

**Canadian Constitutional Law, Fifth Edition**

# SUPPLEMENTARY MATERIALS

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# 1. TRADE AND COMMERCE

# REFERENCE RE PAN-CANADIAN SECURITIES REGULATION

2018 SCC 48

PER CURIAM

## I. Introduction

1 A number of attempts to develop and implement a national system for the regulation of Canadian capital markets in a manner that is compatible with the country’s federal structure have been made since the 1930s. At issue in these appeals is the constitutionality of a recent proposal by the federal government and the governments of Ontario, British Columbia, Saskatchewan, New Brunswick, Prince Edward Island and Yukon to implement a national cooperative capital markets regulatory system (the “Cooperative System”).

2 The structure of the Cooperative System builds on the guidance provided by this Court in *Reference re Securities Act (Canada)*, 2011 SCC 66, [2011] 3 S.C.R. 837 (S.C.C.). Its main components include a model provincial and territorial statute known as the *Capital Markets Act* (the “Model Provincial Act”) that deals primarily with the day-to-day aspects of the securities trade, a federal statute known as the *Capital Markets Stability Act* (the “Draft Federal Act”) that is aimed at preventing and managing systemic risk and which establishes criminal offences relating to financial markets, and a national securities regulator that is to be overseen by the federal Minister of Finance and the ministers responsible for capital markets regulation in the participating provinces (the “Authority”).

3 On July 15, 2015, the Government of Quebec referred two questions pertaining to the Cooperative System to the Quebec Court of Appeal:

[...]

2. Does the most recent version of the draft of the federal “Capital Markets Stability Act” exceed the authority of the Parliament of Canada over the general branch of the trade and commerce power under subsection 91(2) of the *Constitution Act, 1867*?

[...]

## II. Background

8 Canada is one of the only industrialized countries in the world that does not have a *national* securities regulator. This is largely attributable to the constitutional division of provincial and federal powers as set out in Part VI of the *Constitution Act, 1867*. As a result of their jurisdiction over property and civil rights (s. 92(13)) and matters of a merely local nature (s. 92(16)), the provincial legislatures — and not Parliament — have the authority to legislate in respect of the securities trade within their respective borders. The result is a nationwide patchwork of provincial regulatory schemes and the absence of a truly national approach to

regulating capital markets.

[...]

### ***C. The Cooperative System***

22 [The Cooperative System has four components: uniform provincial and territorial legislation, complementary federal legislation, a national regulator, and the council of ministers]. Each of these components is integral to the Cooperative System’s ultimate objective: to establish a unified and cooperative system for the regulation of capital markets in Canada *in a manner that accords with the constitutional division of powers*. ...

## **V. Analysis**

[...]

***B. Question #2: Does the most recent version of the draft of the federal “Capital Markets Stability Act” exceed the authority of the Parliament of Canada over the general branch of the trade and commerce power under subsection 91(2) of the Constitution Act, 1867?***

### ***(1) Constitutional Validity of the Draft Federal Act***

86 The two-stage analytical framework for the review of legislation on federalism grounds is well established in the jurisprudence: *Quebec (Attorney General) v. Canada (Attorney General)*, at para. 28; *Reference re Securities Act*, at paras. 63-65; *Reference re Firearms Act (Can.)*, at para. 15. At the first stage (the “characterization stage”), the court considers the law’s purpose and its effect with a view to identifying the true subject matter — the *pith and substance* — of the law in question. Once the court has completed this exercise, it then moves on to the second stage (the “classification stage”) and determines whether the subject matter of the challenged legislation falls within the head of power being relied on to support the legislation’s validity. Where it does, the legislation will be upheld on the basis that it is *intra vires*, and therefore valid.

#### **(a) Characterization of the Draft Federal Act**

87 On the question of characterization, we agree with the Majority of the Court of Appeal that the pith and substance of the Draft Federal Act is “to control systemic risks having the potential to create material adverse effects on the Canadian economy” (para. 124). Indeed, we find that the Draft Federal Act’s purpose, its structure and the limits it imposes upon the exercise of the Authority’s delegated power all support the conclusion that it has this narrow objective. Importantly, this singular focus distinguishes the Draft Federal Act from the *Proposed Canadian Securities Act* at issue in *Reference re Securities Act*, which went beyond the regulation of nationally significant systemic risk to regulate day-to-day aspects of the trade in securities as well (paras. 97 and 100).

88 The Draft Federal Act’s preamble refers to “the stability of Canada’s financial system” and to the “detection, prevention and management of systemic risk”. It adds that “events and circumstances in domestic and international capital markets can have a profound effect on the stability of Canada’s financial system and on the Canadian economy as a whole”. The dual

purposes of the Draft Federal Act are clearly expressed in s. 4:

4. The purposes of this Act are, as part of the Canadian capital markets regulatory framework,

(a) to promote and protect the stability of Canada's financial system through the management of systemic risk related to capital markets; and

(b) to protect capital markets, investors and others from financial crimes.

This provision, when read together with the Authority's statutory mandate (s. 6), suggests that the federal government's role in regulating capital markets is limited to the detection, prevention and management of risk to the stability of the Canadian economy, as well as to the protection against financial crimes. These stated purposes are not nearly as broad as those of the proposed legislation that was at issue in *Reference re Securities Act*, namely "to provide investor protection, to foster fair, efficient and competitive capital markets and to contribute to the integrity and stability of Canada's financial system" (para. 95).

89 Effect is given to the purposes listed in s. 4 by the substance of the Draft Federal Act, the terms of which carefully limit federal authority to the management of threats to the stability of the Canadian economy. The regulatory powers authorized by the Draft Federal Act are engaged solely when such threats *may foreseeably affect national economic interests*.

90 The cornerstone of the Draft Federal Act is the prevention and control of "systemic risk related to capital markets", which is defined in s. 3 as follows:

3. In this Act, systemic risk related to capital markets means a threat to the stability of Canada's financial system that originates in, is transmitted through or impairs capital markets and that has the potential to have a material adverse effect on the Canadian economy.

For the purposes of this definition, systemic risk can be understood as having three constituent elements: (a) it must represent a threat to the stability of the country's financial system *as a whole*; (b) it must be *connected to the capital markets*; and (c) it must have the potential to have a *material adverse effect* on the Canadian economy. It is noteworthy that this definition does not encompass every economic risk that may relate to capital markets, but is limited to those that pose a sufficiently significant threat to the Canadian economy.

91 The concept of "systemic risk" is invoked throughout the Draft Federal Act as a means of limiting the scope of federal regulatory powers. This is made clear in Part 2, which empowers the Authority to make an order designating a benchmark as "systemically important" (s. 18) and to prescribe by regulation a product to be "systemically important" (s. 20) or a practice to be "systemically risky" (s. 22). Where such an order or regulation is made, the Authority is also given the power to "prescribe requirements, prohibitions and restrictions" respecting these benchmarks (s. 19), products (s. 21) or practices (s. 23).

92 The Draft Federal Act constrains the exercise of each of these powers in several ways. First, the Authority does not have the power to make any such designation or prescription



unless the benchmark, product or practice “could pose a systemic risk related to capital markets” (ss. 18 and 20). Second, any regulations prescribing requirements, prohibitions or restrictions respecting a designated benchmark, product or practice may be made only “in order to address a systemic risk related to capital markets” (ss. 19 and 21). Third, the Authority’s power under s. 24 to make an urgent order can likewise be exercised only for the purpose of addressing “a serious and immediate systemic risk to the capital markets”. Finally, in designating a benchmark or prescribing a product or practice, the Authority must consider a number of factors, including whether there are any relevant existing provincial regulations (ss. 18(2), 20(2) and 22(2)). These requirements indicate that the effect of the Draft Federal Act is to address any risk that “slips through the cracks” and poses a threat to the Canadian economy (C.A. reasons, at para. 197, (per Schrager J.A., dissenting)).

93 The same is true of Part 1 of the Draft Federal Act, which deals with the collection and disclosure of information. Section 9 confers on the Authority the power to make regulations pertaining to the keeping and provision of records and information, but only for the purposes of “monitoring activity in capital markets or detecting, identifying or mitigating systemic risk related to capital markets”, or “conducting policy analysis related to the Authority’s mandate and the purpose of [the Draft Federal Act]”. Similar restrictions are placed on the Chief Regulator’s authority to require that records and information be provided to him or her (s. 10(1)) and on the Authority’s right to disclose information obtained under the Draft Federal Act to various specified bodies (s. 15(1)).

94 Part 3 of the Draft Federal Act deals with the administration and enforcement of the Act. It provides, among other things, for (a) the Authority’s power to conduct inquiries into matters relating to compliance with the Draft Federal Act (ss. 28 to 32), and (b) the power of a tribunal (which is to be established under legislation known as the *Capital Markets Regulatory Authority Act*) to make certain orders where it is deemed “necessary to address a systemic risk related to capital markets” (s. 39). Parts 4 and 5 concern offences, and the validity of their provisions is not at issue in this Court. Part 6 contains various general provisions relating to the operation of the Draft Federal Act, including the procedure for making regulations. Parts 7 and 8 contain transitional provisions and consequential amendments, respectively.

95 Thus, unlike the proposed legislation that was at issue in *Reference re Securities Act*, the Draft Federal Act does not purport “to regulate, on an exclusive basis, all aspects of securities trading in Canada” (*Reference re Securities Act*, at para. 106). It does not contain provisions that go to the day-to-day regulation of all aspects of securities trading, like requirements for the registration of dealers, prospectus filing and disclosure obligations. The extent to which the statutory powers under the Draft Federal Act permit the regulation of these matters remains circumscribed by the requirement of systemic risk, which is a significant threshold that must be met before those powers can be exercised (A.F. (Canada), at para. 94). The management of risk which falls below this threshold — that is, risk that does not pose a threat to the Canadian economy *as a whole* — lies outside the scope of the Draft Federal Act.

96 Properly understood, therefore, the intention is not that the Draft Federal Act will *displace* provincial and territorial securities legislation. It was instead designed to *complement* these statutes by addressing economic objectives that are considered to be national in character.

97 When the Draft Federal Act is viewed as a whole, its pith and substance clearly does not

relate, as Quebec suggests, to regulation of the trade in securities generally (R.F., paras. 111-16). Rather, its subject matter accords with its stated purposes: “to promote and protect the stability of Canada’s financial system through the management of systemic risk related to capital markets” (s. 4(a)), and “to protect capital markets, investors and others from financial crimes” (s. 4(b)).

### **(b) Classification of the Draft Federal Act**

98 We now turn to the question of whether the Draft Federal Act, so characterized, falls within federal jurisdiction. We observe, at the outset, that there is no dispute regarding Parliament’s authority to enact the provisions related to criminality in capital markets (i.e. Parts 4 and 5). At issue is the validity of the balance of the Draft Federal Act — that is, those portions that are regulatory in nature.

[...]

103 The five *General Motors* indicia are as follows:

- (1) Is the law part of a general regulatory scheme?
- (2) Is the scheme under the oversight of a regulatory agency?
- (3) Is the law concerned with trade as a whole rather than with a particular industry?
- (4) Is the scheme of such a nature that the provinces, acting alone or in concert, would be constitutionally incapable of enacting it?
- (5) Would a failure to include one or more provinces or localities in the scheme jeopardize its successful operation in other parts of the country?

Although these inquiries are neither exhaustive nor determinative of a law’s validity under the general trade and commerce power, affirmative answers to these questions will strongly suggest that the subject matter of a federal enactment is “genuinely a national economic concern” (*Canadian National Transportation*, at p. 268; see also *General Motors*, at p. 662-63).

[In *Reference Re Securities Act*, the Court concluded that the enactment of the legislation proposed in that case would be ultra vires Parliament pursuant to the general trade and commerce power.]

106 Importantly, however, this Court found that *some* aspects of securities regulation are actually national in character (*Reference re Securities Act* at paras. 6, 7 and 131). In particular, it recognized that the “preservation of capital markets to fuel Canada’s economy and maintain Canada’s financial stability” is one aspect of securities regulation that may fall within the general trade and commerce power (*Reference re Securities Act*, at para. 114; see also paras. 97 and 123). This Court therefore accepted that Parliament is competent to enact legislation that pursues these “genuine national goals”, which include the management of systemic risk and nationwide data collection (paras. 121 and 123). This was central to this Court’s analysis of the *General Motors* indicia — particularly respecting the fourth inquiry, which pertains to the provinces’ capacity to implement the proposed regulatory scheme.

107 More specifically, this Court endorsed the concept of “systemic risk” as a useful way to differentiate matters that are genuinely national in scope from matters of merely local concern. It accepted the definition of systemic risk as “risks that occasion a ‘domino effect’ whereby the risk of default by one market participant will impact the ability of others to fulfil their legal obligations, setting off a chain of negative economic consequences that pervade an entire financial system” (*Reference Re Securities Act*, para. 103, citing M. J. Trebilcock, *National Securities Regulator Report* (2010)). This Court also relied on expert evidence in concluding that “systemic risk is an emerging reality, ill-suited to local legislation” (para. 104).

[...]

109 Neither of the first two indicia is at issue here: it is common ground that the Draft Federal Act creates a general regulatory scheme that operates under the oversight of a regulatory agency (R.F., at para. 124).

110 Regarding the third indicium, the Attorney General of Canada submits that the Draft Federal Act is concerned with trade *as a whole* rather than with the regulation of the securities industry in particular. The Attorney General of Quebec counters that securities trading takes place within a specific industry or segment of the economy, and that the law applicable to it is therefore distinguishable from competition law or trade-marks law.

111 Although this Court held in *Reference Re Securities Act* that the impugned legislation in that case was concerned not with trade as a whole but rather with the regulation of the securities market in particular, the Draft Federal Act is qualitatively different. Unlike the *Proposed Canadian Securities Act*, it does not “descen[d] into the detailed regulation of *all* aspects of trading in securities” (at para. 114); rather, federal intervention in capital markets is instead limited to addressing issues and risk of a *systemic* nature that may represent a material threat to the stability of Canada’s financial system. In other words, the regulation of systemic risk in capital markets goes to promoting the stability of the economy generally, not the stability of one economic sector in particular. Securities transactions are one of the principal means by which money moves from suppliers to consumers throughout the country (*Reference Re Securities Act*, at para. 113). For this reason, the Draft Federal Act is not concerned only with regulating capital markets specifically, but instead addresses economic matters of national scope which transcend the concerns of any one province. It is therefore akin to the *Combines Investigation Act* that was at issue in *General Motors*, in that both are aimed at stamping out risks and practices that are unhealthy to the Canadian economy. That Parliament’s trade and commerce power is exercised in a way that affects particular industries is not inherently objectionable, so long as the focus of that exercise is on matters that affect trade as a whole.

112 Like the Majority of the Court of Appeal, we can do no better than to reiterate what this Court stated back in 2011:

We accept that preservation of capital markets to fuel Canada’s economy and maintain Canada’s financial stability is a matter that goes beyond a particular “industry” and engages “trade as a whole” within the general trade and commerce power as contemplated by the *General Motors* test. Legislation aimed at imposing minimum standards applicable throughout the country and preserving the stability and integrity of Canada’s financial markets might well relate to trade as a whole.

(*Reference re Securities Act*, para. 114)

113 Turning now to the fourth indicium, we are of the view that the provinces, acting alone or in concert, would be incapable of enacting a scheme like the one set out in the Draft Federal Act. Relying on the principle of parliamentary sovereignty, this Court in *Reference Re Securities Act* observed that “[t]he provinces, acting in concert, lack the constitutional capacity to sustain a viable national scheme aimed at genuine national goals such as management of systemic risk or Canada-wide data collection” (para. 121), given that each of the provinces “retain[s] the ability to resile from an interprovincial scheme” (para. 119). In other words, the fact that any one province can opt against participating in (or can subsequently resile from) such a cooperative scheme could seriously impair that scheme’s capacity to protect the Canadian economy from systemic risk. The Draft Federal Act, with its carefully tailored scope, constitutes a response to this provincial incapacity, with Parliament stepping in to fill this constitutional gap.

114 We accept that the provinces can and do regulate systemic risk in their capital markets. However, our federalism jurisprudence supports the principle that a subject matter can have both federal and provincial aspects (*Hodge*, at p. 130; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.), at p. 181; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59 (S.C.C.), at p. 65; *Law Society (British Columbia) v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113 (S.C.C.), at para. 23). In such a case, the double aspect doctrine permits the provinces to legislate in pursuit of a valid provincial objective and Parliament to do the same in pursuit of a separate federal objective. While provinces have the capacity to legislate in respect of systemic risk in their own capital markets, they do so from a *local* perspective and therefore in a manner that cannot effectively address *national* concerns which transcend their own respective concerns. As this Court made clear in *Multiple Access Ltd.*, at p. 175, “[t]he validity of the federal legislation must be determined without heed to the ... [provincial] legislation” (see also: *General Motors*, at pp. 680-82).

115 Our conclusion with respect to the fifth indicium largely flows from our conclusion as to the fourth. Given our discussion on that subject, we are of the view that the effective management of systemic risk requires market-wide regulation, such that any one jurisdiction’s failure to participate would jeopardize the scheme’s successful operation. Put simply, the management of systemic risk across Canadian capital markets must be regulated federally, if at all. Once again, this Court’s reasons in *Reference Re Securities Act* effectively compel an affirmative answer to the final inquiry:

The fifth and final *General Motors* inquiry is whether the absence of a province from the scheme would prevent its effective operation. On lesser regulatory matters the answer might well be no. However, when it comes to genuine national goals, related to fair, efficient and competitive markets and the integrity and stability of Canada’s financial system, including national data collection and prevention of and response to systemic risks — the answer must be yes — much for the reasons discussed under the fourth question. On these matters a federal regime would be qualitatively different from a voluntary interprovincial scheme (para. 123).

116 In our view, the *General Motors* framework leads to the conclusion that the Draft Federal Act addresses a matter of genuine national importance and scope that relates to trade

as a whole. The preservation of the integrity and stability of the Canadian economy is quite clearly a matter with a national dimension, and one which lies beyond provincial competence. Moreover, the fact that the federal government's foray into securities regulation under the Draft Federal Act is limited to achieving these objectives supports the validity of this proposed statute. Given our conclusions with respect to each of the *General Motors* indicia, we therefore classify the legislation at issue in this case as falling within Parliament's power over trade and commerce pursuant to s. 91(2) of the *Constitution Act, 1867*.

(2) *Regulations under the Draft Federal Act: Sections 76 to 79*

[The Court then briefly addresses and rejects the argument that the Council of Ministers' role in the making of regulations under the Draft Federal Act is problematic from the perspective of the constitutional division of powers.]

127 And as we explained above, the Draft Federal Act is *intra vires* Parliament pursuant to the general trade and commerce power, notwithstanding the fact that provincial representatives will be involved in the making of regulations. To put it simply, the *General Motors* framework is not concerned with whether a particular subject matter relating to trade can only be dealt with through direct, unfettered federal action; rather, its purpose is to identify aspects of the economy that the provinces, acting either individually or collectively, lack the capacity to regulate effectively. For this reason, the fact that some regulations might never be adopted because of provincial opposition does not change the reality that the regulations that are adopted *must*, by their very nature, be respected by all the provinces if the objectives underlying the Draft Federal Act are to be achieved. The Dissenting Judge's comments in this regard are particularly apt:

... Parliament is free to delegate [in the manner set out in *A.G. of Nova Scotia v. A.G. for Canada*, [1951] S.C.R. 31 and *P.E.I. Potatoe Marketing v. Willis*, [1952] 2 S.C.R. 372 and such regard to constitute the body (the Authority) to whom it delegates regulatory functions. Parliament may determine the internal workings of such body and the process of approval of the regulations it proposes. The fact that the body approving the regulations (i.e. the Council [of Ministers]) is populated with ministers of provincial governments does not invalidate the delegation. Parliament can choose to structure the internal mechanics and approval process of the regulatory body in such manner deemed appropriate to the task (C.A. reasons, at para. 205 (per Schrager J.A., dissenting), emphasis added).

128 It therefore follows that we answer the second reference question in the negative.

## 2. CRIMINAL LAW POWER

### REFERENCE RE GENETIC NON-DISCRIMINATION ACT

2020 SCC 17

KARAKATSANIS J. (Abella and Martin JJ., concurring)

[4] I would allow the appeal and conclude that Parliament had the power to enact ss. 1 to 7 of the *Genetic Non-Discrimination Act* under s. 91(27). [T]he “matter” (or pith and substance) of the challenged provisions is to protect individuals’ control over their detailed personal information disclosed by genetic tests, in the broad areas of contracting and the provision of goods and services, in order to address Canadians’ fears that their genetic test results will be used against them and to prevent discrimination based on that information. This matter is properly classified within Parliament’s s. 91(27) power over criminal law. The provisions are

supported by a criminal law purpose because they respond to a threat of harm to several overlapping public interests traditionally protected by the criminal law. The prohibitions in the *Act* protect autonomy, privacy, equality and public health, and therefore represent a valid exercise of Parliament's criminal law power.

### I. Genetic Non-Discrimination Act

[6] Section 2 of the *Act* defines a genetic test as “a test that analyzes DNA, RNA or chromosomes for purposes such as the prediction of disease or vertical transmission risks, or monitoring, diagnosis or prognosis”. Sections 3, 4 and 5 [prohibit any person from requiring an individual to undergo or disclose the results of a genetic test as a condition of contracting with or providing goods and services to that individual, or to collect or use such results without the individual's consent].

[8] Section 7 provides that doing anything prohibited by ss. 3, 4 or 5 is an offence punishable on summary conviction by a fine of up to \$300,000 or imprisonment of up to 12 months, or both, and on indictment by a fine of up to \$1 million or imprisonment of up to 5 years, or both.

### III. Analysis

[26] To determine whether a law falls within the authority of Parliament or a provincial legislature, a court must first characterize the law and then, based on that characterization, classify the law by reference to the federal and provincial heads of power under the Constitution [citations omitted].

## F. *Characterization*

[28] At the characterization stage, a court must identify the law's "pith and substance", or "*caractère véritable*"... the goal is to determine the law's "true subject matter", even when it differs from its apparent or stated subject matter: *Firearms Reference*, at para. 18. Generally, the court will first look to characterize the specific provisions that are challenged, rather than the legislative scheme as a whole, to determine whether they are validly enacted: *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at pp. 666-67.

[30] Identifying a law's pith and substance requires considering both the law's purpose and its effects: *Firearms Reference*, at para. 16. Both Parliament's or the provincial legislature's purpose and the legal and practical effects of the law will assist the court in determining the law's essential character.

### (4) Purpose

[34] To determine a law's purpose, a court looks to both intrinsic and extrinsic evidence. Intrinsic evidence includes the text of the law, and provisions that expressly set out the law's purpose, as well as the law's title and structure. Extrinsic evidence includes statements made during parliamentary proceedings and drawn from government publications: *Firearms Reference*, at para. 17.



[35] A law's title, especially its long title, is an important form of intrinsic evidence, as both titles are an integral part of the law: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 440-41. Here, both the short title — the *Genetic Non-Discrimination Act* — and the long title — *An Act to prohibit and prevent genetic discrimination* — suggest that the *Act's* purpose is twofold. They suggest that the *Act* seeks to prohibit discrimination on genetic grounds and prevent such discrimination from occurring in the first place.

