it wanted “inconsistent” provisions to be identified and reported is because *those* are the ones that are problematic. Parliament had no need to have *consistent* provisions reported to it, as these are not problematic. Parliament can be taken to intend that its legislation be lawful and effective and provisions consistent with the *Charter* would therefore be unremarkable. However, provisions that are inconsistent with the *Charter* would be problematic as they are, under subsection 52(1) of the *Constitution Act, 1982* “of no force or effect”. So, it is those provisions that Parliament wanted the examinations to identify and report.

And it is because of this necessary complementarity between the categories *consistent* and *inconsistent* and *authorized* and *not authorized* that every Minister who proposed the examination provisions to Parliament spoke of them as ensuring consistency with the *Bill of Rights* or *Charter* and lawfulness. And it is why every Minister who spoke of *the* examinations of statutes under the *Bill of Rights* or the DoJAct until the statement of claim in this proceeding was filed referred to the examinations as ensuring consistency with these instruments.

Two small points before I leave this issue: firstly, in law, because of the burden of proof (and perhaps also because of the presumption of legality), if a court is of the view that the arguments and evidence for and against consistency with the *Charter* are equal in persuasive power, the court does not find the provision to be inconsistent. That is, effectively, the *consistent* zone includes any area of equilibrium in the middle. What that means practically is that the *consistent* zone is marginally larger than the *inconsistent* zone: the 50/50 balance point or zone being assigned to the side of consistency. That does not in any way change the full complementarity of the categories of consistent and inconsistent.

Secondly, the examination scheme relies on the complementarity of consistent and inconsistent, the duty to report any inconsistency, and a

third element – a certification that the examination has been completed as required – to create the context for an inference by Parliamentarians.⁴¹ If the examination has been certified to have been completed in accordance with the law and no report has been made, Parliamentarians can logically infer that the Minister of Justice is of the opinion that the bill that was examined is fully consistent with the *Charter* and *Bill of Rights* – and even if a report has been made, Parliamentarians can infer that all provisions not reported are believed by the Minister to be consistent with the *Charter* and *Bill of Rights*.

This last aspect of these examination provisions is logically necessary, inescapable, but it is also confirmed by various statements in Parliament by relevant ministers⁴² (and, as we saw earlier, understood in Grant Huscroft's article).

This particular failure is so fundamental, so basic to logic, to language, to reason, that the FCA decision cannot be considered to be correct.

⁴¹ The certification that the examination was completed as required is the necessary third leg of the inference. Otherwise, silence could simply be the result of work not done. But with certification and silence, the necessary – and intended by Parliament – inference is that the Minister of Justice is of the opinion that a bill is consistent with the *Charter*.

⁴² Just two examples:

When section 4.1 of the DoJAct was introduced, the then Minister of Justice, John Crosbie, said to the House:

The Minister of Justice already has an obligation under the law to examine Bills and regulations to ensure they are consistent with the Bill of Rights. I am referring to the Bill of Rights enacted under the late great John Diefenbaker when his government was in power. These amendments provide a similar obligation on the Minister of Justice to examine regulations and Government Bills to ensure they are consistent with the Charter. [underlining added] Commons Debates, March 27, 1985, p. 3422

On 15 November 2007, Rob Moore – then Parliamentary Secretary to the Minister of Justice – testified as follows in committee:

The minister has to certify in each case that he believes the bills to be constitutional, based on advice he receives. ...

... I would refer everybody to the testimony that the minister has already given, where he has stated that it's his duty as a minister to certify that legislation coming forward is, in his opinion, compliant with the Charter of Rights.", House of Commons, Legislative Committee on Bill C-2, 39th Parl, 2nd Sess, No 7 (15 November 2007) at 1-2.

5. *Is the Charter really void for vagueness?*

The FCA reasons also devote considerable space (at paragraphs 90 to 104) to a novel justification for the later interpretation of the examination provisions. The Court begins its consideration by stating

[90] In my view, the respondent's view of the examination provisions is also supported by the nature of constitutional law and the giving of advice concerning it. Constitutional law is a variable, debatable and frequently uncertain thing.⁴³

Now, I do not disagree with the second sentence. But I submit that the logical conclusion to be drawn from it is quite different from the one the Court drew. If constitutional law concerns principles at such a high level of generality that questions of constitutional law are (almost?) always debatable, that suggests that there would (almost?) never be a situation where argument cannot be made on both sides of a constitutional question. And since that is so, surely Parliament would not have created examinations that would produce useful information only in situations that had virtually no possibility of ever occurring.

