CANADIAN COURT OF JUSTICE

(On appeal from the Federal Court of Appeal)

BETWEEN:

THE BRIAN DICKSON MEMORIAL SCHOOL BOARD

Appellant

- v. -

COMMISSION FOR THE PROMOTION OF CANADIAN HISTORY AND PATRIOTISM

- and -

ATTORNEY GENERAL OF CANADA

Respondents

APPELANT'S FACTUM

COUNSEL FOR THE APPELLANT

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APPELLANT'S FACTUM

PART I: STATEMENT OF FACTS

A. GENESIS OF THE *PROMOTION OF CANADIAN HISTORY AND PATRIOTISM ACT*

1. The *Promotion of Canadian History and Patriotism Act* (the *Act*) was adopted in 1995 following alarming results of surveys ordered by the government to assess the knowledge of Canadian history and level of patriotism of students aged 6 to 17.[1]

2. Created under the *Act*, the Commission for the Promotion of Canadian History and Patriotism's (the Commission) initial mandate was to provide grants to schools and school boards so they could improve education in Canadian history.[2]

3. The *Act* caused constitutional tensions between the Canadian government and several provinces, such as Alberta, Manitoba, Ontario, Québec and Saskatchewan.[3] The discord was due to the provinces' exclusive jurisdiction over education.

4. However, schools and school boards across the country urged provincial governments not to pursue a constitutional challenge of the *Act* because of their chronic underfunding.[4]

B. AMENDMENT TO THE ACT

5. In 2013, an internal review of the effectiveness of the *Act*[5] revealed *inter alia*: (1) a marked improvement in the knowledge of Canadian history of students aged 6 to 17[6] and (2) a lack of uniformity in the teaching of Canadian history from one province to another.[7]

6. In light of these results, Parliament added s. 12.1 to the *Act*[8] to (1) impose minimal curricular requirements;[9] (2) command the use of specific textbooks chosen solely by the Commission;[10] and (3) confer the Commission with the discretionary power

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1 *Brian Dickson Memorial School Board v Commission for Promotion of Canadian History and Patriotism and Attorney General of Canada*, 2014 FC at para 8 [*Federal Court Judgement*].
2 *Promotion of Canadian History and Patriotism Act* s 3 [PCHPA].
3 *Federal Court Judgement*, *supra* note 1 at para 11.
4 *Ibid* at para 12.
5 *Ibid* at para 18.
6 *Ibid* at para 20.
7 *Ibid* at para 21.
8 *Ibid* at para 21-22.
9 *Ibid* at para 23; *PCPHA*, *supra* note 2, s 12.1(a).
10 *Federal Court Judgement*, *supra* note 1 at para 22; *PCPHA*, *supra* note 2, s 12.1(b).

to exempt applicants from these requirements in cases of exceptional circumstances.[11]

C. BRIAN DICKSON MEMORIAL SCHOOL BOARD'S EXEMPTION REQUEST

7. Appellant Brian Dickson Memorial School Board (the School Board) has jurisdiction over four elementary schools and two high schools in Manitoba.[12] Every school year since 1999-2000, the Commission awarded the School Board a grant[13] based on an examination of its financial needs.[14] For the last five years, this grant amounted to $2,000,000 annually.[15]

8. The grants were instrumental for the teaching of twelve different Canadian history classes and the creation of an afterschool Canadian history club.[16] Having to make do without the annual grant would necessarily result in the reduction of Canadian history classes or other classes.[17]

9. For the 2015-2016 school year, the School Board applied for a grant and requested to be exempted from using the prescribed Canadian history textbook for grades 8 to 10 based on the following exceptional circumstances.[18]

10. Imposed by the Commission, the textbook depicts Louis Riel, a central Canadian historical figure namely for Manitoba's Métis and French-speaking communities, as "a dangerous dissenting voice that had to be silenced for the greater good [and whose death was a] triumph for peace, justice and democracy in Canada".[19]

11. A number of parents indicated the School Board they would not allow their children to attend classes in which such content is taught.[20]

12. At the three-day hearing held by the Commission, the School Board presented evidence about the textbook's unfair and unbalanced account of a number of historical events that are inconsiderate of its local concerns.[21]

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11 *Federal Court Judgement*, *supra* note 1 at para 22.
12 *Ibid* at para 14.
13 *Ibid* at para 13.
14 *PCPHA*, *supra* note 2, s 12.1(b).
15 *Federal Court Judgement*, *supra* note 1 at para 13.
16 *Ibid* at para 14.
17 *Ibid* at para 16.
18 *Ibid* at para 29.
19 *Ibid* at para 27.
20 *Ibid* at para 28.
21 *Ibid* at para 30.

