Court File No.: A-105-16

FEDERAL COURT OF APPEAL

B E T W E E N :

EDGAR SCHMIDT

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

THE CANADIAN CIVIL LIBERTIES ASSOCIATION

and

THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Interveners

MEMORANDUM OF FACT AND LAW OF THE INTERVENERS, THE CANADIAN CIVIL LIBERTIES ASSOCIATION AND THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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PART I: OVERVIEW

1. This appeal concerns the interpretation of s. 3 of the *Canadian Bill of Rights*[1], s. 4.1 of the *Department of Justice Act*[2] and ss. 3(2) and (3) of the *Statutory Instruments Act*[3] (the "examination provisions"). The standard adopted by the Respondent and accepted by the trial judge only requires a report to Parliament when there is no credible argument that can be made for the consistency of legislation with the rights guarantees set out in the *Charter*[4] and *Bill of Rights* (the "credible argument standard").

2. The interveners, Canadian Civil Liberties Association ("CCLA") and British Columbia Civil Liberties Association ("BCCLA") were granted leave to intervene pursuant to the order of Scott J.A. dated September 15, 2016. The CCLA and BCCLA are distinct unaffiliated non-profit, non-partisan, nongovernmental advocacy organizations, each with their own independent constitutional structure, directors, staff and supporters. Both brought distinct motions to intervene. While both share the appellant's view that the examination provisions require a higher standard than currently used, the similarities end there.

3. The two interveners have unique positions with respect to the core question at issue in this appeal. CCLA takes the position that the examination provisions must be interpreted in light of constitutional principles and of structural elements of the Canadian Constitution that clearly contemplate a meaningful role for Parliament in assessing the rights implications of proposed legislation. The BCCLA argues that the examination provisions must be interpreted in a way that makes the reporting regime meaningful in practice. Each interveners submits that the trial judge failed to give effect to the respective principles on which they rely.

4. Given the distinct nature of their respective arguments, each intervener's submissions are articulated separately below. Neither of the interveners should be understood as abandoning their unique perspective or argument on this appeal and both

[1] SC 1960, c. 44.
[2] RSC 1985, c J-2.
[3] RSC 1985, c S-22.
[4] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c 11.

request the opportunity to address this Honourable Court by way of *separate* oral submissions on the hearing of the appeal, as set out in their respective motions to intervene.

PART II: POINTS IN ISSUE

5. The issue before the Court is whether the trial judge erred in his interpretation of the standard to be applied under the examination provisions and, if so, what the correct standard should be. Both interveners take the position that the judge's interpretation was in error. Neither intervener takes a position on the correct standard to be applied.

PART III: SUBMISSIONS

A) THE CCLA'S SUBMISSIONS

6. The Court below accepted the Respondent's interpretation of the examination provisions as appropriate, holding, based on a number of interpretive tools, that the credible argument standard applies. The Court's ultimate conclusion was that the examination provisions are directed primarily at the executive branch of government and help to ensure that it will be effectively deterred from introducing unconstitutional legislation.[5] The Court also focused on Canada's strong system of "post-enactment review", concluding that this served to counter-balance what it plainly acknowledged was a "weak" pre-enactment reporting mechanism.[6] The CCLA submits that this interpretation is in error for three reasons:

(i) it does not respect core constitutional principles including constitutionalism and the rule of law;

(ii) it fails to meaningfully consider certain structural elements of the Constitution that highlight the important role of Parliament in considering and assessing the rights implications of proposed legislation; and

(iii) it trivializes the burden placed on ordinary Canadians who challenge unconstitutional legislation.

7. When considered cumulatively, these errors point to a reversible error in the trial judge's analysis which must be addressed by this Honourable Court.

[5] *Schmidt v Attorney General of Canada*, 2016 FC 269 at paras 262, 276 [*Schmidt*].
[6] *Schmidt* at para 285.