That ought to have led the FCA to the conclusion that Parliament could not have intended the examinations to identify only such (virtually) impossible events or occasions but must have intended the examinations to accomplish something useful and meaningful – to identify cases that have some realistic possibility of arising.

But beyond failing to draw the conclusion that actually followed from its premise, the FCA instead reasons that the Supreme Court of Canada has come up with such unforeseeable decisions that it is unrealistic for the examination provisions to be read as requiring examiners to form a reasoned opinion as to compliance with the *Charter*. Assessment of the existence or non-existence of some argument is all that can realistically be expected of the examiners.

Firstly, this appears to be, in substance, a finding that the *Charter* is void for vagueness. The test for this was set out by the Supreme Court of Canada in *R. v Nova Scotia Pharmaceutical Society* as follows:

A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this

⁴³ *Schmidt FCA*, *supra* note 1 at para 90.

Court, and therefore it fails to give sufficient indications that could fuel a legal debate.⁴⁴

It is difficult not to be astonished by the FCA's view – that specialists in human rights law in the Department of Justice do not have a sufficient basis in the *Charter* to form a reasoned opinion as to whether a proposed legislative provision is consistent or not consistent with it!

But it is evident from the guidance to the Public Law Sector examined earlier, that Department of Justice counsel are already directed to classify their examination opinion into categories of likelihood of outcome: is this provision almost certainly lawful, likely lawful, in the middle zone of equal likelihood of lawful and unlawful, likely unlawful, almost certainly unlawful (or so hopelessly unlawful that not even a single argument exists in favour of its lawfulness – the Departmental standard for reporting). Since the evidence is that counsel is already forming these opinions of probability, how can the Court say it is impossible or unrealistic?

Let us assume that it is possible that circumstances may arise in which an examiner would conclude that the jurisprudence on the particular issue – i.e. in relation to the particular provision being examined – is so unsettled as to make it impossible to form the opinion that the provision is inconsistent with the *Charter*. That simply means that the examiner's opinion falls into the third or middle range in the Department's opinion ranges, the range where it is not possible to say which of consistency or inconsistency is the better view. But no one has suggested that when an opinion falls in that range, a report is required. The reportable cases under the historic interpretation are the ones that fall into zones 4 and 5 in the Department's guidance.

Instead of simply acknowledging that in some cases it may be difficult to know where the better view lies, the court is abandoning the consistency/inconsistency project entirely. Surely not every right and every *Charter* issue is so unsettled! Surely some of the jurisprudence is reasonably settled? It is not a reasonable response to instances of uncertainty to abandon the entire project. All that is needed is for the examiner faced with a particular instance of uncertain law to form an opinion appropriate to that particular situation.

And we should keep in mind, this reporting standard is used also for questions of authority for making regulations. Does the FCA believe that

⁴⁴ [1992] 2 SCR 606 at 639-40.

this area of the law is also so utterly in disarray that a reasoned opinion as to the *vires* of a proposed regulation is likewise so impossible as to require complete abandonment of the entire effort?

I submit that the FCA's argument does not withstand scrutiny. If courts can decide questions of consistency/inconsistency with the *Charter*, then lawyers can reasonably form opinions on those same questions. The process that courts and lawyers engage in on questions of *Charter* conformity is the same one; it is only the consequences attaching to the opinion formed that differ.

And in fact, as we saw from the Public Law Sector guidance document quoted from above, Departmental lawyers are reaching opinions as to probability, including opinions as to whether a provision is more likely than not inconsistent with the *Charter* and *Bill of Rights* or, in a proposed regulation, is more likely than not unauthorized. What the Department and Minister are not doing is reporting all the opinions that the law requires to be reported.