13. In the week following the hearing, the Commission informed the School Board by letter that it would have to consult "certain other scholars on certain matters" before rendering its decision.[22]

14. Ten days later, the Commission held a second hearing and asked the School Board additional questions about the textbook and its impact on Canadian history classes.[23]

15. Two days after the second hearing, the Commission denied the School Board a grant. It considered that (1) a disagreement over the content of the textbook is not a valid ground for exemption[24] and (2) deciding otherwise would "invite endless hearings and arguments on the quality of the textbooks chosen by the Commission".[25]

D. JUDICIAL HISTORY

I. *Federal Court*

16. The Federal Court (MacDuff J.) declared s. 12.1 inoperative with immediate effect, quashed the dismissal of the School Board's application for a grant,[26] and returned the matter to the Commission with the instruction to re-examine the School Board's application without imposing the conditions set forth by s. 12.1.[27]

17. It found that (1) the School Board was free to challenge the constitutionality of s. 12.1 for the first time before the Federal Court;[28] and (2) imposing a curriculum and a textbook to obtain a federal grant in a context of important educational budgetary cuts, infringes on the exclusive provincial jurisdiction over education.[29]

18. The Federal Court also concluded that (1) it could rule upon the School Board's claims of reasonable apprehension of bias and breach of procedural fairness because it was unrepresented by counsel before the Commission;[30] and (2) the Commission's internal structure, where the panel members both choose the textbook and decide the applicability of the exemption, raised a reasonable apprehension of bias.[31]

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22 *Federal Court Judgement*, *supra* note 1 at para 31.
23 *Ibid* at para 32.
24 *Ibid* at para 33.
25 *Ibid* at para 33.
26 *Ibid* at para 58-59.
27 *Ibid* at para 58-59.
28 *Ibid* at para 42.
29 *Ibid* at para 45-48.
30 *Ibid* at para 49-51.
31 *Ibid* at para 56.

II. *Federal Court of Appeal*

19. The majority of the Federal Court of Appeal (Wright and Manners JJ.A.) (1) declared s. 12.1 valid under the federal spending power even though that ground was not addressed before the Federal Court,[32] (2) found that the School Board should have raised its reasonable apprehension of bias before the Commission[33], and (3) concluded that the Commission's internal structure and functioning did not raise a reasonable apprehension of bias.[34]

20. Manners J.A. added that the School Board should have challenged the validity of s. 12.1 before the Commission.[35]

21. Gauchetière J.A., dissenting, agreed with the Federal Court that s. 12.1 is invalid[36] and disagreed with the majority that it could be upheld under the federal spending power.[37] He further concluded that (1) the Commission's actions raised a reasonable apprehension of bias; (2) the Commission breached procedural fairness by holding an *ex parte* meeting with other scholars before it made its decision;[38] and (3) disregarding the merits of the textbook proved to be an unreasonable decision.[39]

PART II: OBJECTIONS BY APPELLANT TO JUDGMENT APPEALED FROM

22. Is s. 12.1(b), which allows the Commission to impose Canadian history textbooks, *ultra vires* of Parliament? The answer is yes.

23. Did the Commission violate its duty of procedural fairness by misleading the School Board into believing that a disagreement over the content of the textbook was a sufficient ground to be exempted from using it? The answer is yes.

24. Did the Commission raise a reasonable apprehension of bias? The answer is yes.

25. Is the Commission's decision reasonable? The answer is no.

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[32] *Commission for Promotion of Canadian History and Patriotism and Attorney General of Canada v Brian Dickson Memorial School Board*, 2014 FCA at para 1-2 (Wright J.A.) [*Federal Court of Appeal Judgement*].
[33] *Ibid* at para 9 (Wright J.A.).
[34] *Ibid* at para 7-10 (Wright J.A.).
[35] *Ibid* at para 12-13 (Manners J.A.).
[36] *Ibid* at para 19 (Gauchetière J.A.).
[37] *Ibid* at para 14-15 (Gauchetière J.A.).
[38] *Ibid* at para 16-17 (Gauchetière J.A.).
[39] *Ibid* at para 18 (Gauchetière J.A.).