(i) The credible argument standard does not give due regard to constitutional principles

8. The Supreme Court has recognized that "certain underlying principles infuse our Constitution and breathe life into it"[7] and that these principles, including constitutionalism and the rule of law, "assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, **and the role of our political institutions**".[8] The two principles are similar, but not identical. As the Court has held:

> ...the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution.[9]

9. In our constitutional system, it is Parliament that is responsible for passing legislation and Parliament that must determine how to respond when legislation is declared unconstitutional by our courts. The credible argument standard allows the government (i.e. executive branch) free reign to introduce laws in Parliament that have almost no chance of surviving a constitutional challenge, all while denying there is an inconsistency with the guaranteed rights. By failing to report, the Minister is saying "there is no inconsistency", even when she may actually recognize that the law is quite likely – *even very likely* – inconsistent with guaranteed rights. This does not demonstrate compliance with the law, or the Constitution.

10. The Court below held that the plain language of the examination provisions require the Minister to identify, with *certainty,* whether there are inconsistencies with guaranteed rights, and that only the credible argument standard was capable of meeting the required level of confidence.[10] With respect, the trial judge ignored the inevitable outcome of his conclusion. The credible argument standard establishes such a high threshold for reporting that the Minister effectively operates in an environment where the law – the duty to report – can be completely ignored without consequence. The credible argument standard strips the reporting requirement of all meaning. The judge's

[7] *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217 at para 50.
[8] *Ibid.,* at para 52 (emphasis added).
[9] *Ibid.,* at para 72 (citations omitted).
[10] *Schmidt* at paras 246, 253.

statement that it is a "weak" mechanism is a misleading understatement. In fact, there is no mechanism at all.

(ii) The Court's interpretation ignores the constitutional role of Parliament

11. The Respondent's justification for the credible argument standard relies in large part on a strict separation of powers doctrine whereby the executive sets policy, Parliament enacts laws, and the courts interpret them. The Court below unequivocally accepted this incomplete and inaccurate description of the Canadian political system, stating:

> To each his own obligation: the Executive governs and introduces bills to Parliament; Parliament examines and debates government bills and, if they are acceptable to Parliament, enacts them into law; the Judiciary, following litigation or a reference, determines whether or not legislation is compliant with guaranteed rights. Each branch of our democratic system is responsible for its respective role and should not count on the others to assume its responsibilities.[11]

12. The strict separation of powers doctrine articulated by the Court below does not reflect the realities of the Canadian constitutional system:

> The separation between the executive branch – the "government" – and Parliament is the oldest, most-settled, but...in practice most-disregarded relationship. In practice, the same people who control the executive branch usually control the legislative branch – namely the Cabinet and particularly the prime minister.[12]

13. The contention shared by the Respondent and Noël J. – that Parliament can amend the legislation if the reporting mechanism does not serve the desired function – ignores the reality of Parliament in a majority government situation. If the government does not have the will to change the standard, Parliament will not live up to its constitutional obligations.

14. There is no judicial monopoly on interpreting the meaning of our foundational rights documents – our supreme law. While our courts have exclusive jurisdiction over *challenges* to the constitutional validity of legislation, they are not the sole *interpreters*

[11] *Ibid.*, at para 277.
[12] Craig Forcese & Aaron Freeman, *The Laws of Government*, (Toronto: Irwin Law, 2005) at 21.

of law and should not be the only branch that is seen as having a role in assessing what the guaranteed rights require. The current approach to the examination provisions ignores the significant obligations and responsibilities that reside in both the executive *and* legislative branches to ensure constitutional compliance *before* legislation is passed.

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

16. In assessing justification under section 1 our courts frequently look to legislative intent and parliamentary debates, in addition to evidence adduced purely for the purposes of litigation. The justification aspect of section 1 is not confined exclusively to litigation, but implies a role for the executive and legislative branches prior to and during the process of passing laws. As Hogg notes:

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

17. There is no doubt that the judiciary makes the final determination about the validity of a section 1 justification – if the matter is the subject of litigation – but this should not detract from the obligations on the other branches to take their roles in interpreting and applying the *Charter* seriously.