6. Is it really “perverse” to have 2 different standards of examination?

In paragraph 78 of the reasons, the FCA refers to the standard used by the House of Commons for vetting private members' bills as justifying the later interpretation of the examination provisions. The reasons say

If the appellant's interpretation of the examination provisions is correct, it would seem perverse that the House would adopt a laxer standard than the examination provisions require for government bills. More likely is that the House adopted a standard commensurate with the one in the examination provisions.⁴⁵

I submit the FCA failed to take into account the entirely different context and consequences of the two examinations. An assessment of a private member's bill for *Charter* inconsistency determines whether the bill can even proceed to consideration and debate in the House or not. If it “fails” that assessment, the bill is dead, it does not even proceed to consideration.

The examination of a private member's bill is akin to a motion to dismiss a case summarily before trial. Faced with such a motion, courts wish to ensure that a plaintiff is not deprived of any reasonable opportunity to argue his or her case and as a result adopt a very low

⁴⁵ *Schmidt FCA, supra* note 1 at para 78.

standard: can any argument reasonably be made in favour of the plaintiff's claim? Only if there is no such possibility of success does the court terminate the proceeding without even holding a trial. By contrast, when the court decides a case on it being tried – when it decides whether to give judgment for the plaintiff – the court uses a quite different standard, the balance of probabilities.

That is very much analogous to the two different examinations. The assessment of a private member's bill determines whether the bill can even be considered by the House or is to be killed at the outset. The examination by the Minister of Justice has no such consequences. Its sole consequence is the provision to the House of information that may assist it in its consideration of the bill and in its decisions as to whether to adopt the bill, amend it, adopt it in part, or choose any other path the House wishes to follow.

Just as it is reasonable for a court to use different standards in quite different contexts with quite different consequences, so also it is entirely reasonable (not perverse at all!) for the House of Commons to have a different standard for killing a bill without debate than Parliament has put in place to assist it in deciding what to do with a bill that is before it.

7. Does the Minister of Justice have a role to play in “advising” Parliament?

The FCA reasoned, at paragraphs 82 to 84 of its reasons, that the later interpretation is the better one because

[82] It is no part of the formal job of the Minister of Justice and the Attorney General of Canada to give legal advice to Parliament regarding whether or not proposed legislation is constitutional. Neither the Minister of Justice nor the Attorney General of Canada are legal advisors to Parliament.⁴⁶

The FCA reasons then proceed to refer to sections 4 and 5 of the DoJAct to support this assertion.

Consider this irony: the FCA refers to the wording of sections 4 and 5 of the DoJAct to argue that the minister has no role in advising Parliament. By relying on the statute, the court is implying that Parliament, through its legislative power, has both the power to decide and has in fact decided what the role of the minister is. But right between those two sections is section 4.1, which, directs the minister to assess the

⁴⁶ *Ibid* at para 82.

consistency/inconsistency of government bills with the *Charter* and to report any provisions that fall on the inconsistency side of that division to the House of Commons.

If Parliament gets to decide the minister's role and responsibilities in sections 4 and 5, it surely must have that same power in section 4.1. And if, in section 4.1, Parliament assigns the minister a role in forming a particular legal opinion and providing information to the House of Commons if that opinion is on the side of inconsistency, surely that, too, is for Parliament to decide.

In addition, to so limit the role of the minister does not make sense from the point of view of the state as an organization. Who does not recognize that the legal member of a corporation's executive has a role to play in advising its board of directors, particularly if the board of directors has mandated such advice? The chief legal officer of an organization is there to support and assist the organization in complying with any governing legislation, with its own constituting documents, with its own by-laws. Every directing board of an organization has the full right to look to the organization's chief legal officer for advice and generally has the right to instruct the organization's officers as to the information they are to provide to the board. It would be entirely proper for a board to instruct the chief legal officer of the organization to examine every by-law proposed to the board for consistency with the organization's constituting documents and to report to it if the CLO's opinion is that any provision of the proposed by-law is not consistent with them.

I suggest there is no good reason to think differently about the duties of officers of the state in relation to the state's representative governing body.⁴⁷

8. The FCA's failure to pay attention to context

i. Textual context

Apart from the surrounding textual clues related to purpose (discussed briefly later in this document), there is a key element of textual context that the FCA should have considered but did not.

⁴⁷ See also Andrew Flavelle Martin, "The Attorney General's Forgotten Role as Legal Advisor To The Legislature: A Comment on *Schmidt V Canada (Attorney General)*" *UBCLR* 52:1 at 201-26.