[36] Turning to the *Act's* text and structure, the prohibitions created by ss. 3 to 5 apply to a wide range of circumstances (obtaining goods and services and entering into contracts) in which individuals might be treated adversely based on their decision whether to undergo genetic testing and based on test results. The prohibitions are of general application, as they do not target a particular activity or industry. Instead, they target specific behaviour related to genetic testing, namely forcing individuals to undergo testing and disclose test results, and using test results without consent. The prohibitions target conduct that enables genetic discrimination.

[37] The definition of “genetic test” in s. 2 of the *Act* is broad and captures analyses of DNA, RNA or chromosomes performed with a wide range of ends in mind. Section 2 defines a genetic test as “a test that analyzes DNA, RNA or chromosomes for purposes such as the prediction of disease or vertical transmission risks, or monitoring, diagnosis or prognosis”.

[38] This definition identifies a test that conducts analysis of genetic material and provides examples of the types of purposes for which such analysis may be undertaken. Each example speaks to “disease”: its “prediction”, “diagnosis”, “prognosis” and “monitoring” and the

“prediction” of the “risk” of its “vertical transmission” from a gestational parent to a child. On their face, these words appear to be illustrative examples. But, when read in context, they serve to delineate the scope of the definition. After all, analysis is always conducted for a purpose, so Parliament’s choice to refer to analysis for certain types of purposes must be given meaning. The use of these medical terms relating to disease in association with one another indicates that the purpose for which the analysis is undertaken must be health-related. Since a genetic test is defined as an analysis of genetic material for a health-related purpose, I think it fair to say that the definition speaks to a health-related genetic test. Indeed, Parliament’s particular concern for protecting individuals’ control over the results of health-related genetic tests pervades the debates, as I explain below.

[39] Reading the definition this way would support — not detract from — the conclusion that the *Act* aims to combat discrimination based on genetic test results. Health-related genetic tests reveal highly personal information — details that individuals might not wish to know or share and that could be used against them. The prohibitions target a broad range of conduct that creates the opportunity for genetic discrimination based on intimate personal information revealed by health-related tests. Parliament saw genetic test results relating to health as particularly vulnerable to abuse and discrimination. The intrinsic evidence suggests that the purpose of the provisions is to combat discrimination based on information disclosed by genetic tests by criminalizing compulsory genetic testing, compulsory disclosure of test results, and non-consensual use of test results in a broadly-defined context (the areas of contracting and the provision of goods and services). The extrinsic evidence points largely in the same direction.

[44] In addition to enacting substantive provisions, the *Act* also amended the *Canada Labour Code* to protect employees from forced genetic testing or disclosure of test results, and from disciplinary action on the basis of genetic test results, and amended the *Canadian Human Rights Act* to add “genetic characteristics” as a prohibited ground of discrimination and to create a deeming provision relating to refusal to undergo genetic testing or disclose test results: see *Canada Labour Code*, ss. 247.98 and 247.99, as amended by s. 8 of the *Act*; *Canadian Human Rights Act*, s. 3(1) and (3), as amended by ss. 9 to 11 of the *Act*.

[45] Parliament’s decision to make these amendments to the *Canada Labour Code* and the *Canadian Human Rights Act* in conjunction with its enactment of the *Act*’s substantive provisions suggests that Parliament was looking to take a coordinated approach to tackling genetic discrimination based on test results, using different tools. It was not only targeting genetic discrimination directly through human rights and labour legislation, but was also targeting precursors to such discrimination, namely forced genetic testing and disclosure of the results of such testing. The fact that Parliament did not criminalize genetic discrimination does not belie Parliament’s purpose of combatting genetic discrimination in this context. The relative breadth, directness or efficacy of the means Parliament chooses to address a problem is not the court’s concern in its pith and substance inquiry.

[47] The title of the *Act* and the text of the prohibitions provide strong evidence that the prohibitions have the purpose of combatting genetic discrimination based on test results, and that the more precise mischief they are intended to address is the lack of legal protection for the results of genetic testing. The *Act* does what its title says it does: it prevents genetic discrimination by directly targeting that mischief. The parliamentary debates also provide

strong evidence to support this. I find that the purpose of the challenged provisions is to combat genetic discrimination and the fear of genetic discrimination based on the results of genetic tests by prohibiting conduct that makes individuals vulnerable to genetic discrimination in the areas of contracting and the provision of goods and services.

(5) Effects

[49] Both legal and practical effects are relevant to identifying a law's pith and substance. Legal effects "flow[] directly from the provisions of the statute itself", whereas practical effects "flow from the application of the statute [but] are not direct effects of the provisions of the statute itself": *Kitkatla*, at para. 54, citing *Morgentaler* (1993), at pp. 482-83.

[50] Starting with legal effects, ss. 3 to 5 of the *Genetic Non-Discrimination Act* prohibit genetic testing requirements and non-consensual uses of genetic test results in a broad range of circumstances. Section 7 imposes significant penalties for contravening these prohibitions.

[52] The most significant practical effect of the *Act* is that it gives individuals control over the decision of whether to undergo genetic testing and over access to the results of any genetic testing they choose to undergo. The *Act* does so by preventing genetic testing requirements from being imposed on individuals as a condition of access to goods, services and contracts, and by preventing individuals' genetic test results from being used non-consensually when they seek to obtain goods and services and enter into contracts. Even if an individual voluntarily discloses the results of a genetic test in such circumstances, the *Act* prevents the recipient of the information from using the information in any manner that has not been

consented to in writing or from further disclosing the information. The activities to which the *Act* applies are broad and fundamentally structure Canadians' interactions with the world around them. The control that ss. 1 to 7 of the *Act* gives to individuals over genetic testing and genetic test results is equally significant and broad in scope.

[53] Choices about genetic testing are deeply personal in nature and the reasons for making them vary widely from one individual to another. Just as one individual may wish to be aware of every possible predisposition or risk that a genetic test might reveal, another may prefer not to know. And the individual who wants to know may not want others to know. The *Act* protects those choices.

[54] By protecting choices about who has access to such information, the legislation reduces the risk of genetic discrimination. And by removing the fear of some of the negative consequences that could flow from genetic testing, the *Act* may encourage individuals to undergo genetic testing. Additional testing may in turn produce health benefits, including by enabling earlier detection of health problems or predispositions, providing for more accurate and sometimes life-saving diagnoses and improving the health care system's ability to provide maximally beneficial care.<sup>1</sup>

[58] The prohibitions in question are of general application, and do much more than prevent insurance companies from requiring individuals to disclose genetic test results when they

<sup>1</sup> See House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 37, 1st Sess., 42nd Parl., November 24, 2016, at p. 2 (Dr. Gail Graham).

contain relevant medical information. They give individuals control over their genetic testing results, allowing them to protect themselves against genetic discrimination. They respond to the mischief that is the lack of legal protection of genetic testing information in Canada across all sectors in which the specified activities take place — both private and public. They apply to a broad and growing array of circumstances. They may well apply, for instance, when a person is seeking to adopt a child, to use consumer genetic testing services, to access government services, to purchase any kind of good or service, or to obtain housing, insurance or employment.

(6) Conclusion

[61] In enacting the *Genetic Non-Discrimination Act*, Parliament acted to combat genetic discrimination and the fear of genetic discrimination based on genetic test results. It sought to do so by filling the gap in Canada's laws that made individuals vulnerable to genetic discrimination in the areas of contracting and the provision of goods and services. Parliament's purpose is reflected clearly by the title and text of the *Act*. It is supported by the legislative debates and the concurrent amendments to the *Canadian Human Rights Act* and *Canada Labour Code* made by the *Act*.

[62] Crucially, Parliament's purpose in enacting the provisions in question is borne out in the provisions' effects. The most direct and significant practical effect of the prohibitions is to give individuals control over the decision of whether to undergo genetic testing and over access to the results of genetic testing. This practical effect is a direct result of the prohibitions' legal effects.

[63] I accordingly conclude that, in pith and substance, ss. 1 to 7 of the *Act* protect individuals' control over their detailed personal information disclosed by genetic tests in the areas of contracting and the provision of goods and services in order to address fears that individuals' genetic test results will be used against them and to prevent discrimination based on that information.

G. *Classification*

(4) The Criminal Law Power

[65] Section 91(27) of the *Constitution Act, 1867* gives Parliament the exclusive authority to make laws in relation to “[t]he Criminal Law”. Sections 1 to 7 of the *Genetic Non-Discrimination Act* will be valid criminal law if, in pith and substance: (1) it consists of a prohibition (2) accompanied by a penalty and (3) backed by a criminal law purpose: *Firearms Reference*, at para. 27; *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1, at pp. 49-50 (*Margarine Reference*), aff'd [1951] A.C. 179 (P.C.).

[66] There is no dispute that the challenged provisions meet the first two requirements. They prohibit specific conduct and impose penalties for violating those prohibitions. The only issue is whether the matter of ss. 1 to 7 of the *Act* is supported by a criminal law purpose. ...

[67] Parliament's criminal law power is broad and plenary: see *RJR-MacDonald*, at para. 28; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 34; *R. v. Marmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 73. The criminal law must be able to respond to new and emerging

matters, and the Court “has been careful not to freeze the definition [of the criminal law power] in time or confine it to a fixed domain of activity”: *RJR-MacDonald*, at para. 28; see also *Proprietary Articles Trade Association v. Attorney General for Canada*, [1931] A.C. 310 (P.C.), at p. 324.

[68] But the use of the criminal law power to respond to those new and emerging matters must also be limited. This Court has rejected a purely formal approach that would have allowed Parliament to bring virtually any matter within s. 91(27), so long as it used prohibition and penalty as its vehicle: *Margarine Reference*; *Scowby v. Glendinning*, [1986] 2 S.C.R. 226, at p. 237.

[74] A law will have a criminal law purpose if it addresses an evil, injurious or undesirable effect on a public interest traditionally protected by the criminal law, or another similar public interest.

[77] Taken together, the requirements established in the *Margarine Reference* and subsequently applied in this Court’s jurisprudence mean that a law will have a criminal law purpose if its matter represents Parliament’s response to a threat of harm to public order, safety, health or morality or fundamental social values, or to a similar public interest. As long as Parliament is addressing a reasoned apprehension of harm to one or more of these public interests, no degree of seriousness of harm need be proved before it can make criminal law. The court does not determine whether Parliament’s criminal law response is appropriate or wise. The focus is solely on whether recourse to criminal law is *available* under the circumstances.



(5) Application

[78] In my view, the essential character of the prohibitions represents Parliament's response to the risk of harm that the prohibited conduct, genetic discrimination and the fear of genetic discrimination based on genetic test results pose to several public interests traditionally protected by the criminal law: autonomy, privacy and the fundamental social value of equality, as well as public health.

(a) *Autonomy, Privacy and Equality*

[83] In particular, forced genetic testing (prohibited in s. 3 of the *Act*) poses a clear threat to autonomy and to an individual's privacy interest in not finding out what their genetic makeup reveals about them and their health prospects. People may not want to learn about their "genetic destiny", or risk the psychological harm that can result from obtaining unfavourable genetic test results... Forced disclosure of genetic test results (prohibited in s. 4) and the collection, use or disclosure of genetic test results without written consent (prohibited in s. 5) threaten autonomy and privacy by compromising an individual's control over access to their detailed genetic information. Such threats to autonomy and personal privacy are threats to human dignity.

[88] Protecting fundamental moral precepts or social values is an established criminal law purpose: *Margarine Reference*, at p. 50; *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914, at pp. 932-33; *Reference re AHRA*, at paras. 49-51 and 250. Parliamentarians considered discrimination on the basis of health-related genetic test results to

be morally wrong. They viewed such genetic discrimination to be antithetical to the values of equality and human dignity. ... In acting to suppress a threat of that nature, Parliament acted with a criminal law purpose.

(b) *Public Health*

[91] Health is an “amorphous” field of jurisdiction, featuring overlap between valid exercises of the provinces’ general power to regulate health and Parliament’s criminal law power to respond to threats to health: see *RJR-MacDonald*, at para. 32; *PHS*, at para. 60. The criminal law authority that Parliament exercises in the area of health does not prevent the provinces from regulating extensively in relation to health: *Hydro-Québec*, at para. 131. Indeed, the two levels of government “frequently work together to meet common concerns”: para. 131.

[92] Because of these overlapping exercises of jurisdiction, and the doctrine of paramountcy, the Court has expressed concern that the criminal law power must not “be used to eviscerate the provincial power to regulate health”: *Reference re AHRA*, at para. 77, see also para. 52, per McLachlin C.J. Though the criminal law power must be appropriately circumscribed as a result, its plenary nature does not change when it is exercised to respond to threats to health. The usual requirements that it be exercised by way of prohibition and penalty and be supported by a criminal law purpose suffice to limit it: *RJR-MacDonald*, at para. 32.

[94] Parliament is entitled to use its criminal law power to respond to a reasoned apprehension of harm, including a threat to public health.

[95] ... Testimony before Parliament demonstrated that fear of genetic discrimination leads patients to forego beneficial testing, results in wasted health care dollars and may deter patients from participating in research that could advance medical understanding of their conditions. Genetic discrimination is a barrier to accessing suitable, maximally effective health care, to preventing the onset of certain health conditions and to participating in research and other initiatives serving public health. Parliament accordingly apprehended individuals' vulnerability to and fear of genetic discrimination based on test results as a threat to public health.

(6) Conclusion

[101] Parliament took action in response to its concern that individuals' vulnerability to genetic discrimination posed a threat of harm to several public interests traditionally protected by the criminal law. Parliament enacted legislation that, in pith and substance, protects individuals' control over their detailed personal information disclosed by genetic tests in the areas of contracting and the provision of goods and services in order to address Canadian's fears that their genetic test results will be used against them and to prevent discrimination based on that information. It did so to safeguard autonomy, privacy and equality, along with public health. The challenged provisions fall within Parliament's criminal law power because they consist of prohibitions accompanied by penalties, backed by a criminal law purpose.

The reasons of Moldaver and Côté JJ. were delivered by

## I. Overview

[97] ... I agree with my colleague Justice Karakatsanis that ss. 1 to 7 of the *Act* represent a valid exercise of Parliament's power over criminal law set out at s. 91(27) of the *Constitution Act, 1867*. However, and with respect, I arrive at this result in a different manner because I see the pith and substance of the impugned provisions differently from her, as well as from my colleague Justice Kasirer.

## II. Analysis

### A. *Characterization*

[101] [The] pith and substance of ss. 1 to 7 of the *Act* is to protect health by prohibiting conduct that undermines individuals' control over the intimate information revealed by genetic testing. This is borne out by the purpose and effects of these provisions.

[102] ... I do not agree with Justice Karakatsanis that preventing discrimination forms part of the pith and substance of the challenged provisions. While I accept that ss. 1 to 7 of the *Act* reduce the opportunities for discrimination based on one's genetic test results, thereby mitigating individuals' fear of genetic discrimination, they do so by giving people control over the information revealed by genetic tests in furtherance of the purpose of protecting health. With respect, preventing or combating genetic discrimination is not the "dominant purpose or true character" of these provisions (see *Quebec (Attorney General) v. Canada (Attorney*

*General*), 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 29, quoting *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 29).

[103] Nor can I agree with Justice Kasirer that the pith and substance of the provisions is “to regulate contracts and the provision of goods and services, in particular contracts of insurance and employment, by prohibiting some perceived misuses of one category of genetic tests, the whole with a view to promoting the health of Canadians” (para. 154). As I see it, what is at stake here is not the *promotion* of beneficial health practices but the *protection* of individuals from a serious threat to health. Further, I have no doubt that the impugned provisions affect contracting and the provision of goods and services. However, with respect, I believe that the manner in which my colleague characterizes them “confuse[s] the law’s purpose with ‘the means chosen to achieve it’” (*Quebec v. Canada*, at para. 29, quoting *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569, at para. 25). Although the means chosen by Parliament engage aspects of contracting and the provision of goods and services, as I see it, “the regulation of contracts and the provision of goods and services” is, at best, peripheral to the dominant purpose or true character of the legislation. Indeed, as Justice Kasirer himself recognizes, “health dominates the discussion” (para. 221).

(1) Purpose

(a) *The Structure and Content of the Act*

[106] ... While I disagree with his conclusion regarding what exactly the definition reveals about the impugned provisions’ purpose, I agree with Justice Kasirer that the definition of

“genetic test” is crucial to recognizing that the pertinent provisions are grounded in a health-related purpose. For the purposes of the *Act*, “genetic test” is defined as “a test that analyzes DNA, RNA or chromosomes for purposes such as the prediction of disease or vertical transmission risks, or monitoring, diagnosis or prognosis”. The definition of “genetic test” is accordingly restricted to tests that are taken for health-related purposes such as predicting, preventing and diagnosing hereditary diseases, and guiding treatment options for a wide variety of diseases and conditions. This demonstrates that Parliament was squarely focused on protecting health.

[112] Unlike the changes to the *Canada Labour Code* and the *Canadian Human Rights Act*, the provisions in issue do not prohibit genetic discrimination — that is, differential treatment “on the basis of the results of a genetic test” or based on one’s “genetic characteristics”. Sections 1 to 7 could have included such a prohibition, but they do not. In my view, the different approach taken by Parliament in the amendments to the *Canada Labour Code* and the *Canadian Human Rights Act* as compared to the impugned provisions indicates that where Parliament’s dominant objective was to prevent and prohibit genetic discrimination, it did so directly. This supports my conclusion that the dominant purpose of ss. 1 to 7 is not preventing and prohibiting genetic discrimination, but rather prohibiting conduct that deprives individuals of control over their genetic test results in order to protect health. It follows that I am unable to agree with Justice Karakatsanis’s conclusion that the three parts of the *Act* are all part of “a multi-pronged approach to combatting genetic discrimination” (para. 48). With respect, that conclusion is too broad and fails to place adequate weight on the important differences between ss. 1 to 7 and ss. 8 to 10.

(b) *The Parliamentary Record*

[113] The parliamentary record bolsters my conclusion regarding the purpose of the provisions in question. On my reading of the debates and the testimony heard by the Senate and House of Commons committees tasked with reviewing Bill S-201, *An Act to prohibit and prevent genetic discrimination*, 1st Sess., 42nd Parl., 2017, the focus was clearly directed at the devastating health consequences that were resulting from people foregoing genetic testing out of fear that the personal health information revealed by such testing could be used against them, including in discriminatory ways. By enacting ss. 1 to 7 of the *Act*, Parliament sought to prohibit conduct that was causing individuals who wished to undergo genetic testing to instead forego such testing, to the detriment of their health.

(2) Effects

[120] I substantially agree with how Justice Karakatsanis has characterized the effects of the challenged provisions.

(3) Conclusion

[123] For these reasons, I conclude that the pith and substance of ss. 1 to 7 of the *Act* is to protect health by prohibiting conduct that undermines individuals' control over the intimate information revealed by genetic testing. These provisions prohibit compulsory genetic testing, compulsory disclosure of genetic test results, and the non-consensual collection, disclosure and use of those results in a wide array of contexts that govern how people interact with society.

By giving people control over this information, ss. 1 to 7 of the *Act* mitigate their fears that it will be used against them. Such fears lead many to forego genetic testing, to the detriment of their own health, the health of their families, and the public healthcare system as a whole.

## B. *Classification*

[126] Sections 1 to 7 of the *Act* are backed by a criminal law purpose because they are directed at suppressing a threat to health.

[127] The threat to health that Parliament targeted by enacting ss. 1 to 7 of the *Act* was real — in every sense of the word. Parliament had ample evidence before it that people were refraining from undergoing genetic testing out of fear as to how their genetic test results could be used, thereby suffering significant harm or putting themselves at risk of significant and avoidable harm. The debates and committee testimony are saturated with examples of the life-saving, life-extending, and life-enhancing potential of genetic testing — all of which individuals felt they had to forego because they could not control the ways in which the results of such testing would be used in various contexts.

[130] [Sections] 1 to 7 are not directed at the mere “promotion of beneficial health services or practices” (Kasirer J.’s reasons, at para. 240), but rather at protecting people from severe harms to their health caused by foregoing genetic testing out of fear that their information will be used against them (e.g., by way of non-consensual collection, disclosure, or use of genetic test results). While it is no doubt true that not dying of a preventable disease is a “better health outcom[e]” than dying from that disease (Kasirer J.’s reasons, at para. 239), I believe it makes



more sense to describe measures directed at preventing such outcomes as being protective of health.

[135] Here, like in *RJR-MacDonald*, Parliament employed indirect means to suppress the threat to health it identified. As in *RJR-MacDonald*, it was constitutionally entitled to do so. In both cases, Parliament enacted legislation which prohibited conduct that was influencing people to make a choice that could lead to significant health-related harms. In *RJR-MacDonald*, Parliament recognized that advertising tobacco products was influencing people's choice to use tobacco, to the potential detriment of their health (para. 32). Instead of prohibiting tobacco consumption — a direct approach that would have mitigated the detrimental health effects but raised other issues — Parliament prohibited certain conduct that was influencing individuals' choice of whether to use tobacco. Similarly here, Parliament determined that the disquieting possibility of compulsory genetic testing, and compulsory disclosure and non-consensual collection, disclosure, and use of genetic test results were influencing people's choice to forego genetic testing, to the potential detriment of their health. Rather than forcing individuals to take genetic tests — a direct approach that would have mitigated the detrimental health effects but raised other issues — Parliament saw fit to prohibit the influential conduct.

[137] In sum, as I see it, by enacting ss. 1 to 7 of the *Act*, Parliament targeted conduct that was having an injurious effect on health. ... Parliament was constitutionally entitled to address [this threat to health], pursuant to s. 91(27) of the *Constitution Act, 1867*. ...

The reasons of Wagner C.J. and Brown, Rowe and Kasirer JJ. were delivered by

I. Introduction

[141] On my understanding, the pith and substance of ss. 1 to 7 is to regulate contracts and the provision of goods and services, in particular contracts of insurance and employment, by prohibiting some perceived misuses of one category of genetic tests, the whole with a view to promoting the health of Canadians....

[144] Sections 1 to 7 cut a different and broader swath through the regulation of contract and the provision of good and services. While parliamentarians voiced special concern for discriminatory use of genetic testing in contracts of insurance, none of these provisions prohibits genetic discrimination. Instead, in connection with contracts and the provision of good and services, they prohibit only one class of genetic tests from being required and ensure that the results of such tests already taken not be forcibly disclosed, all as a means of promoting health.

[145] The contested provisions do grant individuals limited control over a narrow class of genetic information, thus achieving two distinct, but interrelated, incidental effects: preventing circumstances from arising that would otherwise have the consequential effect of allowing some forms of discrimination based on genetic characteristics, and protecting individuals' privacy and autonomy related to the decision to undergo genetic testing. But if either of these were the *Act's* dominant aim, Parliament would have broadened the scope of its provisions

beyond forced testing and forced disclosure and not limited ss. 1 to 7 to a narrow category of genetic tests. In other words, the fact that Parliament did not directly target genetic discrimination — the alleged reason behind Canadians’ fear of undergoing genetic testing and for which their personal information must be protected — is fatal to the appellant’s and *amicus curiae*’s positions.

## II. Analysis

### A. Characterization: What is the Pith and Substance of Sections 1 to 7 of the Act?

#### (1) The Purpose of the Impugned Provisions

##### (a) Intrinsic Evidence

[161] In my view, neither the long title of this statute — *An Act to prohibit and prevent genetic discrimination* — nor its short title — *Genetic Non-Discrimination Act* — can be said to reflect clearly the impugned provisions’ true purpose. With respect, I disagree that these titles reveal that the provisions’ purpose is to prohibit discrimination on genetic grounds and prevent such discrimination from occurring in the first place. To my mind, genetic non-discrimination cannot be said to be the primary objective of the impugned provisions.