18. In addition to the frequently invoked and litigated reasonable limits clause of the *Charter* (s. 1), the notwithstanding clause (s. 33) serves as a strong reminder of Parliament's central role in assessing rights compliance. The notwithstanding clause is a tool for Parliament, and is not dependent on a court's interpretation of what the guaranteed rights require. Neither the language nor the purpose of the clause indicates that a successful constitutional challenge is a condition precedent to invoking section

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

33.[14] Its very existence, and its specific requirement that derogations from rights be both specific and public, anticipates that Parliament will be engaged in active consideration of the rights implications of legislation.

19. Thus, the examination provisions rightly aim to make compliance with rights guarantees a site of democratic and Parliamentary debate. Under the credible argument standard, Parliament is deprived of vital information for their discussion of whether a section 1 justification or section 33 invocation are necessary.

20. Moreover, in their frequent references to legislative deference, our courts recognize the vital role that Parliament plays in our constitutional machinery. In some instances, Parliament's objectives and consideration of rights implications will be plain from the statute itself.[15] In other instances, it is the work that Parliament does prior to and in passing legislation that the courts may consider as evidence of contemplation of the rights implications and balancing done in light of policy objectives.[16] In any event, Parliament should not wait for our courts to identify unconstitutional legislation in order to act; placing responsibility for constitutional compliance solely in the hands of our courts is not faithful to the Canadian model of democracy.

21. The reporting mechanism established by the examination provisions may well serve a deterrent function within the executive branch, but it is also directed at ensuring

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[14] As John D. Whyte notes: "Legislative action taken under the notwithstanding clause is simply a declaration of the inapplicability of some of the rights provisions found in the Constitution. *As a matter of form, although not always as a matter of legislative motive, an exercise of the notwithstanding clause is a suspension of the rights listed in a named section of the Charter and is not a legislative act taken to correct a rights determination made by a court.* Neither is it legislative pre-emption of a future court's rights determination, prompted by the fear that there will be mistaken or imprudent judicial protection of a right affected by legislation." See John D. Whyte, "Sometimes Constitutions are Made in the Streets: the Future of the *Charter's* Notwithstanding Clause" (2007) 16:2 *Constitutional forum constitutionnel* 79 at 80, emphasis added.

[15] For example, the Supreme Court held in *R. v. Ferguson*, 2008 SCC 6, that granting individual constitutional exemptions in cases where a mandatory minimum sentence is challenged would directly contradict Parliament's intention.

[16] The case of *R. v. Mills*, [1999] 3 S.C.R. 668, provides an important example. The Respondent's factum, at paras 81-82, points to *Mills* as an instance where the Supreme Court accepted that Parliament could enact a regime that differed from what the Court had previously indicated was constitutionally sound. The Respondent also argues that the case shows that courts "consider, construe and apply legislation once enacted; they do not inquire into the circumstances leading to its enactment." In reality, the Court in *Mills* looked closely at the circumstances leading to the enactment of the scheme, noting (at para 59) that Parliament had "enacted the legislation following a long consultation process that included a consideration of the constitutional standards outlined by this Court" in a prior case in addition to looking at how the prior scheme had been working.

