

FEDERAL COURT
SIMPLIFIED ACTION

BETWEEN:

EDGAR SCHMIDT

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

STATEMENT OF DEFENCE

1. The defendant admits the allegations contained in paragraphs 1 to 3 and 5 to 10 of the statement of claim.
2. The defendant denies the allegations contained in paragraphs 4 and 11 to 27 of the statement of claim.

A. Constitutional principles inform the examination provisions

3. Section 3 of the *Canadian Bill of Rights*, section 3 of the *Statutory Instruments Act* and section 4.1 of the *Department of Justice Act* (the "examination provisions") entrust to the Minister of Justice (the "Minister") and to the Deputy Minister of Justice (the "Deputy Minister") the responsibility to review draft legislation to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the *Canadian Bill of Rights* or the *Canadian Charter of Rights and Freedoms* (the "guaranteed rights").
4. The Minister ascertains that there is an inconsistency between a proposed legislative measure and the guaranteed rights only where there is no credible argument to support the proposed measure – that is, an argument that is reasonable, *bona fide* and capable of being raised before and accepted by the

courts (the “credible argument”). This requires substantial, but not absolute, certainty of inconsistency, and is not based on fixed percentages.

5. An examination conducted upon the basis of a credible argument is robust and meaningful. It applies both to bills and to proposed regulations. In both cases, it complies with the letter and the spirit of the examination provisions.

6. The credible argument approach is consistent with the constitutional principles of democracy, constitutionalism and the rule of law. Elected governments shape policy and introduce legislation as they think best; Parliament debates and enacts legislation; courts have the ultimate responsibility to decide whether legislation is constitutional or not. The examination provisions ensure that each branch of government performs its appropriate role in ensuring that guaranteed rights are respected.

7. The reporting obligation of the Minister arises within those parameters. This requires the Minister to consider the types of arguments that could be presented in court, both in favour of and against the legislation’s consistency with the guaranteed rights, and possible arguments in defence of the proposed measure under section 1 of the *Charter*.

B. The Minister is the legal adviser to the executive

8. Under the *Department of Justice Act*, the Minister of Justice is the official legal adviser of the Governor General and the legal member of the Queen’s Privy Council for Canada.

9. The Minister and his officials are legal advisers to the executive branch of government, not to Parliament. As legal advisers to the executive, the Minister may answer questions in the House and he and his officials may appear before parliamentary committees and respond to written questions to explain the government’s legal position on the legislation that it has introduced. However, their role is not to provide legal advice to Parliament.

10. The legislative branch of government calls upon the Law Clerk and Parliamentary Counsel for legal advice. It can draw upon the professional background of some of its members. Parliament also receives the views or submissions of law professors and other members of the bar who appear before its standing committees.

11. Parliament can thus consider the wide range of views that often exist about the constitutional validity of particular legislative proposals. It is then for the Houses of Parliament to debate the proposed legislation, including its implications for guaranteed rights, and to decide whether or not it will be adopted and become law.

C. The examination process

12. To ensure a consistent approach in review, departmental lawyers employ the credible argument approach when they examine proposed legislation for inconsistency with guaranteed rights.

13. The examination process is dynamic, iterative and ongoing. It involves three inter-related but separate components.

14. The **advisory component** takes place throughout the policy development process, up to and including the introduction of legislation. It typically begins with the development of the policy proposal by government departments. It continues as the proposal is refined, as options are developed and put before Ministers, and throughout the legislative drafting process. All through the advisory component of the examination process, the proposal is adjusted as required to ensure there is no inconsistency with the guaranteed rights.

15. Risk of inconsistency with guaranteed rights is assessed and communicated to clients by using qualifiers describing a continuum beginning, at the one end, with a very low risk and ending, at the other, with a risk that the proposed legislation is manifestly unconstitutional.

16. Senior officials, up to and including the Deputy Minister and the Minister, are briefed about proposed government legislation which poses a significant risk, including risk identified as something lower than that which could trigger the Minister's obligation to report an inconsistency under the examination provisions.

17. The Cabinet process affords the opportunity to ensure that Ministers are informed of relevant impacts on guaranteed rights. As the legal member of the Cabinet, the Minister performs a critical advisory role in those discussions.

18. The **certification component** for government bills takes place after their introduction in the House of Commons. The certification component involves only government officials. This formal step occurs when the Chief Legislative Counsel confirms (*i.e.*, certifies) that the requisite review of the legislation for consistency has taken place. In the case of regulations, the certification component takes place when counsel in the Legislative Services Branch of the Department of Justice stamp draft regulations as having been examined; this is known as blue-stamping.

19. The **reporting component** for a government bill would occur only if the Minister were to form the opinion that it was, at the time of introduction, inconsistent with guaranteed rights. The reporting obligation resides with the Minister alone.

20. The reporting component for a draft regulation would occur only if the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, were to form the opinion that it was inconsistent with guaranteed rights. This reporting obligation resides with the Clerk alone.

21. *Canadian Bill of Rights*, S.C. 1960, s. 3.

22. *Statutory Instruments Act*, R.S.C. 1985, c. S-22, s. 3.

23. *Department of Justice Act*, R.S.C. 1985, c. J-2.

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