[162] ...While the long title explicitly refers to the prohibition of genetic discrimination, it must be borne in mind that this long title speaks to the entirety of the *Act*, which includes amendments to the *CLC* and the *CHRA*. [T]he amendments to the *CLC* and the *CHRA* purport to prohibit genetic discrimination directly whereas the prohibitions in ss. 1 to 7 do not. As a

result, the long title does not support the conclusion that the impugned provisions — the focus of the pith and substance inquiry — seek to prohibit genetic discrimination, as the “prohibition” in the long title could easily be referring to the *CLC* and *CHRA* amendments, but not to ss. 1 to 7. ...

[163] This then brings us to the prevention of discrimination on genetic grounds, which is also explicitly referred to in the long title. While I accept that ss. 1 to 7 do seek to curtail circumstances in which genetic discrimination can occur, and thus prevent such circumstances from arising in connection with contracts and the provision of goods and services, the provisions leave open the possibility that genetic information may be legitimately used — thereby not precluding use for drawing distinctions based on genetic characteristics — when it has been disclosed voluntarily or obtained through other means than a genetic test. In that sense, even “preventing genetic discrimination” cannot be properly understood to be the main objective of the contested provisions. At most, preventing some circumstances from arising that could facilitate genetic discrimination is one of the many consequences of ss. 1 to 7, but an unconvincing way to describe its dominant purpose.

[167] The definition of “genetic test” [in s. 2 of the Act] is central to identifying the law’s purpose as relating to the promotion of health. A genetic test, for the purposes of ss. 1 to 7, refers to “a test that analyzes DNA, RNA or chromosomes for purposes such as the prediction of disease or vertical transmission risks, or monitoring, diagnosis or prognosis”. This definition is thus limited to genetic tests that seek to gather health information on an individual with a view to predicting disease or treating medical problems. Even noting that Parliament uses the expression “such as”, and recognizing that its list of purposes set out in s. 2 is not closed, the

statutory turn of phrase plainly indicates that Parliament is pointing to purposes *eiusdem generis* (i.e. “of the same kind”) as the ones listed, all of which are health-related.

[168] Sections 3 to 5 of the *Act* outline “Prohibitions”. ...The provisions say nothing about genetic tests that do not fall within the narrow health-related definition in s. 2, but could nonetheless be used as a condition for a contract, for example. Moreover, they say nothing about the use of a genetic test outside the — albeit broad — purview of contracts and the provision of good and services.

[171] As the Court of Appeal explained in its reasons, taken together, ss. 1 to 7 aim to prohibit making the provision of goods and services or the making, continuing, or offering of specific terms or conditions of a contract conditional upon an individual undergoing or disclosing the results of genetic testing (paras. 8 and 10). The provisions do not prohibit the use of genetic information that may be disclosed voluntarily or that may be required or obtained through other means, such as family history or other medical tests, and they do not prohibit genetic discrimination. It is clear that the purpose of ss. 1 to 7 is different from the veritable prohibitions against discrimination based on genetic characteristics set forth in the amendments made to the *CHRA* and to the *CLC* in ss. 8 to 10 of the *Act*, which are extrinsic to the impugned provisions, to which I turn in the next section.

[172] Moreover, I stress that the prohibitions in ss. 3 to 5, the exemption in s. 6, and the penalties in s. 7 all rely on the narrow, health-based definition of “genetic test” found in s. 2. The scope of this definition excludes genetic tests done for other reasons, for example, to reveal a person’s ancestry or for forensic purposes, or to determine parental lineage or non-disease

traits. Genetic tests can obviously indicate other human physical characteristics unrelated to predicting disease and treating medical problems. Some of these characteristics — aspects of physical appearance, for example, or ancestry — might be used as grounds for discrimination or misused in some other manner, but they are not spoken to in the *Act* because they are excluded from the definition of a “genetic test”. Sections 1 to 7 of the *Act* simply do not speak to genetic tests undertaken for other purposes. Any privacy or autonomy concerns related to tests undertaken in pursuit of these different ends are therefore not addressed by the *Act*. While the provisions grant individuals some control over their genetic information, this protection is limited to health-related information. Similarly, the protection granted by the provisions is incomplete, as genetic information revealed by means other than a genetic test receives no protection.

(b) *Extrinsic Evidence*

(i) Amendments to the *CHRA* and to the *CLC* in Sections 8 to 10 of the *Act*

[Justice Kasirer discusses the amendments to the *CHRA* and *CLC* that prohibit genetic discrimination.]

[180] The contrast between the amendments to the *CHRA* and the *CLC*, which create prohibitions against discrimination, and the impugned provisions, which do not, shows that the purpose of ss. 1 to 7 is different from that of these amendments. If Parliament had attempted to take a coordinated approach to genetic discrimination in the *Act*, discrimination on the basis

of genetic characteristics would have been directly prohibited in the impugned provisions, and not only in the *CHRA* and *CLC*...

(ii) Legislative Debates

[183] [The legislative] debates generally reveal that genetic tests were considered to be beneficial and viewed as a means of opening avenues to improved health treatment, as they allow Canadians to be aware of risks and change their behaviour. ...

[189] [T]hese debates emphasize that while the amendments to the *CLC* and *CHRA* prohibit genetic discrimination, ss. 1 to 7 of the *Act* were included as a way to encourage Canadians to undergo genetic tests, by mitigating their fears that they would be misused, in particular in respect of insurance and employment.

(c) *Conclusion*

[190] When considering the whole of the record, and giving appropriate weight to intrinsic and extrinsic evidence of purpose, it is plain that the main goal of ss. 1 to 7 is not to combat discrimination based on genetic characteristics. Genetic discrimination may have been on the mind of parliamentarians, but it is not prohibited in the impugned provisions. Nor is their objective to control the use of private information revealed by genetic testing, which is secondary to the true purpose of the provisions. Rather, the true aim of the provisions is to regulate contracts, particularly contracts of insurance and employment, in order to encourage

Canadians to undergo genetic tests without fear that those tests will be misused so that their health can ultimately be improved.

(2) The Effects of the Impugned Provisions

[192] In my view, the dominant effects of the impugned provisions concern the regulation of insurance and the promotion of health rather than the protection of privacy and autonomy or the prevention of genetic discrimination.

(a) *Health, Privacy, and Autonomy*

[197] All information about one's health — whether it is gathered from a blood test, a physical examination, or family history — is considered private. To protect the privacy of health information gathered from genetic tests is a necessary corollary of the promotion of these tests to improve health. Here, the protection of privacy does not extend beyond what is necessary to promote health: the protection from forced disclosure of genetic information is limited to information pertaining to health, and deliberately excludes other genetic information. This supports the conclusion that the effects of the impugned provisions on privacy are incidental to the promotion of health. On balance, they stand second to the effects on health.

(b) *Genetic Discrimination*

[198] As explained above, a thorough analysis of the *Act* reveals that ss. 1 to 7 do not prohibit genetic discrimination. . .



[200] While ss. 1 to 7 purport to prevent discrimination, the prohibitions allow discrimination to persist in numerous respects. Should the results of a genetic test be obtained lawfully, either because they are part of medical records or because an individual consents to their disclosure, there is no prohibition on discrimination on this basis. Moreover, genetic information that comes from sources other than a genetic test, such as family histories, blood tests, or voluntary disclosure, could lawfully be used for discriminatory purposes. The impugned provisions do *nothing* to prevent discrimination based on genetic information from such sources.

[201] I therefore conclude, first, that the impugned provisions do not directly prohibit discrimination and, second, that while ss. 1 to 7 may have an incidental effect of granting individuals some control over their genetic information and thus preventing some discriminatory behaviour from occurring, neither of these effects can be said to be the primary effect of the legislation. Rather, as the Attorney General of Canada asserts, the provisions' focus is on controlling the exchange of information obtained through specific means in relation to contracts and the provision of goods and services.

(c) *Insurance Contracts*

[202] While ss. 1 to 7 speak to all contracts and provision of goods and services generally, I agree with the Court of Appeal that the dominant effects of the contested provisions — both legally and practically — bear on the insurance industry (para. 8). Legally, they represent a departure from the provincial law of insurance and human rights legislation in Canada; practically, the insurance market will be affected by the incomplete information insurers receive from some policy-holders...

[204] Section 4 of the *Act* — which allows individuals who have undergone genetic tests to enter into contracts without having to disclose the results of those tests — represents a departure from ... well-established principle[s] [of provincial insurance law]. It allows individuals to choose to provide favourable genetic test results to insurers while allowing others to retain unfavourable ones, thus permitting some people to take advantage of the provisions to enter into an insurance contract even though they are aware of a material risk that has not been divulged to the insurer. This could have significant impacts on premiums across the pool of policy-holders, as insurers attempt to transfer the risk of non-disclosure to other policy-holders.

(3) Conclusion

[214] As a result of the foregoing, in my view, the pith and substance of ss. 1 to 7 of the *Act* is to regulate contracts and the provision of goods and services, in particular contracts of insurance and employment, by prohibiting some perceived misuses of one category of genetic tests, the whole with a view to promoting the health of Canadians.

B. *Classification: Does the Pith and Substance of the Impugned Provisions Fall Under the Section 91(27) Criminal Law Power?*

(1) Scope of the Criminal Law Power

[217] As the parties all agree, the impugned provisions satisfy the formal requirements of a criminal law. The only issue concerns whether they are supported by the third requirement, a valid criminal law purpose. My colleague Justice Karakatsanis and I have different views of

this requirement, and we accordingly reach different conclusions on whether it is satisfied. Our respective views of the matter — which find echo in the disagreement at the heart of the *AHRA Reference* — cannot be said to have no impact on the result of this case.

(2) Criminal Law Purpose

[218] In the *Margarine Reference*, Rand J., whose reasoning was adopted by the Privy Council in *Canadian Federation of Agriculture v. Attorney-General for Quebec*, [1951] A.C. 179, explained the substantive “criminal law purpose” requirement:

Accordingly, it is not sufficient that Parliament merely wishes to legislate with respect to some public purpose. Rather, the impugned legislation must also be directed at an “evil or injurious or undesirable effect upon the public”.

[219] I disagree with the appellant that the word “evil” — the traditional measure of the criminal law in this context — is unhelpful in the classification analysis. Rather, the concept of “evil” is necessary to remind Parliament that mere undesirable effects are not sufficient for legislation to have a criminal purpose, contrary to my colleague’s suggestion (see Karakatsanis J.’s reasons, at para. 76). In my view, discarding this concept from the core of the criminal law purpose inquiry would be a dramatic change of course from this Court’s past jurisprudence. While the word “evil” may echo language drawn from another time, it has been used frequently in the modern law and it remains conceptually useful for courts to search for an evil before the criminal law purpose requirement is satisfied. Furthermore, to my ear, the French equivalent “*mal*” is perfectly current as a choice of word and I observe that other equivalent words such

as “*fléau*” are also used for “evil” in the decided cases (see, e.g., *R. v. Malmö-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 33).

[220] The words “some evil or injurious or undesirable effect upon the public against which the law is directed” point to a more precise idea than the protection of central moral precepts, in a broad sense: Parliament cannot act unless it seeks to suppress some threat. This threat itself must be well-defined and have ascertainable contours to constitute the valid subject-matter of criminal law pursuant to s. 91(27) of the *Constitution Act, 1867*. It must also be real, in the sense that Parliament has a concrete basis and a reasoned apprehension of harm. To suggest otherwise would be to render the substantive requirement so vague as to be impractical as a measure of what amounts to criminal law for constitutional purposes.

[221] I draw from the *Margarine Reference* and LeBel and Deschamps JJ.’s reasons in the *AHRA Reference* that three questions must be confronted when determining whether a law rests upon a valid criminal law purpose. First, does the impugned legislation relate to a “public purpose”, such as public peace, order, security, health, or morality? Second, did Parliament articulate a well-defined threat to be suppressed or prevented by the impugned legislation (i.e. the “evil or injurious or undesirable effect upon the public”)? Third, is the threat “real”, in the sense that Parliament had a concrete basis and a reasoned apprehension of harm when enacting the impugned legislation? I will discuss each question in turn.

(3) **Application**

(a) *Do the Impugned Provisions Relate to a Public Purpose?*

[223] My colleagues and I agree that the contested provisions can be said to relate to a public purpose: health. ...as I have said, the scope of the definition of “genetic test” means that health is the primary character of the law and that privacy and autonomy are only derivatives thereof.

(b) *Has Parliament Articulated a Well-Defined Threat to Be Suppressed or Prevented By the Impugned Legislation?*

[224] ... Parliament must clearly articulate and define the scope of the threat it seeks to suppress. That is, it must articulate a precise threat with ascertainable contours. This requirement ensures that the scope of Parliament’s actions is limited to a specific problem, and it is particularly important in relation to matters that have provincial aspects, such as health, in order to preserve the balance of federal and provincial powers.

(i) **Health**

[225] The appellant argues that, in this case, the protection and promotion of health is a valid criminal law purpose. This Court has certainly confirmed numerous times that laws aiming to prohibit conduct posing a threat to health satisfy the substantive component of the criminal law. However, this Court has never accepted that it is sufficient for the impugned provisions’ pith and substance to merely relate to health. To invoke Rand J.’s words once again, the

impugned legislation must also involve suppressing an “evil or injurious or undesirable effect upon the public”.

[226] ...In short, there is no defined “public health evil” or threat to be suppressed. The objective of the impugned provisions is to foster or promote beneficial health practices. That is, the legislation seeks to encourage Canadians to undergo genetic testing, which may then result in better health outcomes.

[229] [T]he “promotion of health” in and of itself will simply not suffice at this stage. ... The record must reveal a well-defined threat (i.e. the “evil or injurious or undesirable effect upon the public”) to be suppressed or prevented by the impugned legislation. As my colleague Justice Karakatsanis notes, such threats may be as diverse as tobacco (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199); dangerous food products (*R. v. Wetmore*, [1983] 2 S.C.R. 284); illicit drugs (*Malmo-Levine*); firearms (*Firearms Reference*); and toxic substances (*R. v. Hydro-Québec*, [1997] 3 S.C.R. 213).

[230] My colleague Justice Moldaver writes that the impugned provisions are directed not at the promotion of health, but at the protection of individuals from health-related harms. In his view, the impugned provisions protect against deleterious effects on health that have resulted from Canadians foregoing genetic testing (paras. 116 and 140-43). In the circumstances of this case, however, any protection from health-related harms is present solely because it is a consequence of another objective: the promotion of better health outcomes for all Canadians. Contrary to McLachlin C.J.’s conclusion in the *AHRA Reference*, beneficial practices in our case are not “incidentally” permitted; rather, they are at the very core of the impugned

legislation (para. 30). In other words, Parliament viewed genetic tests as beneficial, and therefore sought to remove barriers so Canadians could access them.

[231] I would highlight that the distinction between the promotion and protection of health is exactly why the substantive criterion of the criminal law is so important. Approaches where Parliament must merely respond “to a risk of harm to health” or an “injurious or undesirable effect” when enacting criminal law have the potential to upset the constitutional balance of powers in this field by greatly expanding Parliament’s ability to enact legislation over health practices (see Karakatsanis J.’s reasons, at paras. 95 and 101). After all, such a requirement could be satisfied in nearly all cases, since many beneficial health services may also involve injurious or undesirable effects (see U. Ogbogu, “The Assisted Human Reproduction Act Reference and the Thin Line Between Health and Crime” (2013), 22 *Constitutional Forum* 93, at pp. 95-96). ..

[234] As explained above, ss. 1 to 7 do not prohibit genetic discrimination. While they may be said to have an indirect effect of preventing genetic discrimination from occurring in the first place, the primary objective of the provisions is not to prohibit or even to prevent genetic discrimination. Rather, the impugned provisions prohibit requiring a genetic test or the disclosure or use of the results in the conclusion of a contract or in the provision of goods and services, except where consent is given. Nothing in the record suggests that these prohibited activities should be regarded as conduct that is a threat to health.

[236] Of course, Parliament can use indirect means in the exercise of its criminal law power, as was the case in *RJR-MacDonald*. [But in] that case, the threat targeted by Parliament was

the detrimental effects caused by tobacco, which was supported by a copious body of evidence demonstrating that tobacco poses a serious threat to Canadians' health. ... In this case, the impugned provisions are designed to encourage the use of genetic tests, which is a beneficial health practice as opposed to an inherently harmful substance, in an attempt to improve Canadians' health. Since Parliament did not target a threat to health, there is simply no public health evil present here.

(ii) Conclusion

[241] In my view, Parliament did not target a threat within the purview of the criminal law through the impugned provisions. Quite simply, the prohibitions target certain practices related to contracts and the provision of goods and services, and more specifically, to insurance and employment. There is nothing on the record suggesting that the prohibited conduct is a threat to Canadians.

[244] Moreover, I respectfully disagree with the view that just because the impugned law “target[s] conduct that Parliament reasonably apprehends as a threat to our central moral precepts”, this means that the impugned provisions are validly backed by a criminal law purpose (Karakatsanis J.'s reasons, at para. 73, citing with approval *AHRA Reference*, at para. 50, per McLachlin C.J.). It bears emphasizing that McLachlin C.J. went on to state that “[t]he role of the courts is to ensure that such a criminal law in pith and substance relates to conduct that Parliament views as contrary to our central moral precepts” and upheld the legislation because “[i]t targets conduct that Parliament has found to be reprehensible” (para. 51; see also para. 30 (emphasis added)). Yet, as LeBel and Deschamps JJ. explained, while “the criminal



law often expresses aspects of social morality or, in broader terms, the fundamental values of society . . . . care must be taken not to view every social, economic or scientific issue as a moral problem” (*AHRA Reference*, at para. 239). In other words, “Parliament’s wisdom” cannot trump the requirement to identify a real evil, even from the standpoint of morality (paras. 76 and 250). To do otherwise has the potential to amplify the scope of s. 91(27) beyond any constitutional precedent (paras. 43 and 239).

(c) *Is the Threat Real, in the Sense That Parliament Had a Concrete Basis and a Reasoned Apprehension of Harm When Enacting the Impugned Legislation?*

[Justice Kasirer discusses, approvingly, LeBel and Deschamps JJ.’s reasons in *AHRA*. Those reasons would require Parliament to describe the apprehended harm “precisely enough that a connection can be established between the apprehended harm and the evil in question” (para. 237).] ...

[254] In my view, the threat Parliament seeks to suppress must be real, in the sense that Parliament has a concrete basis and a reasoned apprehension of harm.

[257] In this case, had I concluded there is a well-defined threat, I would also conclude that there is no evidentiary foundation of harm. Rather, Parliament seeks to improve the health of Canadians by making them aware of underlying conditions they may have and does so by attempting to encourage the use of genetic tests. Just as in the *AHRA Reference*, this advance in technology and health services is beneficial to Canadians, and has always been perceived as such.

(d) *Conclusion*

[258] From the foregoing, I conclude that the contested provisions do not satisfy the substantive component of criminal law. While they do relate to a public purpose, Parliament has neither articulated a well-defined threat that it intended to target, nor did it provide any evidentiary foundation of such a threat. It matters little to the present task whether the impugned provisions constitute good policy: they are *ultra vires* Parliament's criminal law power.

[259] In my view, ss. 1 to 7 of the *Act* rather fall within provincial jurisdiction over property and civil rights conferred by s. 92(13) of the *Constitution Act, 1867*. As explained above, the impugned provisions substantially affect the substantive law of insurance as well as human rights and labour legislation in all provinces. There is no question that the provinces could enact the impugned provisions in their own jurisdiction, if they so desired (see *Citizens Insurance Co. v. Parsons* (1881), 7 App. Cas. 96 (P.C.)).

### 3. ABORIGINAL RIGHTS: DUTY TO CONSULT

# MIKISEW CREE FIRST NATION V. CANADA (GOVERNOR GENERAL IN COUNCIL)

2018 SCC 40

KARAKATSANIS J. (Wagner C.J. and Gascon J., concurring)

## II. Background

6 The Mikisew’s claim relates to two pieces of omnibus legislation that had significant effects on Canada’s environmental protection regime. [...] The Mikisew were not consulted on either of these omnibus bills at any stage in their development or prior to the granting of royal assent.

9 The Mikisew brought an application for judicial review under ss. 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, seeking various declarations and orders concerning the respondent Ministers’ duty to consult them with respect to the introduction and development of the omnibus bills.

## III. Analysis

[The Federal Court lacks jurisdiction in relation to the judicial review of the conduct of ministers when developing legislation. This is sufficient to dispose of the appeal. Nonetheless, the parties have made extensive submissions on [the question] whether the duty to consult applies to the law-making process.]

### *B. The Honour of the Crown and the Duty to Consult*

20 The duty to consult is grounded in the honour of the Crown (*Haida Nation*, at para. 16). Thus, I turn first to the principles that underlie the honour of the Crown and its relationship with the duty to consult.

21 The honour of the Crown is a foundational principle of Aboriginal law and governs the relationship between the Crown and Aboriginal peoples. It arises from “the Crown’s assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people” and goes back to the *Royal Proclamation* of 1763 (*Haida Nation*, at para. 32; *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, at para. 66). It recognizes that the tension between the Crown’s assertion of sovereignty and the pre-existing sovereignty, rights and occupation of Aboriginal peoples creates a special relationship that requires that the Crown act honourably in its dealings with Aboriginal peoples (*Manitoba Metis*, at para. 67; B. Slattery, “Aboriginal Rights and the Honour of the Crown” (2005), 29 *S.C.L.R.* (2d) 433, at p. 436).

22 The underlying purpose of the honour of the Crown is to facilitate the reconciliation of these interests (*Manitoba Metis*, at paras. 66-67). One way that it does so is by promoting negotiation and the just settlement of Aboriginal claims as an alternative to litigation and judicially imposed outcomes (*Taku River Tlingit First Nation v. British Columbia (Project*

*Assessment Director*), 2004 SCC 74, at para. 24). This endeavour of reconciliation is a first principle of Aboriginal law.

23 The honour of the Crown is always at stake in its dealings with Aboriginal peoples (*R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *Manitoba Metis*, at paras. 68-72). As it emerges from the Crown's assertion of sovereignty, it binds the Crown *qua* sovereign. Indeed, it has been found to apply when the Crown acts either through legislation or executive conduct (see *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1110 and 1114; *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 231, per McLachlin J., as she then was, dissenting; *Haida Nation*; *Manitoba Metis*, at para. 69).

24 As this Court stated in *Haida Nation*, the honour of the Crown “is not a mere incantation, but rather a core precept that finds its application in concrete practices” and “gives rise to different duties in different circumstances” (paras. 16 and 18). When engaged, it imposes “a heavy obligation” on the Crown (*Manitoba Metis*, at para. 68). Indeed, because of the close relationship between the honour of the Crown and s. 35, the honour of the Crown has been described as a “constitutional principle” (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, at para. 42). That said, this Court has made clear that the duties that flow from the honour of the Crown will vary with the situations in which it is engaged (*Manitoba Metis*, at para. 74). Determining what constitutes honourable dealing, and what specific obligations are imposed by the honour of the Crown, depends heavily on the circumstances (*Haida Nation*, at para. 38; *Taku River*, at para. 25; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, at paras. 36-37).