Immediately before section 4.1 of the DoJAct, and under the same heading “Powers, Duties and Functions of the Minister” we find the following duty/function (paragraph 4(a)):

The Minister [of Justice] ... shall
(a) see that the administration of public affairs is in accordance with law;
[underlining added]

The duty is not to see that every action in the administration of public affairs has at least some argument (however weak) that can be made in the general direction of compliance with the law; the duty is to see that the state administration is “in accordance with law”.

From the point of view of legislative interpretation, one looks to surrounding text in order to test for coherence: would the entire text be coherent if this particular meaning for the text in question is adopted? But if one gives the examination provision in section 4.1 a meaning that only provisions so hopelessly illegal that not a single argument can be found in favour of their legality are problematic, that meaning is not consistent with paragraph 4(a). Why would Parliament look for compliance with law in paragraph 4(a) but only be concerned with hopeless illegality in section 4.1?

So, the immediate textual context of section 4.1 of the DoJAct does not support the later interpretation of the DoJAct examination provision.

ii. Legal context

The FCA reasons did not consider 3 aspects of the legal context: the standard by which questions of inconsistency with the *Charter* or *Bill of Rights* are determined, the standard by which questions of whether a regulation is authorized or not are determined, and even more fundamentally, the hierarchy of norms in the state.

When courts decide questions of inconsistency with the *Charter*, they do so on the basis of the civil standard, the balance of probabilities. Having an argument in favour of consistency does not determine the question. The courts never say, “Oh, an argument has been made in favour of consistency; this case is over. Clearly since an argument exists, this provision is not inconsistent with the *Charter*.” Rather, courts weigh the arguments for and against consistency/inconsistency and decide whether a provision of legislation is inconsistent with the *Charter* on the

balance of probabilities - i.e. it asks itself if the better view is that the provision is inconsistent with the *Charter*.

So, if balance of probabilities is the basis for the legal determination of inconsistency, why would the Minister of Justice suddenly use the existence or non-existence of some argument as the basis for his/her opinion formation as to inconsistency when conducting the required examination?

And the very same standard applies with regard to authority for the making of regulations. If questions of authority are decided on the civil standard or balance of probabilities (and they are), why would an examination under paragraph 3(2)(a) of the SIAct be conducted on the basis of the existence of some argument?

The FCA's decision ignores this fundamental aspect of the law relating to *Charter* consistency and regulatory authority; the later interpretation and the standard it uses for examinations do not align with the relevant law.

Even more fundamentally, the FCA ignores the hierarchy of norms in the state and its implications for the examinations. The state has a hierarchy of decisions/norms. Its highest-level decisions are expressed in its constitution. Subsection 52(1) of the *Constitution Act, 1982* makes this clear when it declares, "The Constitution of Canada is the supreme law of Canada..."

"Supreme" is a relative expression. It clearly means that there are no other laws of Canada that are superior to the Constitution and the use of the definite article "the" suggests it has no equal. As the supreme law of Canada, it prevails over all other laws. Allowing bills or regulations that are believed to be (almost certainly) inconsistent with the supreme law of Canada to proceed without any report or alert that the examination provisions provide for is inconsistent with the principle that the Constitution is the supreme law of Canada.

Similarly, in the hierarchy of state norms, statutes rank above regulations. To be legally valid, regulations must be within the authority of the relevant enabling statutes. How can allowing a regulation that is believed to be almost certainly unauthorized to proceed without the report contemplated in subsection 3(3) of the SIAct be reconciled with the higher normative value of statutes over regulations (and even more over the policy preference of the regulation-making delegate)?

In sum, the later interpretation flies in the face of important aspects of the legal context of the examination provisions.

iii. International context

I will address this point only briefly. Expert evidence was given by Prof. Janet Margaret McLean about various similar international statutory examination and reporting obligations. Chronologically, all of these were put in place after Canada's *Bill of Rights* provision, and it is arguable that they were inspired by it.

What happens in other countries? In New Zealand, their Attorney General has made 81 reports relating to 116 provisions since their *Bill of Rights Act* examinations began in 1990.⁴⁸ It is absolutely clear that New Zealand's Attorney General does not use an is-there-not-even-one-argument standard for reporting the results of New Zealand examinations. Equally importantly, the presentation of a report by the Attorney-General does not cause the sky to fall. If a report is made, the NZ House of Representatives simply has this relevant information to consider in deciding what to do with the bill that is before it.