PART III: ARGUMENTS

26. The choice of a textbook is a basic, minimum and unassailable content of provincial jurisdiction over education that should be protected from Parliament's encroachment by a novel doctrine of exclusive provincial legislative jurisdiction. Parliament shall not regulate the choice of textbooks under the guise of its spending power or by using its ancillary power to promote Canadian history and patriotism. Section 12.1(b) of the *Act* is invalid.

27. An administrative tribunal empowered to decide grant applications has an imperative obligation to act fairly. It cannot raise a real or perceived apprehension of bias. It must disclose a policy underlying the use of a discretionary power. It must decide reasonably by taking into account *Charter* rights and freedoms, and unwritten constitutional principles. It cannot fetter its discretion. The Commission failed to abide by all of these obligations.

A. SECTION 12.1(B) IS UNCONSTITUTIONAL

I. *Parliament's involvement in education is only remedial*

28. Education is a core provincial issue that must be immune from federal encroachment. It is rooted in the historical compromise, reached in the Charlottetown and Québec pre-Confederation conferences,[40] where provincial

[40] Pierre Carignan, "Les Résolutions de Québec et la compétence législative en matière d'éducation" (1989) 23 RJT 1 at 9-17 [Carignan, "Résolutions"]; Joseph Pope, *Confederation – being a series of hitherto unpublished documents bearing on the British North America Act* (Toronto: Carswell, 1895) at 46-47.

legislatures yielded an extremely limited legislative power to Parliament.[41] In the words of then Prime Minister John A. MacDonald:

> "It was known to everyone that the question of education had threatened Confederation at its very inception, and a proposition that education should be left to the General Legislature of the Dominion would have been enough to secure the repudiation of Confederation by the people of Lower Canada, and it was therefore expressly provided in the Act of Union that the question should be entirely left to the different Provinces with the provision that wherever there was a separate system in force that system should not be interfered with, and that any denomination which had secured at the time of the passing of the Act, or which might at any time thereafter, by the Act of the Local Legislatures secure any privilege, that privilege should not be affected by any Act of the Local Legislature, and that if any attempt was made by that Legislature to set aside such privilege it would be void, and the Governor General was empowered to see that this was carried out."[42] [Emphasis added.]

29. As ss. 97-98 of the *Constitution Act, 1867*,[43] s. 93 embodies this compromise as a "small bill of rights"[44], "frozen in time",[45] a "solemn pact resulting from the bargaining which made Confederation possible".[46] Provincial jurisdiction over education thus calls for a liberal interpretation.[47] Parliament's remedial authority is

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41 *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 SCR 1148 at 1161, 1197 and 1198 [*re Bill 30*]; *Reference in re Educational System in Island of Montreal / Hirsch v. Protestant Board of School Commissioners*, [1926] SCR 246 at 252.

42 *House of Commons Debates*, 1st Parl, 5th Sess, No 5 (April 29, 1872) at 75 (John A. MacDonald). See also *House of Commons Debates*, 7th Parl, 6th Sess, Vol 1 (March 3, 1896) at 2723-2724 (Charles Tupper).

43 See *Renvoi sur l'article 98 de la Loi constitutionnelle de 1867 (Dans l'affaire du)*, 2014 QCCA 2365 (notice to appeal filed, SCC No. 36231).

44 See *Brophy v Attorney General of Manitoba*, [1895] AC 202 at 222 (PC); Peter Hogg, *Constitutional Law of Canada*, 5th ed Supplemented (Toronto: Carswell, 2007) vol 1 at 57-3.

45 *Protestant School Board of Greater Montreal v Quebec (A.G.)*, [1989] 1 SCR 377 at 400 [*Protestant School*].

46 *re Bill 30*, *supra* note 41 at 1173.