Parliament is aware of constitutional vulnerabilities. The Respondent argues, and the Court below accepted, that Parliament has other tools at its disposal to assess constitutional compliance. This is true, but irrelevant. The provisions explicitly require that *the Minister of Justice* report to Parliament. Since it is the Department of Justice that will be defending a case in the event of a constitutional challenge, it is the Minister's opinion that may be most useful to Parliament.

iii) The Court's interpretation trivializes the burden of challenging legislation

22. In bypassing the significant role of Parliament and interpreting the examination provisions as requiring such a high threshold for reporting, the burden of ensuring constitutional compliance is placed squarely on the shoulders of ordinary Canadians and in the hands of our overburdened courts. It is the public who must challenge unconstitutional legislation in court or who may be subject to unconstitutional laws for years before the matter is ever litigated.[17]

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

24. Employing the credible argument standard and leaving individuals to initiate court challenges also costs the government, who must defend against avoidable

[17] The Court's discussion of the statistics it reviewed to assess the effectiveness of the credible argument standard (at paras 249-252), do not tell the whole story. There is a human cost to the high threshold for reporting. For example, in *R. v. Whaling*, 2014 SCC 20, legislation changed the timing of parole eligibility retroactively. The change was found to violate s. 11(h) of the *Charter* and each of the three individuals who challenged the law (and likely many others) spent additional time in prison while the challenge was pending.

constitutional challenges. The precious and limited time and resources of our courts are also implicated in this process of increased constitutional litigation.

25. The Court below trivialized the burden on litigants, noting that if "a member of the public opines that a law should be challenged, both private and public resources exist to facilitate litigation pursued in the public interest".[18] The Court's recognition that constitutional challenges before the courts continue, regardless of public resources, is not responsive to the concern that Canadians are unduly burdened by the high threshold that flows from the credible argument standard.

iv) Conclusion

26. For the foregoing reasons, CCLA submits that a more robust standard and approach to interpreting the examination provisions is clearly required. The credible argument standard is not in keeping with Canada's unwritten constitutional principles, it denies Parliament meaningful opportunities for engagement with rights considerations *before* legislation is passed, and it places undue burdens on Canadians and our courts. The credible argument standard does not serve Parliament, it does not serve the government, and it does not serve the public interest.

B) THE BCCLA'S SUBMISSIONS

i) A Statutory Standard Must be Meaningful

27. The modern principle of statutory interpretation requires that statutes be read in light of "the object of the Act, and the intention of Parliament".[19] The foundational premise of this rule is that "[a]ll legislation is presumed to have a purpose".[20] The same is true for each section within a law – every provision exists for a reason and must be interpreted in a way that has them performing a genuine function directed towards advancing legislative intent.[21]

[18] *Schmidt*, at para 288.
[19] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para. 21.
[20] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at 255.
[21] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 SCR 471 at para. 38.

28. For the examination provisions to serve a function, the standard applied under them must allow for legislation to be reportable, even if only theoretically.[22] Where, as here, the standard being applied is so trivial that no law would ever be reported, then the entire reporting mechanism is charade,[23] attractive on paper, but meaningless in practice. The credible argument standard, applied in the context of constitutional law, is wholly incapable of alerting legislators to constitutional problems in the course of their deliberations. It does not divide legislation between reportable and non-reportable, but rather shifts all legislation – regardless of content – into the latter category. This is because, even for clearly unconstitutional legislation, there will always exist arguments in their defence that meet the Respondent's tissue-thin definition of "credible".

29. An interpretation of the examination provisions that cannot produce reports cannot be squared with the basic principles of statutory interpretation, and must be rejected.

ii) Under the Credible Argument Standard no Legislation is Reportable

30. The fundamental flaw with the Respondent's interpretation of the examination provisions arises due to the interplay of two factors: (1) the standard's trivial content; and (2) the nature of the *Charter* itself. While making *meaningful* predictions about a law's constitutionality is a task that can be undertaken in a pragmatic and informed way, that is not what the credible argument standard provides for. Rather, it poses a question with only one possible answer: whether there exists literally no credible argument that could ever be made in support of the law.

a) The Content of the Standard

31. Under the Department of Justice's interpretation of the examination provisions, the duty to report is triggered only where there exists no "credible argument" in defence of the law. The Respondent's definition consists of three components: the argument