Someone may protest that in New Zealand an inconsistency with the *Bill of Rights Act* does not have the consequence that the legislative provision is of no force or effect. That is true, but we should note that the Canadian *Bill of Rights* is precisely the same in that regard. It, too, is merely an interpretive direction, a largely aspirational document. And Canada's examination under s. 3 of its *Bill of Rights* is only about conformity with that non-constitutional document. So why would any examination under it be any different from New Zealand's?

Further, while examinations in the other jurisdictions do not involve constitutional validity, some approach this quality. For example, in the UK, examinations relate to consistency of bills with the Council of Europe European Convention on Human Rights.⁴⁹ While an incompatibility with

⁴⁸ "Constitutional Issues & Human Rights" (10 February 2021), online: *Ministry of Justice* <<https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/>> [<https://perma.cc/M3EB-KV4Q>].

⁴⁹ Under s 19 of the UK *Human Rights Act 1998*, the minister of the Crown in charge of a bill must, before second reading of it:

(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or

the convention does not have the effect that section 52 of the *Constitution Act, 1982* has in Canada (rendering the law of no force or effect), the effect is significant. A provision of the relevant treaty states that the parties “undertake to abide by the final judgment of the court in any case to which they are parties.”⁵⁰ So, at the very least an incompatibility that is confirmed by such a judgment results in a binding international obligation on the UK to change its law.

The UK practice is to assess compatibility or incompatibility on the balance of probabilities: which is the better view.⁵¹

Finally, on this issue, why would the fact that an inconsistency has more serious consequences in Canada (the provision is of no force or effect) lead to the conclusion that a lower standard of examination is appropriate? I suggest any such submission stands logic on its head. If the consequences of an inconsistency are more severe, surely the importance of avoiding an inconsistency is, if anything, increased!

The later interpretation with its weak standard is entirely out of step with practice in other countries. There is not one other similar examination and reporting scheme that uses the later interpretation’s not-a-single-argument standard for reporting.

9. The FCA’s failure to consider the purpose of the examination provisions

In its reasons, the FCA never really considered the purpose of examinations.

Can it be doubted that Parliament’s intention in establishing the examinations was to create quality-control processes to support and foster

(b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

Incidentally, adhesion to this convention is not terminated by any UK exit from the European Union.

⁵⁰ *European Convention on Human Rights*, online (pdf): <https://www.echr.coe.int/Documents/Convention_ENG.pdf> [https://perma.cc/K7NB-ZE9X] at art 46 para 1.

⁵¹ This was confirmed by Professor Janet Margaret McLean in her evidence: *Schmidt v Canada (Attorney General)*, 2016 FC 269 at 12-13 (Statement of Janet Margaret McLean), online (pdf): *Charter Defence* <<https://www.charterdefence.ca/uploads/3/4/5/1/34515720/statement-of-janet-margaret-mclean.pdf>> [https://perma.cc/4TMH-CBHE].

the making of legislation that was lawful and that respected fundamental human rights?

And how well does the later interpretation's reporting standard serve that purpose? At most, such a standard alerts the legislator to a very, very small class of cases. More realistically, it is entirely useless because of the very characteristics of constitutional law that the FCA acknowledged – that “constitutional law is a variable, debatable and frequently uncertain thing.”⁵²

By contrast, reporting every provision for which the better view (as between lawful and unlawful) is that it is unlawful provides useful information to the legislator (assuming the legislator's intention is to act lawfully). The legislator is not bound to agree with the Minister or the Deputy Minister. But the legislator will have relevant information to consider in deciding what to do.

The later interpretation does not support the purposes of the examinations.

10. The FCA's failure to consider harmony with the scheme of the relevant legislation

Both the *Bill of Rights* and the *Charter* contemplate a situation in which the legislator believes that the legislation being proposed is inconsistent with the *Bill of Rights* or the *Charter*.

The *Bill of Rights* does not operate as supreme law (in contrast to the *Charter*) but as an interpretive direction. Section 2 sets out this interpretive direction, but qualifies its application:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared... [underlining added]⁵³

The *Charter* is supreme law, but it also provides a path for a legislator to enact what the legislator believes to be law inconsistent with the *Charter*. This is found in section 33 of the *Constitution Act, 1982*:

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

⁵² Schmidt FCA, *supra* note 1 at para 90.