47 *Protestant School*, *supra* note 45 at 400; *Reference Re Authority to Perform Functions Vested by Adoption Act, The Children of Unmarried Parents Act, The Deserted Wives' and Children's Maintenance Act of Ontario*, [1938] SCR 398 at 402.

limited to the protection of minority religious groups' rights and privileges they enjoyed in 1867.[48]

30. The failed experiment in the Province of Canada in 1841 showed[49] that only this compromise, built around the recognition of an exclusive provincial jurisdiction, could overcome the insurmountable difficulty of enacting a uniform education system. This was fundamental to the creation of the federation in 1867.[50]

31. Because Parliament's role is strictly remedial, it cannot pass legislation pertaining to the effective core of education.[51]

II. *Interjurisdictional immunity precludes Parliament from legislating over the choice of textbooks*

32. The interjurisdictional immunity doctrine normally applies where a provincial law encroaches on a core jurisdiction of Parliament,[52] thus producing "asymmetrical results".[53] However, the doctrine is reciprocal.[54] Provincial heads of powers

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[48] *Protestant School*, *supra* note 45 at 400; *Saumur v City of Quebec*, [1953] 2 SCR 299 at 330 [*Saumur*]; *Tiny Separate School Trustees v The King*, [1927] SCR 637 at 654-655; *Trustees of the Roman Catholic Separate Schools of Ottawa v MacKell*, [1917] AC 62 at 69 (PC) [*MacKell*]; Gérard A. Beaudoin, *La Constitution du Canada* (Montréal: Wilson & Lafleur, 1990) at 437-438; Paul Davenport and Richard H. Leach, eds, *Reshaping Confederation: The 1982 Reform of the Canadian Constitution* (Durham, North Carolina: Duke University Press, 1984) at 178 and 188.

[49] See *Acte pour abroger certains Actes y mentionnés, et pourvoir plus amplement* à *l'établissement et au maintien des Écoles Publiques en cette Province*, SC 1841, c 18; Carignan, "Résolutions", *supra* note 40 at 15; Pierre Carignan, "La raison d'être de l'article 93 de la Loi constitutionnelle de 1867 à la lumière de la legislation préexistante en matière d'éducation", (1986) 20 RJT 375 at 434.

[50] *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21 at para 48, [2014] 1 SCR 433; *Reference re Secession of Quebec*, [1998] 2 SCR 217 at 79-82 [*re Secession*]; *re Bill 30*, *supra* note 41 at 1206.

[51] See José Woehrling, "La procédure pour modifier l'article 93 de la Loi constitutionnelle de 1867", (1994) 35:3 C de D 551 at 579 [Woehrling].

[52] See *Quebec (Attorney General) v COPA*, 2010 SCC 39 at para 57, [2010] 2 SCR 536; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 60, [2011] 3 SCR 134 [*PHS*].

[53] See *Canadian Western Bank v Alberta,* 2007 SCC 22 at para 35, [2007] 2 SCR 3 [*Canadian Western Bank*]. See also *Quebec (P.G.) v Lacombe*, 2010 SCC 38 at para 110, [2010] 2 SCR 453 [*Lacombe*].

possess a "basic, minimum and unassailable content"[55] that must be protected from interference by Parliament.[56] The enactment of s. 12.1(b) jeopardises the provinces' exclusive power to choose and approve textbooks.[57] This delineated core of the provincial legislative power over education[58] must be immune from Parliament's legislative impairing intervention.[59]

33. Interjurisdictional immunity in the field of education addresses the concerns underlying its limited use: (1) a tension with the current dominant approach of Canadian federalism; (2) a tension with the practice of emergent cooperative federalism; and (3) the risks of "legal vacuums" if the immunity overshoots the head of power in which it is grounded.[60]

a) *Section 12.1(b) encroaches upon the exclusive provincial jurisdiction over education and has adverse effects*

34. Both ss. 93 of the *Constitution Act, 1867*[61] and 22 of the *Manitoba Act, 1870*[62] bestow provinces with exclusive legislative power over education. For s. 12.1(b) to

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54 See *PHS*, *supra* note 52 at para 65; *Lacombe*, *supra* note 53 at para 111; *Canadian Western Bank*, *supra* note 53 at para 35; *Caron v The King*, [1924] AC 999 at 1006 (PC).

55 *Bell Canada v Québec (CSST)*, [1988] 1 SCR 749 at 839 [*Bell Canada*].