[22] Jennifer Bond, "Failure to Report: The Manifest Unconstitutional Nature of the *Human Smugglers Act*" (2014) 51 OHLJ 377 at 386.
[23] Kent Roach, "Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law" (2006) 31 Queen's LJ 598 at 625.

must be (1) reasonable; (2) *bona fide*; and (3) "capable of being successfully argued before the courts".[24]

32. What constitutes a "reasonable argument" is inherently uncertain. In some contexts, it has been held to mean "objectively sensible or justifiable, something that would not be considered stupid or unnecessary or wasteful".[25] Elsewhere, unreasonable arguments have been equated with frivolous ones, meaning one that is "brought for improper purposes" or which has "absolutely no possibility of success".[26]

33. While "[i]t is extremely difficult to state what lawyers mean when they speak of reasonableness" it is largely focused on "logical thought, working upon the basis of the rules of law".[27] This is reflected in the administrative law notion of reasonableness, which focuses on transparency and intelligibility.[28] In the context of the reporting standard, the reasonableness requirement appears to demand an argument that is intelligible and logically valid.

34. A bona fide argument is one made genuinely and in the absence of fraud or deceit,[29] while the "capable of being successfully argued" criterion only excludes arguments that are certain to fail. If there is any uncertainty that an argument will be rejected, no matter how remote, one must necessarily conclude that the argument is "capable" of acceptance.

35. Taken together, these three requirements create a *de minimis* standard. When applied to the context of constitutional litigation, they do no work at all.

b) The Nature of the Constitution and Constitutional Litigation

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[24] *Agreed Statement of Fact*, Appendix 1: *Statutory Examination Responsibilities and Legal Risk Management in Drafting Services* (March 9, 2006), **Appeal Book ["AB"], Vol. I, Tab 5 at 187**; *Agreed Statement of Fact*, Appendix 2: *Legal Risk Management in the Public Law Sector* (November 26, 2007), **AB, Vol I, Tab 5 at 203.**

[25] *Frame v. Nova Scotia (Com. of Inquiry into the Westray Mine Disaster)*, [1997] NSJ No. 62 (SC) at para. 19.

[26] *United States of America v. Bennett*, 2014 BCCA 159 (CanLII) at para. 14 and the authorities cited therein.

[27] John Salmond, *Jurisprudence*, 10th ed. (Glanville Williams Ed.) (London: Sweet & Maxwell, 1947) at 183.

[28] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190 at para. 47.

[29] *Black's Law Dictionary*, 9th ed. (St. Paul: Thomson Reuters, 2009), *sv* "bona fide"; *The Shorter Oxford English Dictionary*, 3d ed. (London: OUP, 1959), *sv* "bona fide".

36. In contrast with a more substantive standard like a balance of probabilities, to be meaningful the credible argument standard requires a static body of rules that can dictate certain outcomes. Such stability is a necessary tool for the Minister to make the extreme conclusions required by the standard. The dynamic nature of the Constitution and the reality of constitutional litigation fundamentally lacks this needed certainty.

37. As the comments of O'Leary J.A. in *Byatt* reflect, the open-textured nature of our Constitution makes it impossible to write off arguments as incapable of legal acceptance. In *Byatt*, after the federal ban on prisoner voting was struck down in *Sauvé*[30] an identical Alberta ban was also struck down.[31] O'Leary J.A. granted a stay pending appeal, notwithstanding acknowledging that there were no significant differences between the federal and provincial acts. He concluded that there was a serious issue on appeal because:

> ...novel arguments should never be written off, so to speak, in a case such as this. In my view, constitutional litigation is the type of litigation where novel arguments may be accepted as opposed to commercial litigation, for example, where certainty and precedent are justly given a great deal more importance.[32]

38. The insufficient certainty within constitutional analysis and adjudication can be seen in a number of different ways. One facet relevant for the purposes of the credible argument standard is the flexible approach to precedent and stare decisis in constitutional matters.