25 The duty to consult is one such obligation. In instances where the Crown contemplates executive action that may adversely affect s. 35 rights, the honour of the Crown has been found to give rise to a justiciable duty to consult (see e.g. *Haida Nation*, *Taku River*, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, and *Little Salmon*). This obligation has also been applied in the context of statutory decision-makers that — while not part of the executive — act on behalf of the Crown (*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, at para. 29). These cases demonstrate that, in certain circumstances, Crown conduct may not constitute an “infringement” of established s. 35 rights; however, acting unilaterally in a way that may adversely affect such rights does not reflect well on the honour of the Crown and may thus warrant intervention on judicial review.

26 The duty to consult jurisprudence makes clear that the duty to consult is best understood as a “valuable adjunct” to the honour of the Crown (*Little Salmon*, at para. 44). The duty to consult ensures that the Crown acts honourably by preventing it from acting unilaterally in ways that undermine s. 35 rights. This promotes reconciliation between the Crown and Aboriginal peoples first, by providing procedural protections to s. 35 rights, and second, by encouraging negotiation and just settlements as an alternative to the cost, delay and acrimony of litigating s. 35 infringement claims (*Clyde River*, at para. 1; *Haida Nation*, at paras. 14 and 32; *Mikisew Cree*, at para. 63).

27 The duty to consult has been recognized in a variety of contexts. For example, in *Haida Nation*, this Court recognized a duty to consult when the Crown contemplated the replacement and transfer of tree farm licences that had the potential to affect asserted but unproven Aboriginal rights. In *Mikisew Cree*, the Court recognized that the contemplation of “taking up”

lands under Treaty No. 8 could adversely affect the Mikisew's rights under the treaty and thus required consultation. Crown conduct need not have an immediate impact on lands and resources to trigger the duty to consult. This Court has recognized that "high-level management decisions or structural changes to [a] resource's management" may also trigger a consultative duty (*Carrier Sekani*, at para. 47; see also para. 44). However, to date, the duty to consult has only been applied to executive conduct and conduct taken on behalf of the executive.

28 The Mikisew's treaty rights are protected under s. 35 of the *Constitution Act, 1982*, and the Crown's dealings with those rights engage the honour of the Crown. Here, the Mikisew argue that their hunting, trapping, and fishing rights under Treaty No. 8 may be adversely affected by the Crown's conduct. This Court has repeatedly found that the honour of the Crown governs treaty making and implementation, and requires the Crown to act in a way that accomplishes the intended purposes of treaties and solemn promises it makes to Aboriginal peoples (*Manitoba Metis*, at paras. 73 and 75; *Mikisew Cree*, at para. 51; *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 44; *Badger*, at paras. 41 and 47). Treaty agreements are sacred; it is always assumed that the Crown intends to fulfill its promises. No appearance of "sharp dealing" will be permitted (*Badger*, at para. 41).

29 However, the question in this appeal is whether the honour of the Crown gives rise to a justiciable duty to consult when ministers develop legislation that could adversely affect the Mikisew's treaty rights. When confronted with a novel case like this, the Court must determine whether the duty to consult is the appropriate means to uphold the honour of the Crown. This Court has explicitly left open the question of whether the law-making process is "Crown conduct" that triggers the duty to consult (*Carrier Sekani*, at para. 44; *Clyde River*, at para. 28). I turn to analyzing this issue now.

[The law-making process, including the conduct of ministers in the development of legislation, does not trigger the duty to consult. Applying the duty to consult doctrine during the law-making process would lead to significant incursion into the workings of the legislature, in conflict with the essential constitutional principle of the separation of powers. Legislation cannot be challenged on the basis that the legislature failed to fulfil the duty to consult. However, as held in *Sparrow*, where there has been a prima facie infringement of a s. 35 right, an important part of the justification inquiry is whether there was consultation on the impugned measure.]

ABELLA AND MARTIN JJ. (CONCURRING)

[Judicial review in the Federal Court is not available for the federal ministers' action in the parliamentary process, but the enactment of legislation with the potential to adversely affect s. 35 rights does give rise to a duty to consult, and legislation enacted in breach of that duty may be challenged directly for relief.]

BROWN J. (CONCURRING)

[The Federal Court did not have jurisdiction to consider the application for judicial review. The law-making process, as an exercise of legislative power, is immune from judicial interference.]

ROWE J. (MOLDAVER AND CÔTÉ JJ., CONCURRING)

148 I concur with the reasons of Justice Brown. In particular, I would adopt his analysis

with respect to the lack of jurisdiction of the Federal Court to conduct the review under the *Federal Courts Act*, R.S.C. 1985, c. F-7; the distinction between the Crown and the legislature; the preparation of legislation as a legislative function; the separation of powers, notably between the legislature and the judiciary; and the critical importance of maintaining parliamentary privilege.

149 To this I would add three main points. First, contrary to submissions made by the appellant Mikisew Cree First Nation, the fact that the duty to consult has not been recognized as a procedural requirement in the legislative process does not leave Aboriginal claimants without effective means to have their rights, which are protected under s. 35 of the *Constitution Act, 1982*, vindicated by the courts. Second, recognizing a constitutionally mandated duty to consult with Indigenous peoples during the process of preparing legislation (and other matters to go before the legislature for consideration, notably budgets) would be highly disruptive to the carrying out of that work. Finally, an additional and serious consequence to the appellant's suggested course of action would be the interventionist role that the courts would be called upon to play in order to supervise interactions between Indigenous parties and those preparing legislation (and other measures) for consideration by Parliament and by provincial legislatures.

### **I. Effective Means Exist to Vindicate and Protect Rights Under Section 35**

152 ...The appellant asks this Court to recognize that the duty to consult is triggered by the preparation of legislation, in other words, at the policy development stage of law making. On a practical level, this can be seen as moving the procedural duty first recognized in *Haida Nation* from executive decision making, either through the operation of legislation, or otherwise (*Rio Tinto*, at para. 43), all the way to the initial stages of the legislative process. As the law stands, the avenue by which aggrieved Aboriginal rights holders can challenge the constitutionality of legislation under s. 35 is through the infringement/justification framework laid out by this Court in *Sparrow*, as affirmed recently in *Tsilhqot'in* (see paras. 118-25). The Mikisew's proposal would short-circuit this process by mandating that consultation occur before any ink is spilled in the drafting of a bill. All legislation that could potentially have an adverse effect on an Aboriginal right or claim would be presumptively unconstitutional unless adequate consultation had occurred. Practically, this would transform pre-legislative consultation from a factor in the *Sparrow* framework (as described below), to a constitutional requirement. Such consultation would be not only with proven rights holders, but with anyone with an unproven Aboriginal interest that might be adversely impacted by contemplated legislation.

153 It is not warranted to extend the law in this way. Section 35 rights are not absolute. Like other provisions of the *Constitution Act, 1982*, s. 35 is both supported and confined by broader constitutional principles. The honour of the Crown arises from the fiduciary duty that Canada owes to Indigenous peoples following the assertion of sovereignty; it is an overarching guide to Canada's dealings with Indigenous peoples: *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, at para. 24, quoted with approval in *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, at para. 66. The current jurisprudence provides for protection and vindication of Aboriginal rights *and* for upholding the constitutional principles of parliamentary sovereignty and the separation of powers. It is important to continue to do both. This can be done while upholding the honour of the Crown.

154 Legislation said to infringe an Aboriginal or treaty right can be challenged under the infringement/justification framework in *Sparrow*. To establish a s. 35 violation, a party must first demonstrate that it holds an Aboriginal right that remains unextinguished as of the enactment of the *Constitution Act, 1982* (*R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Sappier*, 2006 SCC 54), or a treaty right (*R. v. Badger*, [1996] 1 S.C.R. 771; *Delgamuukw*). Next, the party must establish that there has been a *prima facie* infringement of that right by way of an unreasonable limitation, undue hardship, or the denial of the preferred means of exercising the right: (*Sparrow*, at pp. 1112-13). Once a *prima facie* infringement has been established, the burden shifts to the Crown to show that the interference was based on a valid legislative objective and that the interference was consistent with the Crown's honour and fiduciary duty to Indigenous peoples. Along with other factors, including compensation and minimizing the infringement, any prior consultation is considered in determining whether the infringement was justified. It is settled jurisprudence that where a right is infringed and where that infringement has not been justified (to the requisite legal standard), then the courts will grant a substantive remedy to prevent the infringement or (if that is not possible) to mitigate its consequences for those whose s. 35 rights were infringed. In the case of infringing legislation, provisions found not to be justified will be a nullity and will not authorize any regulatory action (P.W. Hogg, *Constitutional Law of Canada*, (5th ed. (loose-leaf), at p. 28-62)...

156 I turn now to the duty to consult recognized in *Haida Nation*. The duty to consult arises when three conditions are met. First, the Crown must have knowledge, actual or constructive, of a potential Aboriginal right or claim. Second, there must be Crown conduct or a decision that is contemplated. Finally, the conduct must have the potential to adversely affect an Aboriginal right or claim. On the part of the Crown, the duty to consult serves two distinct objectives: first is a fact-finding function, as through consultation the Crown learns about the content of the interest or right, and how the proposed Crown conduct would impact that interest or right. The second objective is practical; the Crown must consider whether and how the Aboriginal interests should be accommodated. The Crown must approach the process with a view to reconciling interests. Where it is shown that the duty to consult has not been fulfilled, the decision in question will be quashed and, in effect, the decision maker will be told to “go back and do it again”, this time with adequate consultation. Where consultation has been adequate, but the duty to accommodate has not been fulfilled, various remedies can arise, both procedural and substantive.

[...]

158 ...The appellants submit that the reduction in federal environmental oversight “profoundly affects” treaty rights by removing an environmental assessment process that would trigger the duty to consult (A.F., at para. 13). However, this is not the type of adverse effect that was contemplated in *Haida Nation* and subsequent jurisprudence. What is protected by s. 35 is the Aboriginal or treaty right itself. A specific set of arrangements for environmental regulation is not equivalent to a s. 35 right, and in particular is not equivalent to the treaty right relied on by the Mikisew in this case. As this Court stated in *Rio Tinto*: “the definition of what constitutes an adverse effect [does not] extend to adverse impacts on the negotiating position of an Aboriginal group” (para. 50). The adverse impact must be to the future exercise of the *right itself* (para. 46).

159 In summary, when legislation has been adopted, those who assert that the effect of the



legislation is to infringe s. 35 rights have their remedies under *Sparrow*. Those who assert that government decisions made pursuant to the legislation's authority will adversely affect their claims will have their remedies under *Haida Nation*. Other Crown conduct beyond decisions made pursuant to statutory authority may also attract the duty to consult: *Rio Tinto*, at para. 43. Where new situations arise that require the adaptation or extension of this jurisprudence, the courts provide a means for such development of the law. But, no such requirement has been shown on the facts of this case.

## II. Consequences for the Separation of Powers

[Rowe J lists the many steps involved in the process of preparing legislation]

164 The first 16 steps involved in the preparation of legislation show that this is not a simple process. Rather, it is a highly complex process involving multiple actors across government. Imposing a duty to consult at this stage could effectively grind the day-to-day internal operation of government to a halt. What is now complex and difficult could become drawn out and dysfunctional. Inevitably, disputes would arise about the way that this obligation would be fulfilled. This is why the separation of powers operates the way it does. The courts are ill-equipped to deal with the procedural complexities of the legislative process....

166 The careful reader of the foregoing list of 30 steps will have noted a reference to "policy consultations" in step 1. As a matter of practice and in furtherance of good public administration, consultation on policy options in the preparation of legislation is very often undertaken. But, it is not constitutionally required.

167 Similarly, I would note again that under the jurisprudence, consultation is a factor in the justification of any s. 35 infringement under *Sparrow*. Thus, where an infringement of rights protected under s. 35 is possible by virtue of the adoption of legislation, there is strong incentive to consult. As mentioned above, it is fundamentally different to impose a constitutionally mandated duty to consult, the operation of that would inevitably be supervised by the courts. If Parliament or a provincial legislature wishes to bind itself to a manner and form requirement incorporating the duty to consult Indigenous peoples before the passing of legislation, it is free to do so (Hogg, at p. 12-12). But the courts will not infringe on the discretion of legislatures by imposing additional procedural requirements on legislative bodies (*Authorson (Litigation Guardian of) v. Canada (Attorney General)*, 2003 SCC 39).

168 Finally, I note that legislation itself will not ordinarily give rise to an infringement of rights under s. 35. When it does, an infringement claim may be brought under *Sparrow*. Rather, what is ordinarily the case is that it is *Crown conduct*, whether through the exercise of authority conferred by legislation, or by its own authority, that gives rise to an infringement of rights or to adverse effects to a claimed right. In such instances, *Haida Nation* and the cases following it impose a duty to consult and, where necessary, to accommodate. With respect to the duty to consult, the Crown's actions are reviewable by the courts under the general principles of judicial review: *Haida Nation*. These principles do not allow for courts to review decisions of a legislative nature on grounds of procedural fairness (*Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735, at pp. 758-59). As a general rule, no duty of procedural fairness is owed by the government in the exercise of any legislative function (*Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525 at p. 558; *Wells v.*

*Newfoundland*, [1999] 3 S.C.R. 199, at para. 59; *Authorson*, at para. 41).

### **III. The Role of the Court**

169 ...I agree with Justice Brown's discussion on the impact of imposing a duty to consult on the separation of powers.

170 I would add the following point. If the courts were to impose a duty to consult on the preparation of legislation, would not the next logical step be for the courts to impose a duty to consult on legislatures in their consideration of legislation? In such an eventuality, one would have to situate "consultations" somewhere in the sequence of First Reading, Second Reading, Committee Stage, Report Stage, Third Reading, Royal Assent. If a legislature chooses to participate in consultation with Indigenous peoples pursuant to *Sparrow*, at what stage that consultation takes place is a matter of discretion. Yet the trial judge in this case suggested just such a remedy — that affected groups would be able to make submissions in Parliament. The trial judge's order stated that the duty arose "at the time that each of the [bills] was introduced into Parliament" (2014 FC 1244, 470 F.T.R. 243 (F.C.), at para. 112. Such a result offends the separation of powers and would necessarily engage the courts in regulating the exercise by Parliament and legislatures of their powers and privileges. That would be a profound change in our system of government.

### **IV. Conclusion**

171 This brings me full circle, back to whether there is a "gap" in the jurisprudence that needs to be filled. As I have set out above, no such gap exists. Vindicating s. 35 rights does not require imposition of a duty to consult in the preparation of legislation. Indeed, the imposition of such a duty would be contrary to the distinction between the Crown and the legislature. It would offend the separation of powers. It would encroach on parliamentary privilege. It would involve the courts in supervising matters that they have always held back from doing. In short, imposing such a duty would not provide needed protection for s. 35 rights. Rather, it would offend foundational constitutional principles and create rather than resolve problems.

## 4. FREEDOM OF RELIGION

# KTUNAXA NATION V BRITISH COLUMBIA (FORESTS, LANDS AND NATURAL RESOURCE OPERATIONS)

2017 SCC 54, [2017] 2 SCR 386

[The appellants represent the Ktunaxa people. The Ktunaxa’s traditional territories include an area called Qat’muk, located in a valley in southeastern British Columbia. This area is spiritually significant to the Ktunaxa. It is home to an important population of grizzly bears, and to Grizzly Bear Spirit, or Kławła Tukłakʔis, “a principal spirit within Ktunaxa religious beliefs and cosmology.”

The respondent is Glacier Resorts Ltd. (“Glacier Resorts”). In 1991, Glacier resorts filed a formal proposal to build a year-round ski resort in Qat’muk. For more than two decades, Glacier Resorts negotiated with the BC government and stakeholders, including the Ktunaxa, on the terms and conditions of the development. Early in the process the Ktunaxa informed Glacier Resorts of the spiritual significance of Qat’muk, as well as the presence of Kławła Tukłakʔis. In response, Glacier Resorts made significant changes to the planned development. These changes did not completely satisfy the Ktunaxa. Consultations continued. In 2009, the Ktunaxa took the uncompromising position that development would drive Kławła Tukłakʔis from Qat’muk and irrevocably impair their religious beliefs and practices (the “Late-2009 Claim”). In November 2010 the Ktunaxa issued the “Qat’muk Declaration”, which, among other things, mapped an area in which the Ktunaxa would not permit development. The mapped area included land vital to the resort’s construction and operation. In 2012 the Minister signed a Master Development Agreement with Glacier Resorts Ltd., allowing development to proceed despite the Ktunaxa’s claim.]

THE CHIEF JUSTICE AND ROWE J.

(Abella, Karakatsanis, Wagner, Gascon, and Brown JJ., concurring)

[...]

- [57] A. Did the Minister’s decision violate the Ktunaxa’s freedom of conscience and religion?
- B. Was the Minister’s decision that the Crown had met its duty to consult and accommodate under s. 35 of the *Constitution Act, 1982* reasonable?

V. Analysis

- A. *Did the Minister’s Decision Violate the Ktunaxa’s Freedom of Conscience and Religion?*

(1) The Claim

[58] The Ktunaxa contend that the Minister’s decision to allow the Glacier Resorts project to proceed violates their right to freedom of conscience and religion protected by s. 2(a) of the *Charter*. This claim is asserted independently from the Ktunaxa’s s. 35 claim. Even if the Minister undertook adequate consultation under s. 35 of the *Constitution Act, 1982*, his decision could be impeached on the ground that it violated the Ktunaxa’s *Charter* guarantee of freedom of religion. We note that with respect to the s. 2(a) claim, the Ktunaxa stand in the same position as non-Aboriginal litigants.

[59] The Ktunaxa assert that the project, and in particular permanent overnight accommodation, will drive Grizzly Bear Spirit from Qat’muk. As Grizzly Bear Spirit is central to Ktunaxa religious beliefs and practices, its departure, they say, would remove the basis of their beliefs and render their practices futile. The Ktunaxa argue that the vitality of their religious community depends on maintaining the presence of Grizzly Bear Spirit in Qat’muk.

[60] The Ktunaxa fault the Minister for not having considered their right to freedom of religion in the course of his decision. The Ktunaxa raised the potential breach of s. 2(a) before the Minister. Nevertheless, the Minister’s Rationale for approving the Jumbo Glacier Resort did not analyze the s. 2(a) claim. The Minister should have discussed the s. 2(a) claim. However, his failure to conduct an analysis of the Ktunaxa’s right to freedom of religion is immaterial because the claim falls outside the scope of s. 2(a). This was the finding of both the chambers judge and the Court of Appeal and we agree, though for somewhat different reasons.

(2) The Scope of Freedom of Religion

[61] The first step where a claim is made that a law or governmental act violates freedom of religion is to determine whether the claim falls within the scope of s. 2(a). If not, there is no need to consider whether the decision represents a proportionate balance between freedom of religion and other considerations: *Amselem*, at para. 181.

[62] The seminal case on the scope of the *Charter* guarantee of freedom of religion is this Court’s decision in *Big M Drug Mart*. The majority of the Court, per Justice Dickson (as he then was), defined s. 2(a) as protecting “the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination” (p. 336).

[63] So defined, s. 2(a) has two aspects — the freedom to hold religious beliefs and the freedom to manifest those beliefs. This definition has been adopted in subsequent cases: *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (CanLII), [2015] 1 S.C.R. 613, at para. 58; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 (CanLII), [2015] 2 S.C.R. 3, at para. 68; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 (CanLII), [2013] 1 S.C.R. 467, at para. 159; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 (CanLII), [2006] 1 S.C.R. 256, at para. 32; *Amselem*, at para. 40.

[64] These two aspects of the right to freedom of religion — the freedom to hold a religious belief and the freedom to manifest it — are reflected in international human rights law. Article

18 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948) (“UDHR”), first defined the right in international law in these terms: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

[65] Similarly, art. 18(1) of the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 (“ICCPR”), defined the right to freedom of religion as consisting of “freedom to have or to adopt a religion or belief of [one’s] choice” and “freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching”. The relevance of art. 18(1) of the ICCPR to s. 2(a) of the *Charter* was considered by a noted human rights jurist, Tarnopolsky J.A., in *R. v. Videoflicks Ltd.* (1984), 1984 CanLII 44 (ON CA), 48 O.R. (2d) 395 (C.A.). He observed that art. 18(1) defined freedom of religion “as including not only the right to have or adopt a religion or belief of one’s choice, but also to be able to ‘manifest’ the religion or belief” (p. 421 (emphasis deleted)), and added that s. 2(a) of the *Charter* — then a new and judicially unconsidered feature of Canada’s Constitution — should be “interpreted in conformity with our international obligations” (p. 420). On further appeal to this Court, Dickson C.J. approved Tarnopolsky J.A.’s approach to s. 2(a), noting that his definition of freedom of religion “to include the freedom to manifest and practice one’s religious beliefs . . . anticipated conclusions which were reached by this Court in the *Big M Drug Mart Ltd.* case”: *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713, at p. 735. Later, in *Reference re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, at p. 349, Dickson C.J. proposed, as Tarnopolsky J.A. had done, that the *Charter* be presumed to provide at least as great a level of protection as is found in Canada’s international human rights obligations. The Court has since adopted this interpretive presumption: *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 (CanLII), [2007] 2 S.C.R. 391, at para. 70; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 (CanLII), [2013] 3 S.C.R. 157, at paras. 22-23 and 25; *India v. Badesha*, 2017 SCC 44 (CanLII), [2017] 2 S.C.R. 127, at para. 38.

[66] The two aspects of freedom of religion enunciated in the UDHR and ICCPR are also found in international human rights instruments to which Canada is not a party. Article 9(1) of the *European Convention on Human Rights*, 213 U.N.T.S. 221, recognizes everyone’s right to “freedom of thought, conscience and religion” including “freedom . . . to manifest [one’s] religion or belief, in worship, teaching, practice and observance”. The *American Convention on Human Rights*, 1144 U.N.T.S. 123, provides, at art. 12(1), that “[e]veryone has the right to freedom of conscience and of religion” including “freedom to profess or disseminate one’s religion or beliefs”, while art. 12(3) indicates that the “[f]reedom to manifest one’s religion and beliefs” may be subject only to lawful limitations. While these instruments are not binding on Canada and therefore do not attract the presumption of conformity, they are nevertheless important illustrations of how freedom of religion is conceived around the world.

[67] The scope of freedom of religion in these instruments is expressed in terms of the right’s two aspects: the freedom to believe and the freedom to manifest belief. This Court’s definition from *Big M Drug Mart*, consistently applied in later cases, is in keeping with this conception of the right’s scope. The question, then, is whether the Ktunaxa’s claim falls within that scope.

(3) Application to This Case

[68] To establish an infringement of the right to freedom of religion, the claimant must demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned state conduct interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief: see *Multani*, at para. 34.

[69] In this case, it is undisputed that the Ktunaxa sincerely believe in the existence and importance of Grizzly Bear Spirit. They also believe that permanent development in Qat'muk will drive this spirit from that place. The chambers judge indicated that Mr. Luke came to this belief in 2004 but whether this belief is ancient or recent plays no part in our s. 2(a) analysis. The *Charter* protects all sincere religious beliefs and practices, old or new.