⁵³ *Bill of Rights*, *supra* note 15.

thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

What do the schemes of these Acts suggest to us about the standard to be used in the examinations under the *Bill of Rights* and the DoJAct? Well, expressly providing for a method by which Parliament can override the application of the *Bill of Rights* or *Charter* suggests that it is never intended that Parliament enact legislation that it *believes to be inconsistent* with them unless it uses the override mechanism.⁵⁴

The scheme of the *Bill of Rights* and the *Charter* clearly provide for situations where the legislature believes that legislation it is enacting is not

⁵⁴ That this was the understanding of the Minister of Justice who proposed the Bill of Rights to Canada's Parliament is shown by his evidence before the committee studying the Bill of Rights before its enactment. Here is the key exchange:

Mr. BATTEN: ... I would think that the bill of rights would be made stronger and would have greater effect if the proposed bill to be brought in to the House of Commons were not brought in until it was revised in such a way that it would be in agreement with the bill of rights.

Mr. FULTON: That would be the responsibility of the minister and of the government, to say, after having received the report of the Minister of Justice, as to whether or not the bill is in accord with the bill of rights. If at that time, the time the cabinet receives the minister's report, it feels that notwithstanding the indication that this bill is contrary to the bill of rights, nevertheless it should be proceeded with, because the interest to be served is so important that it warrants proceeding with it, then cabinet could only do that, as I see it, by inserting a clause which is contemplated in clause 3 of this bill, or the words: "notwithstanding the bill of rights the Senate and House of Commons enacts as follows:". That would then make it clear this bill is being submitted to parliament for its approval, notwithstanding the bill of rights. The whole issue would be out in the open for parliament to assess.

Mr. BATTEN: Agreed; but that does not add any strength or "teeth" to the bill of rights if, concerning every act you are going to bring in which contravenes the bill of rights, you are going to get over the hurdle by using the word "notwithstanding".

Mr. FULTON: You cannot get over the hurdle unless parliament agrees it is appropriate to legislate in this way, notwithstanding the bill of rights. But the strength of the two provisions, 3 and 4, taken together, is that parliament cannot be left in the dark and no one can try to deceive or mislead parliament. It will be out in the open and clear for all the country to understand that what parliament is being asked to do it is being asked to do notwithstanding the bill of rights. [underlining added] [Note: as a result of a re-ordering of the provisions, the reference to provisions 3 and 4 is a reference to what are now sections 2 and 3 of the Bill of Rights.]

"Minutes of the Proceedings and Evidence of the Special Committee on Human Rights and Fundamental Freedoms" (Wednesday, 27 July 1960), at 573.

consistent with them by allowing for an express override. A reporting standard under which provisions believed to be inconsistent are not reported – with the consequence that consideration will not be given to an override – is out of sync with those schemes.

F. Summary

The FCA adoption of the later interpretation of the examination provisions,

- is contrary to their grammatical and ordinary meaning;
- is based on legal errors as to the reading of text originating in a statute revision;
- is not supported by the legislative history of the provisions;
- fails to understand the complementarity of consistent and inconsistent, authorized and not authorized and the implications of that complementarity;
- is based on a mistaken view that opinions as to conformity with the *Charter* are impossible;
- is based on an erroneous view of the relationship between the Minister of Justice and Parliament;
- is not consistent with their textual context;
- is not aligned with their legal context;
- is at odds with examinations in all other Commonwealth countries having similar examinations;
- is inconsistent with the relevant legislative schemes;
- fails to achieve the provisions' purposes;
- is inconsistent with all indications of Parliament's intention.

The FCA decision is so comprehensively erroneous in its interpretation of the examination provisions that it cannot be relied upon as correctly stating the law as to their meaning.

V. SOME FINAL THOUGHTS

A. The implications of the FCA decision for law-making

With regard to legislation, there has been a movement of some many decades now toward the use of “plain language”, toward making laws more easily read and understood. This decision from the FCA seriously undermines that movement.