39. Under the credible argument standard, the examining Minister or Clerk need not accept existing jurisprudence as governing whether a potential argument is capable of being accepted. This is because stare decisis is not absolute.[33] While as a practical matter prior *Charter* decisions will generally be followed (and so under a more meaningful standard would have to be assumed), it is impossible to say that this will inevitably occur.

40. Because the relevant question under the credible argument standard is whether an argument is capable of being accepted (as opposed to "likely"), one cannot exclude

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[30] *Sauvé v. Canada (Attorney General)* (1992), 7 OR (3d) 481 (CA), aff'd [1993] 2 SCR 438.
[31] *Byatt v. Dykema*, 1997 CanLII 14742 (AB QB) at paras. 9, 14-33.
[32] *Byatt v. Alberta (Attorney General)*, 144 DLR (4th) 436 (Alta CA (O'Leary JA, In Chambers)) at para. 10.
[33] *Canada (Attorney General) v. Bedford*, [2013] 3 SCR 1101 at paras. 38-46.

the possibility that existing legal rules might be replaced with wholly new ones. History has proven that yesterday's dissent can become tomorrow's majority.[34] Even when a prior decision is of a very recent vintage, judges have accepted arguments to overturn constitutional precedent.[35]

41. Even in the absence of prior dissents, the Supreme Court has overturned itself on *Charter* interpretation. They have done so at the urging of interveners, as in the case of s. 11(b),[36] or by legal academics, as in the case of s. 15.[37] Even where there is no suggestion from any quarter that a clear precedent be abandoned, it does occur. For example, the Court in *Hape*[38] elected to overturn *Cook*[39] and dramatically restrict the territorial scope of the *Charter*, even though there was no suggestion from any party that it should do so.[40]

42. Given the nature of sometimes flexible approaches to precedent in constitutional matters, the minimal content of the credible argument standard simply cannot compel the Minister or Clerk to restrict themselves to arguments that are consistent with existing precedents. This removes any meaningful framework that would bound the universe of 'credible' arguments.

43. Another way of understanding the meaninglessness of the Respondent's standard is to consider the indeterminacy of s. 1. Constitutional law, more so than any

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[34] Compare *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 (s. 2(d) of *Charter* does not protect right to strike, Dickson C.J. and Wilson J., dissenting on this point) with *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 SCR 245 (s. 2(d) of the *Charter* does protect right to strike).

[35] *Ontario (Attorney General) v. Fraser*, [2011] 2 SCR 3 at paras. 172-269 (*per* Rothstein J.) advocating reversing *Health Systems and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 SCR 391.

[36] Compare *R. v. Morin*, [1992] 1 SCR 771 (framework for unreasonable delay) with *R. v. Jordan*, 2016 SCC 27 at para. 45 (majority accepting "invitation" of Appellant and two interveners to adopt new 11(b) framework).

[37] Compare *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 (introducing "human dignity" criterion) with *R. v. Kapp*, [2008] 2 SCR 483 at para. 22 (citing approximately 20 scholarly publications criticizing *Law* when rejecting human dignity as aspect of s. 15 "test").

[38] *R. v. Hape*, [2007] 2 SCR 282 at paras. 103-113.

[39] *R. v. Cook*, [1998] 2 SCR 597 at paras. 25, 46-48. The majority did not expressly say that they overturned *Cook*, there is general acceptance that they did: *Hape, supra* at paras. 182-183 (per Binnie J., dissenting); John H. Currie, "*Khadr's* Twist on *Hape*: Tortured Determinations of the Extraterritorial Reach of the Canadian *Charter*" (2008) 46 Can YB Int'l L 307 at 313; Kent Roach, "*R. v. Hape* Creates *Charter*-Free Zones for Canadian Officials Abroad" (2007) 53 Crim LQ 1 at 1.