[70] The second part of the test, however, is not met in this case. This stage of the analysis requires an objective analysis of the interference caused by the impugned state action: *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7 (CanLII), [2012] 1 S.C.R. 235, at para. 24. The Ktunaxa must show that the Minister's decision to approve the development interferes either with their freedom to believe in Grizzly Bear Spirit or their freedom to manifest that belief. But the Minister's decision does neither of those things. This case is not concerned with either the freedom to hold a religious belief or to manifest that belief. The claim is rather that s. 2(a) of the *Charter* protects the presence of Grizzly Bear Spirit in Qat'muk. This is a novel claim and invites this Court to extend s. 2(a) beyond the scope recognized in our law.

[71] We would decline this invitation. The state's duty under s. 2(a) is not to protect the object of beliefs, such as Grizzly Bear Spirit. Rather, the state's duty is to protect everyone's freedom to hold such beliefs and to manifest them in worship and practice or by teaching and dissemination. In short, the *Charter* protects the freedom to worship, but does not protect the spiritual focal point of worship. We have been directed to no authority that supports the proposition that s. 2(a) protects the latter, rather than individuals' liberty to hold a belief and to manifest that belief. Section 2(a) protects the freedom to pursue practices, like the wearing of a kirpan in *Multani* or refusing to be photographed in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (CanLII), [2009] 2 S.C.R. 567. And s. 2(a) protects the right to freely hold the religious beliefs that motivate such practices. In this case, however, the appellants are not seeking protection for the freedom to believe in Grizzly Bear Spirit or to pursue practices related to it. Rather, they seek to protect Grizzly Bear Spirit itself and the subjective spiritual meaning they derive from it. That claim is beyond the scope of s. 2(a).

[72] The extension of s. 2(a) proposed by the Ktunaxa would put deeply held personal beliefs under judicial scrutiny. Adjudicating how exactly a spirit is to be protected would require the state and its courts to assess the content and merits of religious beliefs. In *Amslem*, this Court chose to protect *any* sincerely held belief rather than examining the specific merits of religious beliefs:

In my view, the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious

requirement, “obligation”, precept, “commandment”, custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.

(para. 50, per Iacobucci J.)

The Court in *Amselem* concluded that such an inquiry into profoundly personal beliefs would be inconsistent with the principles underlying freedom of religion (para. 49).

[73] The Ktunaxa argue that the *Big M Drug Mart* definition of the s. 2(a) guarantee has been subsequently enriched by an understanding that freedom of religion has a communal aspect, and that the state cannot act in a way that constrains or destroys the communal dimension of a religion. Grizzly Bear Spirit’s continued occupation of Qat’muk is essential to the communal aspect of Ktunaxa religious beliefs and practices, they assert. State action that drives Grizzly Bear Spirit from Qat’muk will, the Ktunaxa say, “constrain” or “interfere” with — indeed destroy — the communal aspect of s. 2(a) protection.

[74] The difficulty with this argument is that the communal aspect of the claim is also confined to the scope of freedom of religion under s. 2(a). It is true that freedom of religion under s. 2(a) has a communal aspect: *Loyola; Hutterian Brethren*, at para. 89; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 (CanLII), [2004] 2 S.C.R. 650. But the communal aspects of freedom of religion do not, and should not, extend s. 2(a)’s protection beyond the freedom to have beliefs and the freedom to manifest them.

[75] We conclude that s. 2(a) protects the freedom to have and manifest religious beliefs, and that the Ktunaxa’s claim does not fall within these parameters. It is therefore unnecessary to consider whether the Minister’s decision represents a reasonable balance between freedom of religion and other considerations.

B. *Was the Minister’s Decision That the Crown Had Met Its Duty to Consult and Accommodate Under Section 35 of the Constitution Act, 1982 Reasonable?*

[...]

[The majority Justices held that, contrary to the appellant’s assertions, the Minister’s conclusion that the Crown had met its duty to consolidate was reasonable. The Minister engaged in deep consultation on the spiritual claim prior to the Late-2009 Claim, and the changed the development plan in order accommodate the Ktunaxa spiritual claim. The Minister continued to attempt to consult for two years after the Late-2009 Claim, after which point it was clear that, given the position of the Ktunaxa, more consultation would be fruitless.]

Moldaver J. (Côté concurring) —

[117] I agree with the Chief Justice and Rowe J. that the Minister reasonably concluded that the duty to consult and accommodate the Ktunaxa under s. 35 was met. Respectfully, however, I disagree with my colleagues’ s. 2 (a) analysis. In my view, the Ktunaxa’s right to



religious freedom was infringed by the Minister's decision to approve the development of the ski resort proposed by the respondent Glacier Resorts Ltd. [...]

[124] As indicated, the s. 2(a) inquiry focuses on whether state action has interfered with the ability of a person to act in accordance with his or her religious beliefs or practices. This Court has recognized that religious beliefs are “deeply held personal convictions . . . integrally linked to one’s self-definition and spiritual fulfilment”, while religious practices are those that “allow individuals to foster a connection with the divine” (*Amselem*, at para. 39). In my view, where a person’s religious belief no longer provides spiritual fulfilment, or where the person’s religious practice no longer allows him or her to foster a connection with the divine, that person cannot act in accordance with his or her *religious* beliefs or practices, as they have lost all religious significance. Though an individual could still publicly profess a specific belief, or act out a given ritual, it would hold no religious significance for him or her.

[125] The same holds true of a person’s ability to pass on beliefs and practices to future generations. This Court has recognized that the ability of a religious community’s members to pass on their beliefs to their children is an essential aspect of religious freedom protected under s. 2(a) (*Loyola*, at paras. 64 and 67). Where state action has rendered a certain belief or practice devoid of spiritual significance, this interferes with one’s ability to pass on that tradition to future generations, as there would be no reason to continue a tradition that lacks spiritual significance.

[126] Therefore, where the spiritual significance of beliefs or practices has been taken away by state action, this interferes with an individual’s ability to act in accordance with his or her religious beliefs or practices — whether by professing a belief, engaging in a ritual, or passing traditions on to future generations.

[...]

[129] The Chief Justice and Rowe J. take a different approach. They maintain that the *Charter* protects the “freedom to worship”, but not what they call the “spiritual focal point of worship” (para. 71). If I understand my colleagues’ approach correctly, s. 2 (a) of the *Charter* protects *only* the freedom to hold beliefs and manifest them through worship and practice (para. 71). In their view, even where the effect of state action is to render beliefs and practices devoid of all spiritual significance, claimants still have the freedom to hold beliefs and manifest those beliefs through practices, and there is therefore no interference with their ability to act in accordance with their beliefs. Thus, under my colleagues’ approach, as long as a Sikh student can carry a kirpan into a school (*Multani*), Orthodox Jews can erect a personal succah (*Amselem*), or the Ktunaxa have the ability to conduct ceremonies and rituals, there is no infringement of s. 2 (a), even where the effect of state action is to reduce these acts to empty gestures.

[130] I cannot accept such a restrictive reading of s. 2 (a). As I have indicated, where a belief or practice is rendered devoid of spiritual significance, there is obviously an interference with the ability to act in accordance with that *religious* belief or practice. The scope of s. 2 (a) is therefore not limited to the freedom to hold a belief and manifest that belief through religious practices. Rather, as this Court noted in *Amselem*, “[i]t is the religious or spiritual essence of an action” that attracts protection under s. 2 (a) (para. 47). In my view, the approach adopted by my colleagues does not engage with this crucial point. It does not take into account that if a belief or practice becomes devoid of spiritual significance, it is highly unlikely that a person would continue to hold those beliefs or engage in those practices. Indeed, that person would have no reason to do so. With respect, my colleagues’ approach amounts to protecting empty gestures and hollow rituals, rather than guarding against state conduct that interferes with “profoundly personal beliefs”, the true purpose of s. 2 (a)’s protection (*Edwards Books*, at p. 759).

[131] This approach also risks excluding Indigenous religious freedom claims involving land from the scope of s. 2 (a)’s protection. As indicated, there is an inextricable link between spirituality and land in Indigenous religious traditions. In this context, state action that impacts land can sever the spiritual connection to the divine, rendering Indigenous beliefs and practices devoid of their spiritual significance. My colleagues have not taken this unique and central feature of Indigenous religion into account. Their approach therefore risks foreclosing the protections of s. 2 (a) of the *Charter* to substantial elements of Indigenous religious traditions.

[132] I turn now to the facts of this case. The Ktunaxa’s religion encompasses multiple spirits and several places of spiritual significance (see, e.g., A.R., vol. II, at pp. 119 and 197). The Ktunaxa sincerely believe that Qat’muk is a highly sacred site, home to a very important spirit — Grizzly Bear Spirit. The Ktunaxa assert that Grizzly Bear Spirit provides them with spiritual guidance and assistance. They claim that the proposed development would drive Grizzly Bear Spirit out, sever their spiritual connection with Qat’muk, and render their beliefs in Grizzly Bear Spirit devoid of spiritual significance.

[133] The Chief Justice and Rowe J. frame the Ktunaxa’s religious freedom claim as one that seeks to protect the “spiritual focal point of worship” — that is, Grizzly Bear Spirit (para. 71). I disagree. The Ktunaxa are seeking protection of their ability to act in accordance with their religious beliefs and practices, which falls squarely within the scope of s. 2(a). If the Ktunaxa’s religious beliefs in Grizzly Bear Spirit become entirely devoid of religious significance, their prayers, ceremonies and rituals in recognition of Grizzly Bear Spirit would become nothing more than empty words and hollow gestures. There would be no reason for them to continue engaging in these acts, as they would be devoid of any spiritual significance. Members of the Ktunaxa assert that without their spiritual connection to Qat’muk and to Grizzly Bear Spirit, they would be unable to pass on their beliefs and practices to future generations in any meaningful way, as illustrated in the following excerpt from an affidavit quoted in the appellants’ factum:

If the proposed resort were to go ahead in the heart of Qat'muk, I do not see how I can meaningfully speak to my grandchildren about Grizzly Bear Spirit. How can I teach them his songs, what to ask from him, if he no longer has a place recognizable to us and respected as his within our world? [para. 28]

[134] Viewed this way, I am satisfied that the Minister's decision approving the proposed development interferes with the Ktunaxa's ability to act in accordance with their religious beliefs or practices in a manner that is more than trivial or insubstantial. The decision therefore amounts to an infringement of the Ktunaxa's freedom of religion under s. 2(a).

[...]

[Moldaver J. determined, however, that the Minister's decision was reasonable in the circumstances. In particular, it "limited the Ktunaxa's [s. 2(a)] right 'as little as reasonably possible' given the statutory objectives and amounted to a proportionate balancing."]

# LAW SOCIETY OF BRITISH COLUMBIA V TRINITY WESTERN UNIVERSITY

2018 SCC 32, [2018] SCJ No 32

[Trinity Western University (TWU), an evangelical Christian postsecondary institution, sought to open a law school that would require its students and faculty to adhere to a religiously based code of conduct prohibiting “sexual intimacy that violates the sacredness of marriage between a man and a woman”. The Law Society of British Columbia (LSBC) is the regulator of the legal profession in British Columbia. It exercises authority under a statute, the *Legal Profession Act*, S.B.C. 1998, c. 9 (*LPA*). This appeal concerns a decision of the LCBC not to recognize TWU’s proposed law school. While the appeal also raises issues of statutory interpretation and administrative law, the excerpt below is confined to the issue whether the LSBC’s decision unreasonably limited rights under s. 2(a) of the Charter.]

ABELLA, MOLDAVER, KARAKATSANIS, WAGNER AND GASCON JJ. —

### III. Overview

[3] In our respectful view, the LSBC’s decision not to recognize TWU’s proposed law school represents a proportionate balance between the limitation on the *Charter* right at issue and the statutory objectives governing the LSBC. The LSBC’s decision was therefore reasonable.

[...]

[58] Under the precedent established by this Court in *Doré* and *Loyola*, the preliminary question is whether the administrative decision engages the *Charter* by limiting *Charter* protections — both rights and values (*Loyola*, at para. 39). If so, the question becomes “whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play” (*Doré*, at para. 57; *Loyola*, at para. 39). The extent of the impact on the *Charter* protection must be proportionate in light of the statutory objectives.

[...]

#### (1) Whether Freedom of Religion Is Engaged

[...]

[61] TWU is a private religious institution created to support the collective religious practices of its members. For the reasons set out below, we find that the religious freedom of members of the TWU community is limited by the LSBC’s decision. It is unnecessary to determine whether TWU, as an institution, possesses rights under s. 2(a) of the *Charter*.

[...]

[63] Section 2(a) of the *Charter* is limited when the claimant demonstrates two things: first, that he or she sincerely believes in a practice or belief that has a nexus with religion; and second, that the impugned state conduct interferes, in a manner that is more than trivial or insubstantial, with his or her ability to act in accordance with that practice or belief (*Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 65; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386, at para. 68). If, based on this test, s. 2(a) is not engaged, there is nothing to balance.

[64] Although this Court’s interpretation of freedom of religion reflects the notion of personal choice and individual autonomy and freedom, religion is about both religious beliefs and religious relationships (*Amselem*, at para. 40; *Loyola*, at para. 59, quoting Justice LeBel in *Hutterian Brethren*, at para. 182). The protection of individual religious rights under s. 2(a) must therefore account for the socially embedded nature of religious belief, as well as the “deep linkages between this belief and its manifestation through communal institutions and traditions” (*Loyola*, at para. 60). In other words, religious freedom is individual, but also “profoundly communitarian” (*Hutterian Brethren*, at para. 89). The ability of religious adherents to come together and create cohesive communities of belief and practice is an important aspect of religious freedom under s. 2(a).

[65] On the sincerity of the belief, the respondents have articulated the religious interest at stake in various ways. In their factum, they contend that “[t]he sincere beliefs of evangelical Christians include ‘the belief in the importance of being in an institution with others who either share that belief or are prepared to honour it in their conduct’” (para. 96, quoting *Trinity Western University v. Nova Scotia Barristers’ Society*, 2015 NSSC 25, 381 D.L.R. (4th) 296, at para. 235). Elsewhere they argue that evangelicals believe “they should carry their beliefs into educational communities” and in the value of educating the whole person with a Christian ethos (para. 113).

[66] The affidavit evidence from TWU students focusses primarily on the spiritual growth that is engendered by studying law in a religious learning environment.

[67] There is no doubt evangelical Christians believe that studying in a religious environment can help them grow spiritually. Evangelical Christians carry their religious beliefs and values beyond their private lives and into their work, education, and politics.

[68] TWU seeks to foster this spiritual growth. It was founded on religious principles and was intended to be a religious community, primarily serving Christians. Indeed, the university teaches from a Christian perspective and aims to develop “godly Christian leaders” (R.R., vol. I, at p. 119). TWU’s purpose statement further provides that TWU seeks to promote “total student development through . . . deepened commitment to Jesus Christ and a Christian way of life” (p. 120).

[69] Several alumni of TWU emphasized the spiritual benefits of receiving an education from a Christian perspective in an environment infused with evangelical Christian values. According to Mr. Volkenant, completing his undergraduate studies at TWU gave him “an appreciation

for the importance of integrating [his] Christian faith into all areas of [his] life” (R.R., vol. I, at p. 68). For another alumna, Ms. Jody Winter, attending TWU was about more than obtaining a university education; it was a time of spiritual formation.

[70] Because s. 2(a) protects beliefs which are sincerely held by the claimant, the court must “ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice” (*Amselem*, at para. 52; see also *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 35). It is clear from the record that evangelical members of TWU’s community sincerely believe that studying in a community defined by religious beliefs in which members follow particular religious rules of conduct contributes to their spiritual development. In our view, this is the religious belief or practice implicated by the LSBC’s decision.

[71] This belief is, in turn, supported through the universal adoption of the Covenant. The Covenant “reflects both historic patterns of evangelical practice and widely accepted contemporary evangelical theological convictions” (R.R., vol. IV, at p. 89). A core value at TWU is “obeying the authority of Scripture” (R.R., vol. I, at 121), and the Covenant promotes this compliance. Specifically, it requires TWU community members to “encourage and support other members of the community in their pursuit of these values and ideals” (A.R., vol. III, at p. 402). Thus, the mandatory Covenant helps create an environment in which TWU students can grow spiritually. According to the Covenant:

The University is an interrelated academic community rooted in the evangelical Protestant tradition; it is made up of Christian administrators, faculty and staff who, along with students choosing to study at TWU, covenant together to form a community that strives to live according to biblical precepts, believing that this will optimize the University’s capacity to fulfil its mission and achieve its aspirations. [Emphasis added.]

(A.R., vol. III, at p. 401)

[72] Members of the TWU community have noted that the mandatory Covenant “makes it easier” for them to adhere to their faith, and it creates an environment where their moral discipline is not constantly tested. The relationship between the Covenant and the religious environment at TWU is succinctly set out by Ms. Winter:

I am grateful that students at TWU were asked to refrain from behaviour that was against my religious beliefs. It was easier for me to remain committed to my religious values living in a community like TWU’s, where guidelines were put in place in respect to student behaviour.

(R.R., vol. I, at pp. 59-60)

[73] To summarize, it is clear from this evidence that evangelical Christians believe that studying in an environment defined by religious beliefs in which members follow particular religious rules of conduct enhances the spiritual growth of members of that community. And the Covenant supports the practice of studying in an environment infused with evangelical beliefs.

[74] The next question is whether the LSBC's decision not to approve TWU's law school limits the ability of TWU's community members to act in accordance with these beliefs and practices in a manner that is more than trivial or insubstantial (*Amselem*, at para. 74; *Ktunaxa*, at para. 68). Was this decision "capable of interfering with religious belief or practice" (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759; *Hutterian Brethren*, at para. 34)? This is an objective analysis that looks at the impact on the claimants, rather than the impact of the implicated practices or beliefs *on others* (*S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235, at paras. 23-24; *Ktunaxa*, at para. 70).

[75] By interpreting the public interest in a way that precludes the approval of TWU's law school governed by the mandatory Covenant, the LSBC has interfered with TWU's ability to maintain an approved law school as a religious community defined by its own religious practices. The effect is a limitation on the right of TWU's community members to enhance their spiritual development through studying law in an environment defined by their religious beliefs in which members follow certain religious rules of conduct. Accordingly, their religious rights were engaged by the decision.

[...]

### (3) Proportionate Balancing

[79] In *Doré* and *Loyola*, this Court held that where an administrative decision engages a *Charter* protection, the reviewing court should apply "a *robust* proportionality analysis consistent with administrative law principles" instead of "a literal s. 1 approach" (*Loyola*, at para. 3). Under the *Doré* framework, the administrative decision will be reasonable if it reflects a proportionate balancing of the *Charter* protection with the statutory mandate (see *Doré*, at para. 7; *Loyola*, at para. 32). *Doré's* approach recognizes that an administrative decision-maker, exercising a discretionary power under his or her home statute, typically brings expertise to the balancing of a *Charter* protection with the statutory objectives at stake (*Loyola*, at para. 42; *Doré*, at para. 54). Consequently, the decision-maker is generally in the best position to weigh the *Charter* protections with his or her statutory mandate in light of the specific facts of the case (*Doré*, at para. 54). It follows that deference is warranted when a reviewing court is determining whether the decision reflects a proportionate balance. *Doré* recognizes that there may be more than one outcome that strikes a proportionate balance between *Charter* protections and statutory objectives (*Loyola*, at para. 41). As long as the decision "falls within a range of possible, acceptable outcomes", it will be reasonable (*Doré*, at para. 56). As this Court noted in *Doré*, "there is . . . conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a 'margin of appreciation', or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives" (para. 57).

[80] [...] For a decision to be proportionate, it is not enough for the decision-maker to simply balance the statutory objectives with the *Charter* protection in making its decision. Rather, the reviewing court must be satisfied that the decision *proportionately* balances these factors, that is, that it "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" (*Loyola*, at para. 39). Put another way, the *Charter* protection must be "affected as little as reasonably possible" in light of the applicable statutory objectives

(*Loyola*, at para. 40). When a decision engages the *Charter*, reasonableness and proportionality become synonymous. Simply put, a decision that has a disproportionate impact on *Charter* rights is not reasonable.

[81] The reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives. This does not mean that the administrative decision-maker must choose the option that limits the *Charter* protection *least*. The question for the reviewing court is always whether the decision falls within a range of reasonable outcomes (*Doré*, at para. 57; *Loyola*, at para. 41, citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160). However, if there was an option or avenue *reasonably* open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant statutory objectives, the decision would not fall within a range of reasonable outcomes. This is a highly contextual inquiry.

[82] The reviewing court must also consider how substantial the limitation on the *Charter* protection was compared to the benefits to the furtherance of the statutory objectives in this context (*Loyola*, at para. 68; *Doré*, at para. 56). The *Doré* framework therefore finds “analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing” (*Loyola*, at para. 40). In working “the same justificatory muscles” as the *Oakes* test (*Doré*, at para. 5), the *Doré* analysis ensures that the pursuit of objectives is proportionate. In the context of a challenge to an administrative decision where the constitutionality of the statutory mandate itself is not at issue, the proper inquiry is whether the decision-maker has furthered his or her statutory mandate in a manner that is proportionate to the resulting limitation on the *Charter* right.

[83] We now turn to whether the limitation on the religious freedom of the members of the TWU community is a proportionate one in light of the LSBC’s statutory mandate.

[84] The LSBC was faced with only two options — to approve or reject TWU’s proposed law school. Given the LSBC’s interpretation of its statutory mandate, approving TWU’s proposed law school would not have advanced the relevant statutory objectives, and therefore was not a reasonable possibility that would give effect to *Charter* protections more fully in light of the statutory objectives.

[85] The LSBC’s decision also reasonably balanced the severity of the interference with the *Charter* protection against the benefits to its statutory objectives. To begin, the LSBC’s decision did not limit religious freedom to a significant extent. The LSBC did not deny approval to TWU’s proposed law school in the abstract; rather, it denied a specific proposal that included the mandatory Covenant. Indeed, when the LSBC asked TWU whether it would “consider” amendments to its Covenant, TWU expressed no willingness to compromise on the mandatory nature of the Covenant. The decision therefore only prevents TWU’s community members from attending an approved law school at TWU that is governed by a *mandatory* covenant.

[86] The Court of Appeal described the limitation in this case as “severe” because it precludes graduates of TWU’s proposed law school from practising law in British Columbia (para. 168).



However, the LSBC's decision does not prevent any graduates from being able to practise law in British Columbia. Furthermore, it does not prohibit any evangelical Christians from adhering to the Covenant or associating with those who do. The interference is limited to preventing prospective students from studying law at TWU with a mandatory covenant.

[87] First, the limitation in this case is of minor significance because a mandatory covenant is, on the record before us, not absolutely required for the religious practice at issue: namely, to study law in a Christian learning environment in which people follow certain religious rules of conduct. The decision to refuse to approve TWU's proposed law school with a mandatory covenant only prevents prospective students from studying law in their *optimal* religious learning environment where everyone has to abide by the Covenant.

[88] Second, the interference in this case is limited because the record makes clear that prospective TWU law students view studying law in a learning environment infused with the community's religious beliefs as preferred (rather than necessary) for their spiritual growth. As McLachlin C.J. explained in *Hutterian Brethren*, at para. 89:

There is no magic barometer to measure the seriousness of a particular limit on a religious practice. Religion is a matter of faith, intermingled with culture. It is individual, yet profoundly communitarian. Some aspects of a religion, like prayers and the basic sacraments, may be so sacred that any significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to some adherents than to others. [Emphasis added.]