How is a drafter to draft a legislative text and a legislator to enact one if the FC and FCA

- can read “is authorized” in the text and replace it (without any basis in the text, context, purpose, scheme of the Act, or otherwise in the law) with “has at least some frail hope of being authorized – at least some feeble argument that can be made on the side of it being so”;
- can read “is not inconsistent with the ... *Charter* or the *Bill of Rights*” in the text and replace it (without any basis in the text, context, purpose, scheme of the Act, or otherwise in the law) with “is not so manifestly inconsistent that not even one feeble argument can be made on the side of consistency”; or
- can read “whether any provision is inconsistent” in the text and replace it (without any basis in the text, context, purpose, scheme of the Act, or otherwise in the law) with “whether any provision is so manifestly inconsistent that not even one feeble argument can be made on the side of consistency”.

If courts feel free to make such radical and far-reaching insertions or alterations to a legislative text, what hope is there for any legislative drafter or parliamentarian in the use of plain language? Does a drafter now need to write and a parliamentarian enact texts such as this: “...ensure that a proposed regulation is authorized – but really authorized, not just having the feeblest hope of being authorized”?

But surely if a court considers itself at liberty to inject into a text the particular alien ideas referred to above, it could equally find other things to inject into the text? There is no end to the extraneous ideas that a court could inject into a text if the court does not deal seriously with the actual text of the enactment in interpreting it. So where would the need to negative all possible injections of extraneous meaning into a text end?

Do not misunderstand me as arguing that text is all in legislative interpretation. It is, however, the critically important foundation, the starting point, for legislative interpretation, because that is what parliamentarians and the public read, consider, study, testify about before legislative committees, opine on in journalistic items, and ultimately adopt as the expression of the state’s decision. The text must be the foundation from which legislative interpretation begins if the democratic process is to be respected at all.

The effective functioning of the principled democratic state relies on the courts to read the state's decisions, its enactments, in a sensible way, taking seriously their meaning in accordance with the shared linguistic usage of the people. Otherwise, all the debate and discussion in Parliament about the texts of enactments is pointless. The approval of a particular legal text in Parliament is intended to express the decision and will of Parliament and is assumed to significantly determine what meaning and effect that decision/text will have.

The FCA abandoned that connection between text and meaning, and did so without a single, defensible rationale. And in doing so, it casts in doubt the entire enterprise of speaking plainly in legislation.

B. Reasonableness as a universal standard

In contrast to the FC, which held that correctness was the right standard to use in interpreting the examination provisions, the FCA held that the matter at issue involved the examiners interpreting their own statutes or statutes closely connected to their function and therefore found “reasonableness” to be the appropriate standard.

I’m not going to enter into any consideration of whether the FCA interpreted the current jurisprudence correctly. I wish rather to point out why it is undemocratic to have such a presumptive standard.

Reasonableness, as contrasted with correctness, is a skewed or tilted standard of review. It is a form of presumption in favour of the state administration’s interpretation of legislation.

Legislation enacted by Parliament often involves differing interests of various actors. It may apply to situations where the interests of the state are in tension with the interests of citizens (a not-infrequent situation). When the citizens’ representatives in Parliament adopt such legislation, they surely consider whether the wording of the legislation strikes the right balance between the common or shared interest (expressed through rights of the state) and the interests of individual citizens. Consider, for example, the *Income Tax Act*.⁵⁵ It would be perverse indeed if, in an Act that delineates rights as between the state acting through its tax administration and the citizen, that the views of tax administrators would automatically be given preferential treatment. The traditional inverse of this – that taxing legislation is to be “strictly construed” – has been abandoned, probably

⁵⁵ RSC 1985, c 1 (5th Supp), as amended.

rightly, but not yet, as far as I know, in a way that automatically favours the interpretation of the tax administrators.

Why should this be any different with regard to interpretations of any other legislation that involves competing interests as between citizen and state?

The automatic application of a skew in favour of the state through a presumptive “reasonableness” standard disregards the democratic process. Parliamentarians and the public wrestle over the right wording, the wording that will express their decision as to the right balance point(s) as between competing interests. In such a democratic debate, the issue surely is “what language ought we to use to achieve our intended meaning?” And that debate ought not to become “what language can we use that will not be capable of being (reasonably) misinterpreted by the state?”. The plain language issues discussed earlier⁵⁶ apply here as well. It is not in the public interest to require statutes to be drafted in overly complex and convoluted ways so as to prevent state misinterpretation.