[40] *Hape, supra* at paras. 182-183, 187 (per Binnie J., dissenting).

other field, lacks the certainty needed to arrive at the conclusion demanded by the credible argument standard. In many ways flexibility is a crucial virtue of our constitutional order, allowing our Constitution to grow and evolve to meet society's ever changing needs. But this flexibility comes with a cost: less certainty than in other legal fields.

44. The *Oakes*[41] test is in practice a dynamic, indeterminate schema. While *Oakes* itself was couched in strict language, the Court quickly moved to a highly contextual approach.[42] This shift has made s. 1 conclusions unpredictable.[43]

45. In one of its most recent *Charter* decisions – *KRJ* – all of the members of the Supreme Court agreed that the nature of the infringed right was an important contextual factor to take into account in applying *Oakes*, but reached dramatically different conclusions on what that meant. Justice Abella found that the absolutist nature of s. 11 of the *Charter* required the state to provide a more compelling justification in order to save a law,[44] while Justice Brown found the procedural nature of s. 11 to demand less.[45] This kind of result is reflects the reality that:

> section 1 gives to the Canadian judiciary an extraordinarily vague yardstick to ascertain just how limited the guarantee of rights and freedoms is to be. To say that this most critical section of the *Charter* is "open-textured" is to make the ultimate grand understatement.[46]

46. In summary, the certainty required to make the credible argument standard meaningful – in the sense of actually dividing laws into two groups – requires a more mechanistic and determinate framework than the constitution has ever provided.

iii) These Problems do not Arise on any Meaningful Standard

47. The difficulties canvassed above should not be taken as endorsing a form of legal nihilism, in which constitutional questions are answered arbitrarily. The

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[41] *R. v. Oakes*, [1986] 1 SCR 103.
[42] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927.
[43] *Sujit Choudhry*, "So What is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006) 34 SCLR (2d) 501 at 513-521; Peter G. Hogg, *Constitutional Law of Canada*, 5th ed., Loose-leaf (Rel. 2015-1) (Toronto: Carswell, 2015) at 38--43.
[44] *R. v. KRJ*, 2016 SCC 31, at paras. 124-126 (per Abella J., dissenting in part).
[45] *Ibid.*, at paras. 134-135 (per Brown J., dissenting in part).
[46] Errol Mendes, "The Crucible of the *Charter*: Judicial Principles v. Judicial Deference in the Context of Section 1" (2005) 27 SCLR (2d) 47 at 49.

fundamental problems canvassed here arise only in the context of the credible argument standard, where its bizarre threshold demands extreme conclusions in order for laws to be reportable. But meaningful predictions about constitutional adjudication are still possible, even with the *Charter*'s open texture.

48. On any meaningful standard, whether the Appellant's "more likely than not" or some other one ("reasonable prospect of success", "substantial grounds to argue"), the Minister can make rational, substantial predictions about the constitutionality of a law. Marginal possibilities of rejecting precedent or unlikely applications of legal doctrine, while significant under the credible argument standard, are largely irrelevant if the question is whether it is more likely than not that a law would be struck down. The Minister is only paralyzed because her standard demands a kind of certainty that the constitution will never provide. But the constitution contains ample stability for other standards to be employed.

49. Consider the government's approach to regulating medical marijuana. Once *Parker*[47] announced a s. 7 right for some to consume marijuana, it would be obvious to anyone involved that the state would have to ensure a licit supply of the drug. Yet time and time again, the Government re-enacted identical rules that restricted such a supply, resulting in the same finding of unconstitutionality in *Hitzig*,[48] *Sfetkopolous*,[49] *Beren*[50] and *Allard*,[51] results that courts themselves said "should not surprise anyone".[52]

50. The credible argument standard was made out in these cases[53] perhaps because the Deputy Minister felt that it was credible to argue that earlier decisions were just wrongly decided, as was unsuccessfully attempted in *Beren*. Whatever it was about these cases that made the regulations non-reportable under the current standard, it is