[89] Attending TWU's proposed law school is said to make it "easier" to practise evangelical beliefs. That attending law at TWU, with a mandatory covenant, is a preference is clear from TWU's own affiants who, like Mr. Volkenant, expressed a desire to attend TWU's proposed law school:

I do not know if I would have chosen to attend TWU law school, but I certainly would have appreciated the option. [Emphasis added.]

(R.R., vol. I, at p. 154)

I am familiar with TWU's proposal for its School of Law. Had this option existed when I was considering law schools, I likely would have applied to it. [Emphasis added.]

(R.R., vol. I, at p. 7)

. . . I am familiar with the proposal put forward by TWU in respect to its School of Law and believe I would have considered attending had this option been available to me. [Emphasis added.]

(R.R., vol. I, at p. 143)

[90] Our point is that, on the record before us, prospective TWU law students effectively admit that they have much less at stake than claimants in many other cases that have come before

this Court (see e.g. *Multani*, at para. 3; *Amselem*, at para. 6; and *Hutterian Brethren*, at para. 7; and *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, at para. 58). Put otherwise, denying someone an option they would merely appreciate certainly falls short of “forced apostasy” (*Hutterian Brethren*, at para. 89).

[91] On the other side of the scale is the extent to which the LSBC’s decision furthered its statutory objectives. As the regulator of the legal profession in British Columbia, its decision must represent a reasonable balance between the benefits to its statutory objectives and the severity of the limitation on *Charter* rights at stake.

[92] It is clear that the decision not to approve TWU’s proposed law school significantly advanced the LSBC’s statutory objectives — to promote and protect the public interest in the administration of justice by preserving and protecting the rights and freedoms of all persons and ensuring the competence of the legal profession (see *LPA*, ss. 3(a) and 3(b)).

[93] First, the decision advances the LSBC’s relevant statutory objectives by maintaining equal access to and diversity in the legal profession. While TWU submits that it “is open to all academically qualified people wishing to live and learn in its religious community” (R.F., at para. 10), the reality is that most LGBTQ people will be deterred from applying to its proposed law school because of the Covenant’s prohibition on sexual activity outside marriage between a man and a woman. As this Court acknowledged in *TWU 2001*, “[a]lthough the Community Standards are expressed in terms of a code of conduct rather than an article of faith, we conclude that a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost” (para. 25). It follows that the 60 law school seats created by TWU’s proposed law school will be effectively closed to the vast majority of LGBTQ students. This barrier to admission may discourage qualified candidates from gaining entry to the legal profession.

[94] TWU submits that even if LGBTQ people are deterred from attending TWU’s law school, there are many other options open to LGBTQ people who wish to attend law school (R.F., at para. 175). Even further, TWU asserts that its law school will result in an overall increase in law school seats, which expands choices for all students (para. 138). The British Columbia Court of Appeal accepted this argument, finding that the negative impact on access to law school by LGBTQ students would be “insignificant in real terms” (para. 179).

[95] Such arguments fail to recognize that even if the net result of TWU’s proposed law school is that more options and opportunities are available to LGBTQ people applying to law school in Canada — which is certainly not a guarantee — this does not change the fact that an entire law school would be closed off to the vast majority of LGBTQ individuals on the basis of their sexual identity. Those who are able to sign the Covenant will be able to apply to 60 *more* law school seats per year, whereas those 60 seats remain effectively *closed* to most LGBTQ people. In short, LGBTQ individuals would have fewer opportunities relative to others. This undermines true equality of access to legal education, and by extension, the legal profession. Substantive equality demands more than just the availability of options and opportunities — it prevents “the violation of essential human dignity and freedom” and “eliminate[s] any possibility of a person being treated in substance as ‘less worthy’ than others” (*Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at para. 138). The public confidence

in the administration of justice may be undermined if the LSBC is seen to approve a law school that effectively bars many LGBTQ people from attending.

[96] Second, the decision furthers the statutory objective — protecting the public interest in the administration of justice by preserving rights and freedoms — by preventing the risk of significant harm to LGBTQ people who attend TWU’s proposed law school. The British Columbia Court of Appeal accepted that if LGBTQ students signed the Covenant to gain access to TWU “they would have to either ‘live a lie to obtain a degree’ and sacrifice important and deeply personal aspects of their lives, or face the prospect of disciplinary action including expulsion” (para. 172). TWU’s Covenant prevents students who are not married to members of the opposite sex from engaging in sexual activity in the privacy of their own bedrooms. It requires non-evangelical LGBTQ students, whom TWU welcomes to its school, to comply with conduct requirements even when they are off-campus, in the privacy of their own homes. Attending TWU’s law school would mean that LGBTQ students would have to deny a crucial component of their identity in the most private and personal of spaces for three years in order to receive a legal education (I.F., *Egale Canada Human Rights Trust* (file No. 37318), at para. 14; *Start Proud and OUTlaws* (file No. 37209), at para. 6).

[97] Despite this, TWU asserts that LGBTQ students will suffer no harm to their dignity or personal identity while enrolled at TWU because the Covenant requires all members of TWU’s community to “treat all persons with dignity, respect and equality, regardless of personal differences” (R.F., at para. 92). However, as this Court recognized in *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, it is not possible “to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood” (para. 123, quoting L’Heureux-Dubé J. in *TWU 2001* in dissent (though not on this point), at para. 69).

[98] LGBTQ students enrolled at TWU’s law school may suffer harm to their dignity and self-worth, confidence and self-esteem, and may experience stigmatization and isolation (see evidence of Dr. Ellen Faulkner in A.R., vol. V, at pp. 828-29 and 834; Dr. Catherine Taylor in A.R., vol. V, at p. 904; Dr. Mary Bryson in A.R., vol. V, at pp. 967-68). The public confidence in the administration of justice may be undermined by the LSBC’s decision to approve a law school that forces some to deny a crucial component of their identity for three years in order to receive a legal education.

[99] The TWU community has the right to determine the rules of conduct which govern its members. Freedom of religion protects the rights of religious adherents to hold and express beliefs through both individual and communal practices. Where a religious practice impacts others, however, this can be taken into account at the balancing stage. The Covenant is a commitment to *enforcing* a religiously based code of conduct, not just in respect of one’s own behaviour, but also in respect of other members of the TWU community (D. Pothier, “An Argument Against Accreditation of Trinity Western University’s Proposed Law School” (2014), 23:1 *Const. Forum Const.* 1, at p. 2). The effect of the mandatory Covenant is to restrict the conduct of others.

[100] The limitation on religious freedom in this case must be understood in light of the reality that conflict between the pursuit of statutory objectives and individual freedoms may be inevitable. As this Court has held, state interferences with religious freedom “must be considered in the context of a multicultural, multi-religious society where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs” (*Hutterian Brethren*, at para. 90; see also *Loyola*, at para. 47). Accordingly, minor limits on religious freedom are often an unavoidable reality of a decision-maker’s pursuit of its statutory mandate in a multicultural and democratic society.

[101] In saying this, we do not dispute that “[d]isagreement and discomfort with the views of others is unavoidable in a free and democratic society” (C.A. reasons, at para. 188), and that a secular state cannot interfere with religious freedom unless it conflicts with or harms overriding public interests (para. 131, citing *Loyola*, at para. 43). But more is at stake here than simply “disagreement and discomfort” with views that some will find offensive. This Court has held that religious freedom can be limited where an individual’s religious beliefs or practices have the effect of “injur[ing] his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own” (*Big M*, at p. 346). Likewise, in *Multani*, the Court held that state interference with religious freedom can be justified “when a person’s freedom to act in accordance with his or her beliefs may cause harm to or interfere with the rights of others” (para. 26). Being required by someone else’s religious beliefs to behave contrary to one’s sexual identity is degrading and disrespectful. Being required to do so offends the public perception that freedom of religion includes freedom from religion.

[102] In the end, it cannot be said that the denial of approval is a serious limitation on the religious rights of members of the TWU community. The LSBC’s decision does not suppress TWU’s religious difference. Except for the limitation we have identified, no evangelical Christian is denied the right to practise his or her religion as and where they choose.

[103] The refusal to approve the proposed law school means that members of the TWU religious community are not free to impose those religious beliefs on fellow law students, since they have an inequitable impact and can cause significant harm. The LSBC chose an interpretation of the public interest in the administration of justice which mandates access to law schools based on merit and diversity, not exclusionary religious practices. The refusal to approve TWU’s proposed law school prevents *concrete*, not abstract, harms to LGBTQ people and to the public in general. The LSBC’s decision ensures that equal access to the legal profession is not undermined and prevents the risk of significant harm to LGBTQ people who feel they have no choice but to attend TWU’s proposed law school. It also maintains public confidence in the legal profession, which could be undermined by the LSBC’s decision to approve a law school that forces LGBTQ people to deny who they are for three years to receive a legal education.

[104] Given the significant benefits to the relevant statutory objectives and the minor significance of the limitation on the *Charter* rights at issue on the facts of this case, and given the absence of any reasonable alternative that would reduce the impact on *Charter* protections while sufficiently furthering those same objectives, the decision to refuse to approve TWU’s proposed law school represents a proportionate balance. In other circumstances, a more serious

limitation may be entitled to greater weight in the balance and change the outcome. But that is not this case.

[105] In our view, the decision made by the LSBC “gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate” (*Loyola*, at para. 39). Therefore, the decision amounted to a proportionate balancing and was reasonable.

## V. Disposition

[106] The resolution of the LSBC to declare that TWU’s proposed law school not be approved is restored. As a result, the appeal from the Court of Appeal for British Columbia is allowed, with costs.

CÔTÉ AND BROWN JJ. (DISSENTING) —

### I. Introduction

[260] One way of understanding this appeal and the appeal in *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33 ... is that they call upon this Court to decide who controls the door to “the public square”. In other words, accepting that the liberal state must foster pluralism by striving to accommodate difference in the public life of civil society, where does that state obligation — that is, where does that public life — begin? With a private denominational university? Or with a judicially reviewable statutory delegate charged by the provincial legislature to regulate the profession and entry thereto in the public interest?

[261] In our view, fundamental constitutional principles and the statutory jurisdiction of the Law Society of British Columbia (“LSBC”), properly interpreted, lead unavoidably to the legal conclusion that the public regulator controls the door to the public square and owes that obligation. The private denominational university, which is not subject to the *Canadian Charter of Rights and Freedoms* and is exempt from provincial human rights legislation, does not. And, in conditioning access to the public square as it has, the regulator has — on this Court’s own jurisprudence — profoundly interfered with the constitutionally guaranteed freedom of a community of co-religionists to insist upon certain moral commitments from those who wish to join the private space within which it pursues its religiously based practices. While, therefore, the LSBC has purported to act in the cause of ensuring equal access to the profession, it has effectively denied that access to a segment of Canadian society, solely on religious grounds. In our respectful view, this unfortunate state of affairs merits judicial intervention, not affirmation.

[...]

### I. *The LSBC Benchers’ Decision Is an Infringement of TWU’s Section 2(a) Charter Rights*

[315] We agree with the majority that the LSBC decision not to approve TWU’s proposed law school infringes the religious freedom of members of the TWU community (Majority Reasons, at paras. 60-75). The LSBC was bound to make its accreditation decision regarding TWU’s

proposed law school in a way that conforms to the *Charter*-protected religious freedom of members of the TWU community who seek to offer and wish to receive a Christian education (*Loyola*, at para. 34). ...

[316] We emphasize, like our colleague McLachlin C.J. (paras. 122 and 124), that freedom of religion under the *Charter*, interpreted broadly and purposively, also captures the freedom of members of the TWU community *to express* their religious beliefs through the Covenant and *to associate* with one another in order to study law in an educational community which reflects their religious beliefs. Religious freedom is “not just about individuals praying alone but about communities of faith living out their traditions and religious lives” (Newman, at p. 9). Freedom of religion is among the “original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order” (*Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, at p. 329, per Rand J.).

[317] It follows, therefore, that we reject our colleague Rowe J.’s proposed narrowing of the scope of activity protected by the right to freedom of religion (paras. 231-34). In our view, looking only to circumstances in which “the claimant sincerely believes that their religion compels them to act” does not begin to account for the scope of activities identified by this Court in *Big M Drug Mart*, at p. 336. As this Court recognized in *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 47, “[i]t is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection.” Not every adherent will “declare religious beliefs openly” because they feel compelled to do so. Nor will every adherent “teach” or “disseminate” religious belief out of compulsion. Rather, they may freely choose to do so.

[318] We agree with the analytical approach set out in the reasons of the majority (at paras. 62 and 63) and McLachlin C.J. (at para. 120): a s. 2(a) *Charter* infringement is made out where a claimant establishes that impugned state conduct interferes, in a manner that is more than trivial or insubstantial, with their ability to act in accordance with a sincere practice or belief that has a nexus with religion (*Amselem*, at paras. 56 and 65; *Multani*, at para. 34; *Loyola*, at para. 134; *Ktunaxa*, at para. 68).

[319] In this case, it is the TWU community’s expression of religious belief through the practice of creating and adhering to a biblically grounded Covenant that is at issue. The Covenant describes TWU as “a community that strives to live according to biblical precepts, believing that this will optimize the University’s capacity to fulfill its mission” (TWU Community Covenant Agreement, reproduced in A.R., vol. III, pp. 401-5, at p. 401). For members of the TWU community, religious belief and education are inextricably linked (TWU Mission Statement; TWU Purpose Statement; TWU Core Values, reproduced in R.R., vol. I, at pp. 119-21). As described in the affidavit evidence of TWU students, the Covenant is a key mechanism for facilitating students’ spiritual development and growth in the Christian faith so as to engender a personal connection with the divine (Affidavit #1 of Brayden Volkenant, July 30, 2014, reproduced in R.R., vol. V, pp. 42-46, at p. 44). Covenanting assists in the creation and strengthening of a religious community which includes all those who study and work at TWU. It fosters their moral and spiritual growth in an academic setting. Members of the TWU community sincerely believe that, as a manifestation of their creed, studying, teaching and working in a post-secondary educational environment where all participants

covenant with those around them — regardless of their personal beliefs — subjectively engenders their personal connection with the divine.

[320] The LSBC decision was “capable of interfering with religious belief or practice” in a manner that was not trivial or insubstantial (*Edwards Books*, at p. 759; *Amselem*, at para. 60). This assessment is an “objective” one (*Hutterian Brethren*, at para. 89), and the distinction between obligatory and non-obligatory practices is irrelevant to determining whether an interference is more than trivial or insubstantial (*Amselem*, at para. 75). The denial of the benefit of LSBC approval in this case negatively impacts the TWU community’s ability to practise its beliefs through the Covenant at an approved law school. As we explain below, not only was this interference not trivial or insubstantial, it violated the state’s duty of neutrality and profoundly interfered with the religious freedom of the TWU community.

J. *Proportionality: The Infringement Was Not Proportionate*

(1) The LSBC Approval Decision Does Not Balance the TWU Community’s Section 2(a) Rights With a Relevant Statutory Objective

[322] ... We accept that in the administrative law context, judicial review of individualized decisions made pursuant to statutory authority which is not itself challenged may not require the objectives of the legislation to be reviewed at the justification stage (*Multani*, at para. 155, per LeBel J.). Even, however, where a decision-maker’s authority is not challenged (and particularly where a decision-maker does not provide any formal reasons whatsoever), we think it is worth emphasizing the importance of a reviewing court carefully ensuring that the objectives put forward by the state actor find their source in the actual grant of authority. Doing so avoids the danger that objectives said to advance a statutory mandate might be invented holus-bolus after an infringement is claimed. This is precisely the risk that materialized here: while the majority refers to the LSBC’s “interpretation of its statutory mandate”, the decision-making process adopted by the LSBC did not, at the time of the decision, involve *any* delineation or articulation of any particular statutory objectives.

[323] As we have already recounted, the LSBC’s statutory objective in rendering an approval decision is to ensure that individual applicants are fit for licensing. And, as the fitness of future graduates of TWU’s proposed law school was not in dispute, this statutory objective cannot justify any limitations on the TWU community’s s. 2(a) rights. But as we will explain (under heading (3) “Approving TWU’s Proposed Law School Is Not Against the LSBC’s Public Interest Mandate”), *even if* the LSBC’s statutory mandate had permitted the consideration of broader “public interest” concerns invoked by the LSBC and the majority, the LSBC’s decision would not be justified, since withholding approval substantially interferes with the TWU community’s freedom of religion and approving TWU’s proposed law school was not against the public interest, so understood.

(2) The LSBC Approval Decision Substantially Interferes With Freedom of Religion

[324] In our view, the LSBC approval decision represents a profound interference with religious freedom: it is a measure that undermines the core character of a lawful religious institution and disrupts the vitality of the TWU community (*Loyola*, at para. 67). While the

approval decision under review may appear to be facially neutral (as it denies a benefit and does not purport to directly compel or prohibit a religious practice), it is substantively coercive in nature. As the majority recognizes, at para. 99 of its reasons, “the TWU community has the right to determine the rules of conduct which govern its members” through its Covenant. Indeed, the TWU Covenant is protected by British Columbia’s *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 41(1). Yet, notwithstanding that right and that statutory protection, the LSBC approval decision makes state acceptance contingent upon the TWU community manifesting its beliefs *in a particular way*. That this is so is, on this record, beyond dispute. As noted by the British Columbia Court of Appeal, “the Law Society was prepared to approve the law school if TWU agreed to remove the offending portions of the Covenant requiring students to abstain from ‘sexual intimacy that violates the sacredness of marriage between a man and a woman’” (para. 176; see also the respondents’ Judicial Review Petition, reproduced in A.R., vol. I, pp. 125-55, at p. 136, at para. 45). This is highly intrusive conduct by a state actor into the religious practices of the TWU community. That conduct, like the ensuing LSBC decision to deny accreditation, contravened the state’s duty of religious neutrality: each represented an expression by the state of religious preference which promotes the participation of non-believers, or believers of a certain kind, to the exclusion of the community of believers found at TWU (*Mouvement laïque*, at paras. 74-78).

[325] The majority concludes that the infringement in this case was “limited” and “of minor significance” (paras. 86-90). We agree with the Chief Justice (at paras. 128-32) that the fact the Covenant is not “absolutely required” and “preferred (rather than necessary)” does not diminish the severity of the infringement in this case.

(3) Approving TWU’s Proposed Law School Is Not Against the LSBC’s Public Interest Mandate

[326] In our view, even were the majority’s overbroad interpretation of the LSBC’s statutory mandate to apply, approving TWU’s proposed law school would not undermine the statutory objectives which the majority identifies as relevant to deciding whether or not to approve TWU’s proposed law school. Accommodating religious diversity *is* in “the public interest”, broadly understood, and approving the proposed law school does not condone discrimination against LGBTQ persons.

[327] The majority states that the decision not to approve TWU’s proposed law school furthers its public interest objective by “maintaining equal access to and diversity in the legal profession” (Majority Reasons, at paras. 93-95). We recognize, as this Court has previously recognized, that while there is evidence before us that some LGBTQ persons do attend TWU, the vast majority of LGBTQ students “would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost. TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions” (*TWU 2001*, at para. 25). In our view, however, the majority fails to appreciate that the unequal access resulting from the Covenant is a function of accommodating religious freedom, which itself advances the public interest by promoting diversity in a liberal, pluralist society.



[328] The rights recognized in the *Charter* and the enshrinement of multiculturalism therein reflect the premise of our constitutional law and history that pluralism is intrinsically valuable. Our colleague McLachlin C.J. notes Canada’s long history of religious schools (para. 130). Similarly, and writing extra-judicially, our colleague Karakatsanis J. has observed that, “[i]n a global environment where religious accommodation is sometimes seen as a detriment, Canada has found a way to welcome difference” (quoted in H. MacIvor and A. H. Milnes, eds., *Canada at 150: Building a Free and Democratic Society* (2017), at p. 9; see also M. A. Yahya, “Traditions of Religious Liberty in Early Canadian History” in D. Newman, ed., *Religious Freedom and Communities* (2016) 49, at p. 49).

[329] But this generous and historically Canadian posture towards religious accommodation stands in stark contrast to the majority’s view of the pursuit of statutory objectives as “unavoidabl[y]” limiting the individual freedoms protected by the *Charter* (Majority Reasons, at para. 100). This view fundamentally misconceives the role of the state in a multicultural and democratic society. As described by W. A. Galston, “[i]n a liberal pluralist regime, a key end is the creation of social space within which individuals and groups can freely pursue their distinctive visions of what gives meaning and worth to human existence” (*The Practice of Liberal Pluralism* (2005), at p. 3). Or as Sachs J. said in *Christian Education South Africa* (at paras. 23-24), “if society is to be open and democratic in the fullest sense it needs to be tolerant and accepting of cultural pluralism” and allow “individuals and communities . . . to enjoy what has been called the ‘right to be different’”.

[330] We emphasize that it is the state and state actors — not private institutions like TWU — which are constitutionally bound to accommodate difference in order to foster pluralism in public life.

[331] This is entirely consistent with this Court’s jurisprudence. In *Big M Drug Mart*, this Court recognized (at p. 336) that “[a] truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct.” It is therefore not open to the state to impose values that it deems to be “shared” upon those who, for religious reasons, take a contrary view. The *Charter* protects the rights of religious adherents, among others, to participate in Canadian public life in a way that is consistent with *their own* values. By accommodating diverse beliefs and values, the state protects and promotes the *Charter* rights of all Canadians. [...]

[333] Simply put, the secular state is a neutral state, which refrains from espousing “values” that undermine or go beyond what is necessary for the civic participation of all. As Iacobucci J. recognized in *Amselem*, at para. 50, “the State is in no position to be, nor should it become, the arbiter of religious dogma”. [...]

[334] It follows from the foregoing that accommodating diverse beliefs and values is a precondition to secularism and pluralism. [...]

[335] The “public interest”, broadly understood, is therefore served by accommodating TWU’s religious practices, including the Covenant. That this is so is confirmed by provincial and federal legislation. [...] [T]he holding and expression of the moral views of marriage which underpin the portions of TWU’s Covenant that are at issue here have been expressly recognized

by Parliament as being not inconsistent with the public interest and worthy of accommodation (*Civil Marriage Act*, S.C. 2005, c. 33, preamble and s. 3.1)...

[337] That federal and provincial legislators alike have taken this view should not surprise. Pluralism, and the religious accommodation necessary to secure it, is inherently valuable. In a country whose people sometimes harbour conflicting moral values that cannot be reconciled to a single conception of how one should live life, there is wisdom in the idea that the public sphere is for all to share, even where beliefs differ. [...]

[340] In short, both Parliament and British Columbia’s Legislature have recognized the so-called “discriminatory” (McLachlin C.J.’s Reasons, at para. 138), “degrading and disrespectful” (Majority Reasons, at para. 101) practices represented by the TWU Covenant as consistent with the public interest, legal and worthy of accommodation. Such legislatively accommodated and *Charter*-protected religious practices, once exercised, cannot be cited by a state-actor as a reason justifying the exclusion of a religious community from public recognition. Approval of TWU’s proposed law school would not represent a state preference for evangelical Christianity, but rather a recognition of the state’s duty — which the LSBC failed to observe — to accommodate diverse religious beliefs without scrutinizing their content.

### III. Conclusion

[341] Under the LSBC’s governing statute, the only proper purpose of a law faculty approval decision is to ensure the fitness of individual graduates to become members of the legal profession. The LSBC’s decision denying approval to TWU’s proposed law school has a profound impact on the s. 2(a) rights of the TWU community. Even if the LSBC’s statutory “public interest” mandate were to be interpreted such that it had the authority to take considerations other than fitness into account, approving the proposed law school is not contrary to the public interest objectives of maintaining equal access and diversity in the legal profession. Nor does it condone discrimination against LGBTQ persons. In our view, then, the only decision reflecting a proportionate balancing between *Charter* rights and the LSBC’s statutory objectives would be to approve TWU’s proposed law school.