But any universal presumption in favour of the state actors’ interpretation of legislation creates the context for a return to exactly such drafting. A legislator must, in the face of an interpretive presumption that always favours the state, consider not only what is the best meaning of the text of the legislation, but also “And what other ‘reasonable’ interpretations could the administrators of this legislation come up with that would not achieve the results I intend?”

I leave this issue for scholars and courts to refine further. There is likely a place for deference where Parliament expressly or with clear implication is giving a discretion to the administrator of the legislation. But absent a true delegation of discretion, a universal standard of reasonableness is anti-democratic, militates against plain and understandable legislation, and is simply unfair to citizens in contexts where the legislation is about a regime involving the interests of both state and citizen.

Incidentally, not every assignment of a task or a responsibility is a delegation of discretion. Sometimes the administrator is simply to execute, that is, carry out the legislation. So, for example, when Parliament enacts an employment insurance regime and sets out the criteria for benefits under that regime, why ever would anyone assume that because a

⁵⁶ Part V A of this paper, *supra*.

department or agency of the state must administer that legislation, that its views as to the scope of entitlement is to be preferred over those of citizens/potential beneficiaries? No, all the department or agency is called on to do is carry it out. No discretion is given; it is a task, an assignment that is given. And the courts should determine whether that task has been correctly carried out as between citizen and state without favouring either.

In this particular case, the entire purpose of the examinations was to protect interests of citizens – their democratic interests (in ensuring that delegated legislation is within the authority democratically delegated) and their fundamental human rights and freedoms (in ensuring that legislation is not inconsistent with these rights and freedoms). Why then, in interpreting the examination provisions, should the interpretation of the Department be given preferential treatment?

C. How to correct the erroneous FCA decision

If, as I argue, the FCA decision is manifestly in error and, as a result, the examinations continue to be conducted in a manner that does not accord with law, how might this situation be remedied?

1. Initiative by the Minister of Justice

The first and easiest step by which it is possible to return the conduct of the statutory examinations to conformity with law is for the Minister of Justice

- to confirm that he understands that the executive officers of the state and all other state actors have a duty to act only in ways that they honestly and reasonably believe to be lawful, including in conformity with the Constitution and statutes of Canada;
- to confirm that he believes the FCA decision to be manifestly in error, that he is of the view that there is, in the case of that decision, a difference between the law and the jurisprudence;
- to confirm that, until the jurisprudence has changed to correctly state the law, he intends to comply with both;
- to advise that, since the jurisprudence only sets a minimum standard for reporting, he can comply with both by reporting all inconsistencies with the *Charter* and ensuring the report of all unauthorized regulations, instead of only those so hopelessly unlawful as to allow for not even one argument in their behalf.

The FCA decision is no obstacle to a Minister of Justice with intellectual integrity and ethical integrity to begin acting in accordance with Parliament's directions and in accordance with the law. The purport of the FCA decision is essentially that it does not consider the Minister of Justice or the Clerk of the Privy Council acting in consultation with the Deputy Minister of Justice to be required to report except where a bill or regulation is so hopelessly unlawful that not even the feeblest argument can be made in support of its lawfulness. It is not a contravention of its decision for the Minister to report more than the FCA says is required.

Do we have such a Minister of Justice?

2. Act of Parliament

In the Canadian state, Parliament is supreme. There is no reason why Parliament could not enact new legislation that overrules the erroneous FCA decision and reaffirms what it has already clearly set out in its statutes as to the conduct of the examinations.

Is there somewhere at least one federal parliamentarian who is willing to develop and propose such legislation?

3. Litigation in the superior court of a province

Since the Supreme Court has not heard and decided the question, the only decisions on the meaning of the examination provisions are those of the FC and FCA. These decisions are not binding on the superior courts in the provinces. While FCA decisions in particular ought to be, and are, accorded respect where they are persuasive, that principle would not, because of the evident errors in this decision, present any obstacle to better decision consistent with the law from any superior court.

Also, the principle of *res judicata* would not, I believe, be a bar where the parties to the litigation are not the same. An organization whose mandate/mission is the protection of human rights could potentially be an appropriate plaintiff in such an action.

Is there a plaintiff willing and able to initiate litigation to establish the correct meaning in law of the examination provisions?