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[47] *R. v. Parker* (2000), 146 CCC (3d) 193 (Ont CA).
[48] *Hitzig v. Canada* (2003), 177 CCC (3d) 449 (Ont CA).
[49] *Sfetkopoulos v. Canada (Attorney General)*, [2008] 3 FCR 399 (FC), aff'd 2008 FCA 328 (CanLII), motion for a stay and for leave to appeal dismissed 2009 CanLII 20680 (SCC).
[50] *R. v. Beren and Swallow*, 2009 BCSC 429 (CanLII)
[51] *Allard v. Canada*, 2016 FC 236 (CanLII).
[52] *Hitzig, supra* at paras. 124-126.
[53] Mr. Keyes, who held relevant positions within the Department of Justice during a period of time covering these cases, testified that, in his view, even in cases where laws were struck down under his tenure, they were always defenced with credible arguments: Mark Keyes, *Transcript of Proceedings, September 23, 2015*, **AB, Vol IV, Tab 17 at 1674 ll. 7-18.**

clear that under a more meaningful one predictions about the fate of the law would have been rather easy to make.

iv) Conclusion

51. During the proceedings below, the Trial Judge commented to a witness that "we've all been lawyers… we can always find an argument to try to defend the position that there is no breach".[54] He was right. There are always arguments that can ethically be made that are framed in the language of law and that, even if obviously wrong are still technically "capable" of acceptance in constitutional litigation.

52. What this means, however, is that the credible argument standard performs no work. It identifies no defects, screens no laws, and is incapable of ever generating a report. If all that triggers the reporting obligation is the absence of any credible argument, then the standard is meaningless. Parliament may as well have never enacted it. But it did enact it, and whatever standard Parliament envisioned when it passed these provisions, it could not have been one so extreme as to render the scheme wholly meaningless.

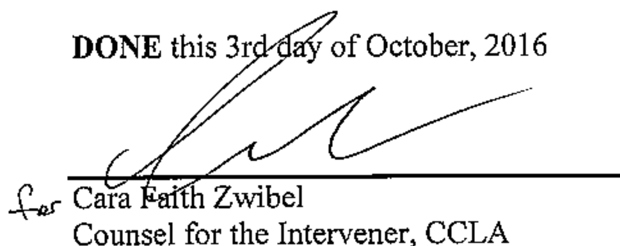
PART IV: ORDER SOUGHT

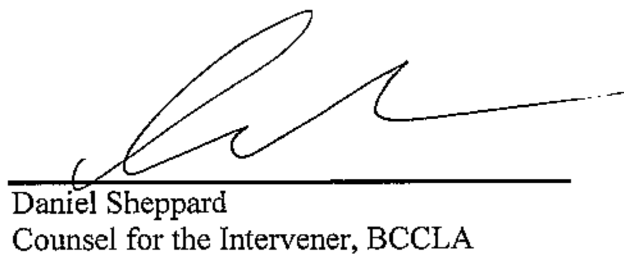
47. The CCLA and BCCLA request that this Honourable Court allow the appeal, declare that the interpretation of the examination provisions accepted by the Trial Judge is in error, and declare a standard that is meaningful and accords with the institutional and constitutional context articulated above.

48. The CCLA and BCCLA both request the opportunity to make oral submissions at the hearing of this appeal, for a period of twenty minutes each.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DONE this 3rd day of October, 2016





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Daniel Sheppard
Counsel for the Intervener, BCCLA

[54] Martin Low, *Transcript of Proceedings, September 21, 2015*, **AB, Vol III, Tab 15 at 1630 ll. 26-28.**

PART V: AUTHORITIES

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Court File No. A-105-16

FEDERAL COURT OF APPEAL

EDGAR SCHMIDT

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

THE CANADIAN CIVIL LIBERTIES ASSOCIATION and THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Interveners

MEMORANDUM OF FACT AND LAW OF THE INTERVENORS, THE CANADIAN CIVIL LIBERTIES ASSOCIATION and THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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