[342] The appeal should be dismissed. We therefore dissent.

[The Chief Justice and Rowe J. wrote separate concurring reasons. While the Chief Justice agreed with the majority that the LSBC’s decision to deny accreditation represented a proportionate balancing of freedom of religion against the LSBC’s duty to combat discrimination, she departed from the majority on certain aspects of the analysis. Specifically, she wrote separately so as to clarify, among other things, that if, as in this case, a claimant’s constitutional rights have been limited, the state actor (here the LSBC) should bear the onus of demonstrating that the limitation is reasonable and demonstrably justified in a free and democratic society [par. 117]. In addition, she disagreed with the majority’s characterization of the negative impacts of the decision on religious freedom as “of minor significance,” for

“[if] the community wishes to operate a law school, it must relinquish the mandatory Covenant it says is core to its religious beliefs, with the attendant ramifications on religious practices.” [par. 145.] Nevertheless, McLachlin C.J. accepted the LSBC’s contention that it could not comply with its duty to combat discrimination while accrediting TWU:

[146] ...[T]here is great force in the LSBC’s contention that it cannot condone a practice that discriminates by imposing burdens on LGBTQ people on the basis of sexual orientation, with negative consequences for the LGBTQ community, diversity and the enhancement of equality in the profession. It was faced with an either-or decision on which compromise was impossible — either allow the mandatory Covenant in TWU’s proposal to stand, and thereby condone unequal treatment of LGBTQ people, or deny accreditation and limit TWU’s religious practices. In the end, after much struggle, the LSBC concluded that the imperative of refusing to condone discrimination and unequal treatment on the basis of sexual orientation outweighed TWU’s claims to freedom of religion.

[147] In a case like *Multani*, the claimant was vindicated because the school board could not show that it would be unable to ensure its mandate of public safety. In *Loyola*, we found that the limitation at issue did nothing to advance the ministerial objectives of instilling understanding and respect for other religions. This case is very different. The LSBC cannot abide by its duty to combat discrimination and accredit TWU at the same time.

For this reason, the Chief Justice concluded, the decision was reasonable.

Rowe J. concurred with the majority that the LSBC’s decision should be restored, albeit on the basis that the decision did not infringe the freedom of religion. (It was therefore unnecessary, in his view, to consider whether any such infringement was reasonable.) The essence of the Mandatory Covenant, according to Rowe J., was to compel observance by non-believers attending TWU. The Covenant, therefore, fell outside the protection of s. 2(a):

[213] ... [R]eligious freedom is also defined by the absence of constraint. From this perspective, religious freedom aims to protect individuals from interference with their religious beliefs and practices. Its character is noncoercive; its antithesis is coerced conformity.

[...]

[251] In the end, I agree that “a right designed to shield individuals from religious coercion cannot be used as a sword to coerce [conformity to] religious practice”: *Canadian Secular Alliance, I.F.*, at para. 11. This follows if we accept that the freedom of religion guaranteed by the *Charter* is “a function of personal autonomy and choice”: *Amsalem*, at paras. 42. It is based on the idea “that no one can be forced to adhere to or refrain from a particular set of religious beliefs”: *Loyola*, at para. 59. For this reason, it protects against interference with profoundly personal beliefs and with the voluntary choice to abide by the practices those beliefs require. It does not protect measures by which an individual or a faith community seeks to impose adherence to their religious

beliefs or practices on others who do not share their underlying faith. I therefore conclude that what the claimants seek in this appeal falls outside the scope of freedom of religion as guaranteed by the *Charter*.]

## 5. EQUALITY RIGHTS

# CENTRALE DES SYNDICATS DU QUÉBEC V QUEBEC (ATTORNEY GENERAL)

2018 SCC 18, [2018] SCJ No 18

ABELLA J. —  
(Moldaver, Karakatsanis and Gascon JJ., concurring)

[...]

[5] In Quebec, [the] right to equal pay for work of equal value was adopted in 1975 through s. 19 of the *Charter of Human Rights and Freedoms*, S.Q. 1975, c. 6 (now CQLR, c. C-12). [...] Since s. 19 required male comparator groups “at the same place”, female workers were excluded from access to pay equity where there were no male comparators.

[6] Fixing this gap required a determination of how to measure pay discrimination against women who were not only in female dominated jobs, but whose workplaces contained no male dominated job with which to do a comparison. This appeal arises out of Quebec’s efforts to find — and adopt — a solution to that problem.

[7] [...] The result was the *Pay Equity Act*, S.Q. 1996, c. 43 (now CQLR, c. E-12.001), in 1996, designed to set out a proactive pay equity scheme for all predominately female job classes. This includes addressing pay inequities for women in workplaces without male comparators. [...]

[9] All employers with 10 or more employees were to conduct a pay equity exercise to identify and redress pay inequity through adjustments in compensation or the creation of a pay equity plan, depending on the size of the enterprise.

[10] At the time the *Act* came into force, there was, however, no methodology for assessing pay equity adjustments where there was no male comparator. [...]

[11] Regulatory authority was therefore given to the Pay Equity Commission under s. 114 to conduct the necessary research and to establish a methodology for identifying the appropriate male comparators. [...]

[12] This section directed the Commission to develop a proposed methodology based on two criteria to bring it into line with s. 19 of the Quebec *Charter*: it was to draw comparisons with male job classifications found in enterprises where a pay equity exercise had already been completed; and it was to factor in the characteristics of the enterprises whose job classes were to be compared.

[13] Once a regulation was developed, s. 13 directed that workplaces with no predominantly male job classes were to establish a pay equity plan in accordance with the Regulation. Under s. 71, the first pay equity adjustments became payable on the date by which the pay equity exercise was required to be completed: [...]

[14] Section 38 of the *Act* sets out two possible deadlines by which those employers in workplaces with no male comparators were to determine adjustments or complete a pay equity plan: [...]

[15] The first deadline, based on s. 37, was the same one as for workplaces where male job classes did exist. Section 37 gave employers in those workplaces that had male comparators four years to implement pay equity from the time they became subject to the *Act*. They became subject to the *Act* on November 21, 1997. Four years from this date was November 21, 2001.

[16] But this first deadline for workplaces with no male comparators was illusory, since there could be no pay equity for those workplaces until a Regulation was passed. And, under s. 114, a regulation could not be passed until workplaces *with* male comparators had completed their first pay equity exercise on or before November 21, 2001.

[17] The only realistically possible deadline under the legislation was the second one, namely within two years of the coming into force of the Regulation. The [...] *Regulation respecting pay equity in enterprises where there are no predominantly male job classes*, (2005) 137 G.O. II, 977 (now CQLR, c. E-12.001, r. 2), was not promulgated until May 5, 2005. The two-year grace period provided by s. 38 further postponed pay equity for workplaces without male comparators until May 5, 2007.

[18] As a result, access to pay equity under the *Act* for women in workplaces without male comparators was delayed, in accordance with s. 38, by two years beyond the length of time it took to enact the Regulation under s. 114. By this time, almost six years had passed since women in workplaces that had male comparators first gained access to pay equity.

[19] This six-year legislatively delayed access to pay equity resulting from s. 38 of the *Act* was challenged by several unions, who argued that it amounted to a breach of s. 15(1) of the *Charter* for women in workplaces without male comparators.

[...]

### Analysis

[...]

[22] When assessing a claim under s. 15(1), this Court's jurisprudence establishes a two-step approach: Does the challenged law, on its face or in its impact, draw a distinction based on an enumerated or analogous ground, and, if so, does it impose "burdens or [deny] a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating . . . disadvantage", including "historical" disadvantage? (*Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, at

paras. 323-24 and 327; *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 S.C.R. 548, at paras. 19-20.)

[23] The first question is therefore whether the limitation challenged by the unions — a six-year pay equity delay mandated by s. 38, for women employed in workplaces without male comparators — draws a distinction on the basis of sex.

[24] In my view, it does. The goal of pay equity legislation is to recognize and remedy the discrimination that *women* have suffered in the way they are compensated in the workforce. This is systemic discrimination premised on the historic economic and social devaluation of “women’s work” compared to “men’s work” (*Report of the Commission on Equality in Employment* (1984), at p. 232; Final Report of the Pay Equity Task Force (2004), at pp. 25-27). Accordingly, pay equity legislation, including the *Act* at issue here, draws a distinction based on sex in targeting systemic pay discrimination against women. And, as explained later in these reasons, the specific provisions of the *Act* that target particular groups of women based on where they work — such as s. 38 — also necessarily draw a distinction based on sex.

[25] The contrary view adopted by the trial judge, the Court of Appeal, and my colleague, is that the distinction created by the *Act* was based not on sex, but on the absence of male comparator groups in the enterprise. This is “formal equality”, an approach expressly rejected by this Court in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, where the Court refused to apply a rigid Diceyan analysis and declared, instead, that substantive equality is the premise underlying s. 15.

[26] The trial judge’s approach is difficult to distinguish from the paradigmatic example of formalism in *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183, which was specifically rejected in *Andrews*. There, the Court had concluded that legislation excluding pregnant women from unemployment benefits did not discriminate on the basis of sex, but on the basis of pregnancy.

...

[28] In this case, the trial judge’s analysis falls into precisely the same error as *Bliss* by holding, in effect, that the distinction created by s. 38 is not based on sex because not *all* women are denied timely access to the scheme, only those in certain workplaces. The relevant distinction created by s. 38 of the *Act* is between male employees and underpaid female employees, whether or not those male employees are in the same workplace. The trial judge’s approach erases the sex-based character of the legislative provisions and obscures the fact that the claimants disproportionately suffer an adverse impact *because they are women* (*Taypotat*, at para. 21).

[29] And the sex-based character of the distinction drawn by s. 38 is inescapable. That is because the two categories into which the *Act* sorts women — women in workplaces with male comparators, under s. 37, and those without such comparators, under s. 38 — are themselves inextricably related to sex. Only if we ignore the gender-driven bases for the two categories can it be said that the distinction is based only on workplace and not on sex. Not only are both categories expressly defined by the presence or absence of men in the workplace, but, more



fundamentally, both categories are set up to address disparities in pay between men and women. Moreover, since women in workplaces without male comparators may suffer more acutely from the effects of pay inequity precisely because of the absence of men in their workplaces, these categories single out for inferior treatment the group of women whose pay has, arguably, been most markedly impacted by their gender. So the categories set up by ss. 37 and 38 of the *Act* draw distinctions based on sex both on their face — that is, by their express terms — and in their impact.

[30] The second question is whether that distinction is a discriminatory one, that is, whether it imposes burdens or denies benefits in a way that reinforces, perpetuates, or exacerbates disadvantage.

[31] The discriminatory impact of the delay is clear. The women targeted for the delay created by s. 38 (those in workplaces with no male comparators), suffer the effects of pay discrimination — without a remedy — for the period of the delay, in this case six years.

[32] The fact that the legislation did not *create* pay discrimination is irrelevant. In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, this Court held that “[i]t is not necessary to find that the legislation *creates* the discrimination existing in society” to find a s. 15 breach (para. 84 (emphasis in original)). There, as here, the law perpetuated the disadvantage of a protected group through a legislated “denial of access to remedial procedures for discrimination”, remedial procedures that “they so urgently need because of the existence of discrimination against them in society” (*Vriend*, at paras. 84 and 97).

[33] The legislature chose to act to address pay discrimination against women, but denied access by delaying it for a group of women, leaving them, in comparison to male workers, paid less for longer. Whatever the motives behind the decision, this is “discrimination reinforced by law”, which this Court has denounced since *Andrews* (p. 172). The fact, then, that women in one type of workplace — with male comparators — received a remedy promptly is not an answer to the question of whether women in another type of workplace were also disadvantaged. It is no defence to a claim of discrimination by one group of women to suggest that another group has had its particular discrimination addressed.

[34] There is no doubt that the claimants in this case will experience a considerable economic impact as a result of the delay. Occupational segregation and low wages “usually go hand in hand” (Final Report of the Pay Equity Task Force (2004), at p. 15). “[H]istorical attitudes towards the role of women” tend to “result in the undervaluation of ‘female jobs’ in comparison with those of men . . . when determining wage rates” (*Report of the Committee of Experts on the Application of Conventions and Recommendations* (2007), at p. 271). Put simply, “the more women are concentrated in a field of work, the less it pays” (Mary Cornish, “Closing the Global Gender Pay Gap: Securing Justice for Women’s Work” (2007), 28 *Comp. Lab. L. & Pol’y J.* 219, at pp. 224-25). And enterprises that employ mainly women tend to have lower pay rates (Oelz et al., at p. 18). So, as previously noted, the very women singled out for differential and delayed access to pay equity under this scheme may be the very ones most likely to experience its effects in a more pronounced way.

[35] The fact that the *Act* was intended to help these women does not attenuate the *fact* of the breach. Purpose and intention are part of the s. 1 justification analysis. Determining whether there is a breach focuses on the *impact* of, not motive for, the law (*Andrews*, at pp. 181-82; *Quebec v. A*, at para. 333). As a result, the trial judge’s finding that the delay was not based on the assumption that *employees in female segregated workplaces were* “less capable or . . . worthy of recognition or value as human beings or as members of Canadian society” (*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 99) cannot sanitize the discriminatory impact (*Quebec v. A*, at paras. 244, 327 and 330).

[36] The impact of the delay created by s. 38, therefore, reinforced and perpetuated the historic economic disadvantage experienced by women in workplaces without male comparators, amounting to a *prima facie* breach of s. 15(1) of the *Charter*.

[37] Quebec suggests that s. 15(2) could apply in this case to immunize s. 38 from the unions’ challenge under s. 15(1). In my respectful view, s. 15(2) has no application whatever to this case. It states:

Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[38] The purpose of s. 15(2) is to “save ameliorative programs from the charge of ‘reverse discrimination’” (*Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 S.C.R. 670, at para. 41; *R. v. Kapp*, [2008] 2 S.C.R. 483). Reverse discrimination involves a claim from someone outside the scope of intended beneficiaries who alleges that ameliorating those beneficiaries discriminates against him. It stands the purpose on its head to suggest that s. 15(2) can be used to deprive the program’s intended beneficiaries of the right to challenge the program’s compliance with s. 15(1). And it would be equally inconsistent with the purpose to suggest that legislation that has a discriminatory impact on a scheme’s intended beneficiaries, can “serve” or be “necessary to” any ameliorative purpose in the sense intended by this Court in *Cunningham*.

...

[42] This brings us to s. 1 of the *Charter*. Quebec bears the burden of justifying the *prima facie* infringement of s. 15(1) by identifying a pressing and substantial objective and showing that, in furtherance of that objective, it did not disproportionately interfere with the *Charter* right. The first step is to identify the objective of the infringing measure, namely the legislatively mandated delay in pay equity in workplaces where there are no male comparators. This delay occurred because of the combined effect of ss. 38 and 114 of the *Act*.

[43] The essence of Quebec’s argument is that the pressing and substantial objective was to enact a scheme that created an effective remedy for systemic pay discrimination for women who were outside the existing pay equity scheme. The delay was, it argued, necessary to finding the right approach. I see no reason for refusing to accept this as the objective of the delay caused by s. 38.

[44] The next question is whether the delay is rationally connected to the purpose. The Pay Equity Commission needed time to develop a methodology, and the resulting regulation had to move through the necessary stages of executive and legislative approval. The issue was complex and required considerable research and analysis. The 1995 reports commissioned by the government gave no guidance to Quebec on how to measure gender-based inequity in private enterprises lacking male comparators. Nor did any solution emerge as a result of the public consultations held during the legislative process. Moreover, there was scant policy experience elsewhere to draw on for inspiration. When the *Act* was adopted, there was little guidance from other Canadian jurisdictions for extending the benefits of pay equity legislation to female employees in workplaces without male comparators in the private sector. The closest equivalent in terms of coverage was Ontario's *Pay Equity Act*, R.S.O. 1990, c. P.7, but it applied only to workplaces in the "public" sector. I therefore accept that the delay in developing and implementing a credible methodology is rationally connected to the objective of creating the possibility of an effective remedy.

[45] As to minimal impairment, the question is whether the delay that resulted from the legislation impaired equality rights as little as reasonably necessary to create the possibility of an effective remedy.

[46] Quebec was seeking a wide-ranging and pioneering approach to pay equity for women in workplaces without male comparators. Where, as here, the government introduced, and gave effect to, an entirely new regime, a degree of delay is to be expected. Minimal impairment requires the government to narrowly tailor limitations to its pressing and substantial objective, but, as McLachlin J. held in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199:

The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement . . . [para. 160]

In other words, governments enacting multi-faceted remedial regimes to protect constitutional rights should be given some degree of latitude to accomplish the objectives sought through these initiatives (*RJR-MacDonald*, at para. 135; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at pp. 993-94; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624).

[47] But the government must demonstrate that, in the circumstances, it acted with reasonable diligence. The time frame must be calibrated to the nature and complexity of the issue, but it cannot be indefinite.

[48] The fact that so many years elapsed between the adoption of the *Act* and the promulgation of the Regulation is, on its face, troubling. The trial judge reviewed in considerable detail the reasons for the delay and found that it was not caused by a lack of diligence on Quebec's part. There was ample evidence to support that factual finding. In this case, a significant cause of the delay was that the Pay Equity Commission, the agency in charge of administering the *Act*, was itself only created in 1996 and was tasked with numerous new duties. The move in 1996

from a complaints-based regime under s. 19 of the Quebec *Charter* to a proactive pay equity scheme meant that the Commission had to develop new strategies for implementation on multiple fronts.

[49] As the trial judge found, the first proposal for a methodology to the Minister of Labour came in 2002 and was the result of considerable effort from the Pay Equity Commission. In the end, it was rejected because it did not conform to the conditions in s. 114. The Commission's second proposal in 2004 to the Minister of Labour ultimately proved successful, and was followed closely by the promulgation of the Regulation in 2005. While close to the line, in my view the record supports the conclusion that Quebec was not unreasonable in the steps it took to keep the delay within reasonable bounds.

[50] And I would make the same observation regarding the unions' complaints about the two-year grace period given to employers under s. 38. Just as the scheme contemplated a regrettable but necessary period of delay while a viable methodology was developed and approved, it also contemplated a two-year period for employers to determine how to implement the new regime in their enterprises. Quebec struck an acceptable balance between the scheme's objective in ensuring compensation, and the logistical complexity of implementing a new system. Again, although close to the line, in my respectful view the two-year grace period did not bring the length of the delay outside reasonable bounds.

[51] The final step is proportionality, balancing the harm of the delay created by s. 38 against the benefit of waiting for the implementation of the regime.

[52] The negative consequences of the delay are clear: access to pay equity was postponed until May 5, 2007. In the time that elapsed between the adoption of the *Act* and the end of the two-year grace period, women in workplaces without male comparators continued to experience pay inequity.

[53] In my respectful view, however, the ultimate advantages of Quebec's expanded approach outweigh the harm. Women in workplaces with no male comparators saw the creation of an effective, coherent remedy for systemic economic discrimination where none had previously existed. The delay was serious and regrettable, but had the long-term benefit of resulting in the *Act's* meaningful ability to address pay discrimination for a previously excluded group of female employees.

[54] Nonetheless, the unions argue that Quebec cannot satisfy the proportionality test because of the absence of retroactive payments covering the period of the delay. Quebec chose to make compensation available from the point in time at which a viable methodology had been developed. This represented a proper balancing of interests. On the one hand, the scheme was designed to make employers responsible for paying compensation once they had the tools to identify and measure pay inequity. On the other, employers would *not* be responsible for compensation *before* those tools were developed. As this Court held in *RJR-MacDonald*, proportionality does not require perfection, nor does legislation fail the proportionality test just because the claimants can "conceive of an alternative which might better tailor objective to infringement" (para. 160). The test is whether the balance Quebec struck falls within the range

of “reasonable alternatives” (para. 160) and results in greater benefit than harm. In my view, it does.

[55] The *prima facie* breach is therefore justified under s. 1.

[56] I would dismiss the appeal with costs.

English version of the reasons delivered by

CÔTÉ J. —

(Wagner, Brown and Rowe JJ., concurring)

...

[58] For many years, the situation of women in the workplace was characterized by significant inequality resulting from prejudice, stereotyping and discrimination. [...]

[59] This problem was magnified by occupational segregation. [...]

[60] Conscious of this problem, the Quebec legislature enacted the *Pay Equity Act*, S.Q. 1996, c. 43 (now CQLR, c. E-12.001) (“Act”), on November 21, 1996. The purpose of the Act, which is applicable to both the public sector and the private sector, is to “redress differences in compensation due to the systemic gender discrimination suffered by persons who occupy positions in predominantly female job classes” (s. 1).

[61] The Act requires every public or private employer whose enterprise has between 10 and 49 employees to determine the adjustments in compensation required to afford the same remuneration, for work of equal value, to employees holding positions in predominantly female job classes as to employees holding positions in predominantly male job classes (s. 34).

[62] An employer whose enterprise has 50 or more employees must establish, in accordance with the Act, a pay equity plan to redress differences in compensation due to discrimination (ss. 10, 31 and 50).

[63] As a general rule, employers that were subject to the Act when it came into force on November 21, 1997 had to determine the required compensation adjustments and make the necessary payments within four years, that is, by November 21, 2001 (ss. 37 and 71). If an employer failed to do so within this time limit, the unpaid adjustments bore interest at the legal rate from that date (s. 71 para. 2).

[64] At the time the Act was enacted, the Minister responsible for the Status of Women described it as an implementation statute (*Journal des débats de l’Assemblée nationale*, vol. 35, No. 56, 2nd Sess., 55th Leg., November 21, 1996, at p. 3306), because its purpose was to uphold the right to pay equity already provided for in the *Charter of human rights and freedoms*, S.Q. 1975, c. 6 (now CQLR, c. C-12) (“Quebec Charter”): [...]

[65] In enacting the Act, the legislature chose to go further than the Quebec *Charter* and to extend the application of the Act to employees working in enterprises in which it was impossible to make comparisons with predominantly male job classes. [...]

[67] [...] However, a method for determining the adjustments required in such enterprises remained to be developed. [...]

[68] The legislature thus opted to proceed by way of regulation, as had been recommended by most of the experts and stakeholders who were consulted. This meant that the Act could be passed quickly so as to guarantee pay equity for most employees. The Commission de l'équité salariale ("Commission") (now the Commission des normes, de l'équité, de la santé et de la sécurité du travail) could then establish a solution by way of a regulation that would be submitted to the government to be examined and then made (s. 114 of the Act). The employers concerned would then have to determine and pay the required compensation adjustments within two years of the coming into force of the regulation (s. 38 of the Act).

[69] It took just over five years for the solution in question to be developed and adopted. There were several reasons for this delay, as I will explain below. For one thing, the Act required the Commission to base its solution on job classes in enterprises in which a pay equity plan had already been completed. The Commission therefore had to wait for the completion of an initial pay equity exercise before it could start developing the regulation. Moreover, because of the complexity of the problem, the Commission had to appoint a consulting firm, produce documents and reports, and hold various consultations. The *Regulation respecting pay equity in enterprises where there are no predominantly male job classes*, (2005) 137 G.O. II, 1425 (now CQLR, c. E-12.001, r. 2), finally came into force on May 5, 2005, and the employees to whom it applied were entitled to compensation adjustments as of May 5, 2007.

...

[70] The appellants represent employees working for enterprises in which there are no predominantly male job classes, childcare centres in particular. Under ss. 13, 38 and 114 of the Act, such employees had to wait until May 5, 2007 to obtain compensation adjustments, whereas employees of enterprises that had male comparators were entitled to adjustments as of November 21, 2001.

[...]

#### IV. Issue

[80] The main issue is whether, because the compensation adjustments were not to be paid retroactively, the additional time that was needed to establish a method of calculation to be applied by enterprises with no male comparators in order to implement pay equity violated the right to substantive equality guaranteed by s. 15(1) of the *Charter*.

#### VI. Analysis Under Section 15 of the Charter

...

[117] The main issue under s. 15(1) is whether the impugned law violates this *Charter* guarantee of substantive equality (*Withler*, at para. 2). It is therefore necessary to apply the two-step analytical framework laid down by the Court and ask the following two questions: (1) Does the law create a distinction based on an enumerated or analogous ground? and (2) Does the distinction create a discriminatory disadvantage by, among other things, perpetuating prejudice or stereotyping? (*Kapp*, at para. 17; *Withler*, at paras. 30 and 61; *Quebec v. A*, at para. 324). In this analysis, the main consideration must be the impact of the law (*Andrews*, at p. 165; *Quebec v. A*, at para. 319).

A. *First Step of the Section 15(1) Analysis*

[118] At the first step of the analysis, it must be determined whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground (*Taypotat*, at para. 19). Accordingly, the courts will address only those grounds of distinction that were intended to be prohibited by the *Charter* (*Withler*, at para. 33).

[119] As the trial judge indicated, s. 38 of the Act clearly makes a distinction by postponing the payment of compensation adjustments to May 5, 2007:

[TRANSLATION] In the case at bar, however, section 38 of the Act, by allowing the payment of compensation adjustments to female employees in enterprises with no male comparators to be put off until May 5, 2007, had the effect of treating such employees differently, for some time, than those working in enterprises with comparators. The plaintiffs argue that, had it not been for section 38, these employees would, the belated coming into force of the Regulation respecting pay equity notwithstanding, have received an adjustment retroactive to December 21, 2001.

...

Furthermore, this was an adverse distinction for them, insofar as the making of the Regulation respecting pay equity was a long time coming, thereby depriving them of more than five years of retroactive compensation adjustments. [Emphasis deleted; paras. 192-93.]

[120] The question of the basis for that distinction requires that it be determined whether the impugned law has a disproportionate effect on employees working in enterprises without predominantly male job classes that is “based on [their] membership in an enumerated or analogous group” (*Taypotat*, at para. 21 (emphasis added)).

[121] By establishing different time limits, the Act had an adverse impact on employees working in enterprises in which comparisons with predominantly male job classes are impossible. This group consists mostly of women and is at a particular disadvantage in the labour market, which may suggest that these women are being treated differently because of their sex. However, to resolve this issue, we must go further and ask what the basis for this differential treatment is.

[122] In the case at bar, I am of the opinion that the distinction is not based on sex, because the differential treatment does not result from the fact that the affected employees are women. In this regard, an analysis of the evidence as a whole leads to the conclusion that the basis for the differential treatment affecting the employees in question lies in the lack of male comparators in their employers' enterprises.

[123] Contrary to what my colleague Abella J. asserts, this does not amount to adopting a formal equality approach as in *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183. Indeed, it has since been established that s. 15(1) grants every person a guarantee of substantive equality, not just of formal equality, under the law.

[124] In *Bliss*, a woman was denied unemployment insurance benefits to which she would have been entitled had she not been pregnant. Her claim was rejected by the Court then on the basis that the distinction was based not on sex, but on pregnancy. This approach has since been specifically rejected in *Andrews*, in which McIntyre J. commented as follows regarding the analysis that is required in order to determine the basis for a distinction:

I would also agree with the following criticism of the similarly situated test made by Kerans J.A. in *Mahe v. Alta. (Gov't)* (1987), 54 Alta. L.R. (2d) 212, at p. 244:

. . . the test accepts an idea of equality which is almost mechanical, with no scope for considering the reason for the distinction. In consequence, subtleties are found to justify a finding of dissimilarity which reduces the test to a categorization game. Moreover, the test is not helpful. After all, most laws are enacted for the specific purpose of offering a benefit or imposing a burden on some persons and not on others. The test catches every conceivable difference in legal treatment.

For the reasons outlined above, the test cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the *Charter*. Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application. The issues which will arise from case to case are such that it would be wrong to attempt to confine these considerations within such a fixed and limited formula. [Emphasis added; p. 168.]

[125] This passage reiterates the importance of taking the context into consideration in order to determine the real reason for the distinction. After thoroughly reviewing the evidence, Yergeau J. concluded that the distinction created by s. 38 of the Act is based not on sex, but on the fact that the enterprises to which it applies do not have predominantly male job classes that would allow for comparison.

[126] My colleague Abella J. instead focuses in her reasons on the basis for the distinction drawn by the Act as a whole (paras. 24-25). But the provision being challenged by the appellants is s. 38 of the Act. It is thus the reason for the distinction established in that section, not the reason for the distinction the Act is intended to eliminate as reflected by its purpose, that must be identified at this step. My colleague does identify the real reason for the distinction in stating that s. 38 targets a particular group *on the basis of where they work* (para. 24). Her



reasoning can lead to only one conclusion: that every distinction in a pay equity statute is necessarily based on sex.

[127] The alleged violation is based on the principle that the legislature is, when it acts proactively, under a constitutional obligation not to be discriminatory in how it treats those who are meant to benefit from the law. But the distinction in this case is not based on sex, as the comparator group is not that of male employees, to whom the Act does not apply. Certain of those who are meant to benefit from the Act — employees of enterprises that have no predominantly male job classes — wish to be paid in accordance with the same timetable that applies to others who are also meant to benefit from the Act — employees of enterprises that do have predominantly male job classes. Hence, the distinction resulting from s. 38 cannot be rooted in the gender-based discrimination that the Act is as a whole intended to remedy.

[128] A pay equity statute grants rights to a group consisting essentially of women. Like any other statute, it may make distinctions, and such distinctions can be more advantageous for one group consisting of women than for another group also consisting of women. However, we cannot conclude that every distinction drawn by a pay equity statute is necessarily based on sex. Such a conclusion would deprive trial judges of any discretion in their assessment of the evidence and would make the first step in the s. 15(1) analysis irrelevant. On the contrary, it must be possible to show on a balance of probabilities that the distinction in question is based not on sex, but on another, perfectly legitimate ground.

[...]

[130] In the instant case, I agree with Yergeau J.'s analysis and accordingly conclude that s. 38 does not create a distinction based on sex. It therefore should not be declared to be invalid under the *Charter*.

[131] This conclusion is in and of itself sufficient to dispose of the appeal. In light of the evidence before him, however, Yergeau J. preferred to discuss the second step of the s. 15(1) analysis, and I will therefore also consider this step, which, once again, confirms the validity of s. 38.

[132] In theory, we must conduct the analysis under s. 15(2) of the *Charter* before turning to the second step of the s. 15(1) analysis (*Kapp*, at para. 40; *Cunningham*, at para. 44). But given my conclusion that s. 38 of the Act is valid, it is not necessary to go on to determine whether that section can be saved under s. 15(2).

#### B. *Second Step of the Section 15(1) Analysis*

[133] The distinction made in s. 38 of the Act does not have a discriminatory impact.

[134] A statute is not necessarily invalid because it makes distinctions (*Andrews*, at p. 167; *Kapp*, at para. 28; *Withler*, at para. 31). On the contrary, drawing distinctions is essential to the effective operation of our governments. That is why s. 15(1) guarantees the equal benefit of the law to every individual “without discrimination”. This qualifier prohibits only those distinctions that are discriminatory. The claimant must therefore prove that the law creating a

distinction has a discriminatory impact in that it perpetuates a disadvantage faced by the group in question (*Andrews*, at p. 181; *Kapp*, at para. 28; *Withler*, at paras. 31-34; *Quebec v. A*, at para. 322; *Taypotat*, at para. 20)....

[135] What must be done at this stage of the analysis is to consider the situation of the group's members and the law's impact on them. "The analysis is contextual, not formalistic, grounded in the actual situation of the group and the potential of the impugned law to worsen their situation" (*Withler*, at para. 37; *Quebec v. A*, at para. 331). State conduct that widens the gap between a historically disadvantaged group and the rest of society will be found to be discriminatory (*Quebec v. A*, at para. 332).

[136] In *Law*, four contextual factors were identified that might be relevant in determining whether a law is discriminatory: (1) the nature of the affected interest, (2) a pre-existing disadvantage, (3) a correspondence with actual characteristics and (4) the impact on other groups. It is not always necessary to expressly canvass every one of these factors, and there will be cases in which other factors might also be pertinent (*Law*, at para. 62; *Withler*, at para. 66; *Quebec v. A*, at para. 331).

(1) Nature of the Affected Interest

[137] The importance of the right at issue in the case at bar is not in doubt. For the employees concerned, it is a question of being paid an amount that reflects the fair value of their work and receiving compensation based on a prejudice-free evaluation that focuses on the objective value of their work. The Court has said the following in this regard:

Work is an important part of life. For many people what they do for a living, and the respect (or lack of it) with which their work is regarded by the community, is a large part of who they are. Low pay often denotes low status jobs, exacting a price in dignity as well as dollars. As such, the interest affected by the Act was of great importance.

(*N.A.P.E.*, at para. 49)

(2) Pre-existing Disadvantage

[138] This right is all the more important because women working in enterprises with no male comparators have a significant pre-existing disadvantage, one that is documented, is not in dispute and is in fact recognized from the outset in s. 1 of the Act. The fact that there is pre-existing prejudice is relevant to the s. 15(1) analysis (*Withler*, at para. 38; *Quebec v. A*, at para. 327; *Taypotat*, at para. 21) and requires that particular attention be paid to the distinctions that affect the group. But it does not give rise to a presumption that a distinction is discriminatory (*Law*, at para. 67).

(3) Correspondence With Actual Characteristics

[139] What must be asked, therefore, is whether the Act and the time limits it establishes reflect the actual capacities and needs of the members of the affected group or, instead, impose a burden on them or deny them a benefit in a manner that has the effect of reinforcing,

perpetuating or exacerbating their disadvantage (*Taypotat*, at para. 20; see also *Law*, at para. 70).

[140] In this case, it can be seen that significant differences in compensation due to systemic gender discrimination already existed in the labour market and that these differences were maintained in the private sector. The legislature, which was not required to intervene under s. 15(1) of the *Charter*, chose to do so, after extensive consultations, to redress these differences. In the Act, it established a mechanism for achieving pay equity and set various applicable time limits. It is important to bear in mind that the systemic discrimination at issue in this case was not caused by the legislature's actions. On the contrary, the Act has an ameliorative effect and does not have the effect of perpetuating that systemic discrimination.

[141] My colleague McLachlin C.J. asserts that when the legislature enacted the Act, it sent to the members of the group represented by the appellants a message that the systemic discrimination in their jobs was their problem (para. 156). I disagree with this assertion, which in my view disregards the effect the Act has actually had on that group.

[142] In enacting the Act, the legislature was responding directly to the needs of the members of the group represented by the appellants. It set up a proactive scheme that, once completed, made it possible to redress differences in compensation due to systemic gender discrimination. In so doing, it narrowed the gap that had existed between the employees in question and the rest of society for far too long. In order to extend that right to as many people as possible, the legislature chose to include employees working in enterprises with no male comparators. In the Act, it recognized the discrimination faced by the members of that group. When the Act was enacted in 1996, Quebec became the first province to tackle this problem. An initiative such as this that is designed to enhance substantive equality should be encouraged and praised. This is all the more true given that the Act continues today to be one of the most ambitious in the country.

[143] However, it was also recognized from the outset that, if the intention was for the Act to apply to the group in question, more time would be needed to develop an adequate method for calculating compensation adjustments. Proceeding by way of a regulation thus made it possible to develop a simple and innovative method for redressing differences in compensation in enterprises with no male comparators.

[144] In sum, the Act has an undeniably ameliorative effect on the employees in question. My colleagues' analysis leads to the conclusion that any ameliorative measure adopted by the legislature that does not result in perfect equality would infringe s. 15(1). On the contrary, given that the problem existed and persisted in the private sector, and given that it would have been perfectly valid from a constitutional standpoint for the legislature not to intervene, any measure that ameliorates the conditions of this group will necessarily respond to its needs. Even if a solution is not necessarily perfect and does not totally eliminate the disadvantage suffered by the group, only an intervention that would damage or exacerbate the group's situation would be discriminatory.

#### (4) Impact on Other Groups

[145] Lastly, an essential factor to consider is the significant positive effect of the Act on many other employees who also have pre-existing disadvantages:

Where the impugned law is part of a larger benefits scheme . . . the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis [under s. 15(1)].

(*Withler*, at para. 38)

[146] When the Act was being drafted, the groups representing female employees sent the legislature a clear message: it had to act quickly. The legislature therefore chose to enact the Act quickly, thus guaranteeing pay equity for a large number of employees working in more than 225,000 enterprises in Quebec (trial judge's reasons, at para. 46). The decision to do so obviously had a significant positive effect on those employees. At the same time, it was decided that the case of employers that have no predominantly male job classes would be dealt with by way of a regulation. Very few stakeholders objected to this approach. The comments of the Conseil du statut de la femme on this point are instructive:

[TRANSLATION] There have also been calls for the legislation to apply to enterprises with fewer than 10 employees as well as for including a solution to the specific case of job ghettos. But everyone agrees that these two issues will not be easily resolved. We instead believe that rather than depriving a large majority of female workers of the benefits of such a statute, it is preferable to proceed right away. As indicated in the draft bill, however, we will have to go straight to work to address this serious deficiency.

(*Journal des débats de la Commission des affaires sociales*, vol. 34, No. 39, 1st Sess., 35th Leg., February 15, 1996, at pp. 2-3)

[147] It would have been disadvantageous and unfair for female Quebec employees as a whole had the enactment of the Act been postponed for several years in order to identify a method for calculating compensation adjustments that could apply to employers with no male comparators. It goes without saying that when a government develops a complex scheme such as that of pay equity legislation, it will not always be able to ameliorate the conditions of every member of a disadvantaged group at the same time and in the same way. That is why an obligation of result cannot be imposed on the legislature in this regard. Such an obligation would cause it to show extreme caution and even, in some instances, to postpone the enactment of legislation, to everyone's detriment.

[148] The decision to proceed by way of regulation enabled the legislature to take the necessary time to develop an innovative, simple and practical method for valuating differences in compensation for employers that have no predominantly male job classes. The adoption of that method meant that it was not necessary to have recourse to external comparators or to import a salary structure that was foreign to the enterprise.

[149] The legislature was entitled to proceed as it did. The different time limits provided for in the Act do not perpetuate prejudice or a stereotype. On the contrary, the legislature recognized the existence of discrimination and did what was necessary to rectify it. The situations of some

of the groups concerned were different and therefore required different methods. The result of this reality may very well be that the Act provides for different time limits or even different procedures. Nevertheless, the Act does not have a discriminatory impact, as it instead narrows the gap between these historically disadvantaged groups and the rest of society.

[150] In this case, as the Court put it in *Withler*, differential treatment was required in order to ameliorate the actual situation of the group represented by the appellants, as well as that of the other groups to which the section applies (para. 39). That differential treatment also enabled Quebec to be the first Canadian province to guarantee pay equity in private sector enterprises that had no male comparators.

[151] My colleague Abella J. maintains that the reasoning adopted in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, should apply in the instant case. In *Vriend*, the *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, had in 1990 prohibited discrimination based on any of the following grounds: race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry or place of origin. The statute had subsequently been amended to add other grounds to the existing ones, namely marital status, source of income and family status. The *Individual's Rights Protection Act* established a remedy for all members of society so that they could avail themselves of any of the grounds of discrimination provided for in the statute. However, the Alberta government had not deemed it necessary to include sexual orientation in the statute as a prohibited ground. Individuals who were discriminated against on the basis of their sexual orientation were therefore excluded from the protection of the statute and found themselves worse off than they had been before it came into force, given that they were not protected by the statute as were other disadvantaged groups. As a result, the gap between their situation and that of the rest of society widened and their marginalization increased. In short, society had moved forward, but their situation remained unchanged. Unlike a general protection scheme, such as the one established by the *Individual's Rights Protection Act*, the scheme established by the Act in the case at bar deals with only one ground of discrimination, namely sex, and applies to only a small group of employees in Quebec, those who hold positions in predominantly female job classes in enterprises with 10 or more employees. The analogy my colleague is trying to draw cannot therefore be accepted, nor is it even desirable; and it is irrelevant. Moreover, the situation of the employees in question is alleviated by the fact that they belong to the group benefiting from the Act that is challenging its effects. This means that it cannot be argued that they do not receive “the equal protection and equal benefit of the law” (s. 15(1) of the *Charter*). Also, unlike the statute that was at issue in *Vriend*, the Act has an undeniably ameliorative effect for the employees the appellants represent, and it helps narrow the gap between them and the rest of society.

[152] I therefore conclude that the impugned provision does not create a disadvantage by perpetuating prejudice or by stereotyping and does not have a discriminatory impact. The second condition has accordingly not been met. Although my conclusion with respect to s. 15(1) of the *Charter* means that I need not deal with s. 15(2), my silence should not be interpreted as an endorsement of my colleague Abella J.'s comments on s. 15(2).

## VII. Conclusion

[153] In conclusion, I am of the opinion that the distinction made in s. 38 is based not on sex, but on whether there are predominantly male job classes in an enterprise for the purpose of comparing compensation. Furthermore, this distinction does not have a discriminatory impact on the group of women represented by the appellants. Section 38 of the Act is therefore valid under s. 15(1) of the *Charter*, and the appeal should be dismissed with costs.

THE CHIEF JUSTICE —

[154] I agree with Abella J. that s. 38 of the *Pay Equity Act*, CQLR, c. E-12.001, breaches s. 15(1).

[155] The legislated delay imposed by the provision creates a distinction based on sex because it distinguishes between women in female-dominated workplaces — the focus of s. 38 — and male employees in general, whose presence is the lynchpin for higher wages in mixed workplaces. The substantive effect of the delay Abella J. describes is that women in female-dominated workplaces were unable to secure fair wages for their work, in contrast to men doing comparable work in other arenas. Where a distinction viewed in context is redolent of gender-based difference, as it is here, that cannot be ignored in the s. 15(1) analysis. Otherwise, the promise of substantive equality that animates s. 15(1) is betrayed.

[156] This distinction is discriminatory because the delay excused employers of women in female-dominated workplaces from paying their employees fairly for the work they were doing. Quebec gave employers *carte blanche* to ignore pay inequity in their organizations during the delay. The scheme said to impacted women: this is your problem. And the legislated delay signaled that it was acceptable for employers to make decisions to the detriment of the autonomy and inherent dignity of women in female-dominated workplaces. In effect, the scheme bolstered the very power imbalance between employers and female employees that lies at the heart of gender-based pay disparities, thereby perpetuating systemic inequality. Finally, it goes without saying that the economic consequences of pay inequity for women are profound.

[157] However, I depart from Abella J. on the question of justification under s. 1 of the *Charter*. In my view the Attorney General has not established that the breach is reasonable and justified under s. 1: *R. v. Oakes*, [1986] 1 S.C.R. 103. The Attorney General at the outset must establish a pressing and substantial objective for delaying the right and disempowering affected women from access to pay equity, exacerbated here by a lack of retroactive corrections under the Act. The government says it needed six years to come up with a formula to determine corrections for female-dominated workplaces due to the absence of male comparator groups and the need to ensure employer compliance. It also says that retroactive correction was rejected because it was problematic for employers. I agree that devising a satisfactory method of evaluating underpayment is a pressing and substantial objective capable of justifying a limit on the right to equal benefit of the law. It is more questionable whether the government's objective of ensuring employer compliance by imposing a long delay that would be unmet with any retroactive correction, for example, could justify breaching employees' rights. To agree would be to accept that obeying pay equity laws is an option that can be negotiated and that the very

segment that perpetuates systemic pay inequities — the employers — should be able to perpetuate them as the price of accepting the law.

[158] The Attorney General's attempt to justify the infringement, in any event, fails at the minimal impairment and balancing stages of the *Oakes* test. The Attorney General says the six-year delay was necessary to work out what constituted equal pay in female-dominated workplaces, where no male comparator groups were available. But it has not demonstrated that the whole of the six-year period was required for this purpose. This period was dictated not by the exigencies of the matter, but at least in part by the government's decision to negotiate with employers over a lengthy period, in order to ensure that the scheme was one that employers would accept and with which they would comply. Were there other less impairing options than extended negotiations? The government has not negated this. Similarly, the Attorney General says it agreed to deny retroactive correction of pay inequity because this would be difficult for employers to accept. Again, the government has not demonstrated that other options that impaired the right less were not available. It does not suggest it raised the possibility of partial redress, for example. It simply relies on what it did. Minimal impairment cannot be established simply by saying that a lengthy delay was required full-stop or that a lengthy delay could not be accompanied by retroactive correction because this is problematic to the employers who were perpetrating the inequality. Finally, the Attorney General has not established that the denial of benefits to the affected, already-marginalized women, is proportionate to the public interest in denying them a remedy.

[159] I conclude that the breach of s. 15(1) has not been shown to be justified under s. 1 of the *Charter*, and therefore I would allow the appeal.

*Appeal dismissed with costs, MCLACHLIN C.J. dissenting in the result.*

# QUEBEC (ATTORNEY GENERAL) V ALLIANCE DU PERSONNEL PROFESSIONNEL ET TECHNIQUE DE LA SANTE ET DES SERVICES SOCIAUX

2018 SCC 17, [2018] SCJ No 17

[In this companion case to *Centrale des syndicats du Québec v. Québec (Attorney General)*, the alliance du Personnel Professionnel et Technique de la Santé et des Services Sociaux challenged ss. 76.3, 76.5, and 103.1 para 2 of the *Pay Equity Act*. These Provisions created an auditing scheme whereby the Pay Equity Commission audited employers' compliance with the *Act* every five years. If the Commission found that an employer was noncompliant, the employer was ordered to rectify wages going forward. Except in cases where the employer acted in bad faith or in an arbitrary or discriminatory manner, the Pay Equity Commission could not award retroactive compensation. Audit results were to be posted for 60 days following the audit. In a case of non-compliance, the employer was not required to release the date on which they fell out of compliance with the act, making it more difficult for employees to show bad faith in a case for damages over the pay inequity. The majority, made up of McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ, found that these sections infringed s. 15 of the *Charter*, and that this infringement could not be justified under s. 1. The majority held that these sections together effectively “[gave] an amnesty to the employer for discrimination between audits. . . cemented by . . . barring the Pay Equity Commission from assessing adjustment payments prior to the date of the posting . . . [and denying] employees and unions the information they need to challenge decisions employers make as a result of pay equity audits” [paras 33-34]. Côté, Brown and Rowe JJ, dissenting, held that the sections were not discriminatory, as the state conduct at issue did not widen the gap between the historically disadvantaged group and the rest of society. The dissent further held that, even if this were not the case, the *Act* as a whole should be protected under s. 15(2).]