56 See *Reference re Securities Act*, 2011 SCC 66 at para 7, [2011] 3 SCR 837 [*re Securities Act*]; *PHS*, *supra* note 52 at para 58; *Lacombe*, *supra* note 53 at para 106.

57 See *Canadian Western Bank*, *supra* note 53 at para 48.

58 See *Canadian Western Bank*, *supra* note 53 at para 50; *Bell Canada*, *supra* note 55 at 839.

59 See *Lacombe*, *supra* note 53 at para 107.

60 *PHS*, *supra* note 52 at para 62-64.

61 *Constitution Act, 1867* (U.K.), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

62 *Manitoba Act (An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba), 1870*, 33 Vict., c 3 (Can.), s 22. See *Attorney General of Manitoba v Forest*, [1979] 2 SCR 1032 at 1038.

be valid, its pith and substance cannot be correlated to this head of power.[63] Otherwise, it must be deemed as an encroachment and found *ultra vires*.[64]

35. Section 12.1 does not state its specific purpose,[65] but its pith and substance can be distilled[66] as educational.[67] Contrary to the rest of the *Act*, it adds a normative dimension to the curriculum. By imposing textbooks, it directs the way educational subject matters are taught.[68] This is indicative of a singular pedagogical standardising aim that does not take into account the fact that provinces have different local concerns and have the "basic, minimum and unassailable" right to teach Canadian historical events differently pursuant to the historical compromise reached in 1867.

36. The provinces' exclusive legislative power[69] over education encompasses the choice of an academic curriculum, textbooks and their contents.[70] To that end, provinces have the discretion to choose the extent to which they delegate this responsibility amongst different local authorities.[71]

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[63] See *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 at para 17, [2002] 2 SCR 146 [*Kitkatla*].

[64] See *Kitkatla*, *supra* note 63 at para 17.

[65] *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56 at para 25, [2005] 2 SCR 669.

[66] See *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para 190, [2010] 3 SCR 457.

[67] See *Kitkatla*, *supra* note 63 at para 56-57; *General Motors of Canada Ltd. v City National Leasing*, [1989] 1 SCR 641 at 665.

[68] See *Lacombe*, *supra* note 53 at para 22-23. See also *Kitkatla*, *supra* note 6 at para 53.

[69] See *Quebec (A.G.) v Greater Hull School Board*, [1984] 2 SCR 575 at 585-586 [*Greater Hull School Board*]. See also *Mahe v Alberta,* [1990] 1 SCR 342 at 369 [*Mahe*].

[70] *Protestant School*, *supra* note 45 at 399 and 414; *re Bill 30*, *supra* note 41 at 1201; *Greater Hull School Board*, *supra* note 69 at 584; *Hirsch et al v Protestant Board of School Commissioners of Montreal*, [1928] AC 200 at 215 (PC) [*Hirsch*]; *Winnipeg (City of) v Barrett*, [1892] AC 445 at 459 (PC); *MacKell*, *supra* note 48 at 68.

[71] *Québec (Procureur général) c Loyola High School*, 2012 QCCA 2139 at para 120 and 146; *Reference re Education Act (Que.),* [1993] 2 SCR 511 at 530-531; *Hirsch*, *supra* note 70 at 215. See also *Mahe*,

37. In Manitoba, the Department of Education's Advisory Board is charged with that task.[72] Once the Advisory Board has made its recommendations, the Manitoba Text Book Bureau issues an approved list of instructional materials[73] and ensures their availability.[74] School boards can then choose approved educational materials, as they see fit.[75] In doing so, they must take into account the diverse needs and interests of Manitobans and strive to be responsive to local or parents' concerns.[76] Other provinces have implemented similar practices.[77]

38. Section 12.1 allows the Commission to bypass the Manitoban educational authorities' power to approve textbooks through its established structures.[78] It also undermines the advantages of the Manitoba Text Book Bureau's[79] prescribed practice of consolidated purchasing.[80]

b) *Interjurisdictional immunity in the field of education addresses the concerns underlying its limited use*

(i) *The proposed immunity reiterates the principle of federalism*

39. A provincial interjurisdictional immunity over the choice of textbooks reconciles diversity with unity and reiterates the principle of federalism underlying the

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supra note 69 at 368.

72 *Education Administration Act*, CCSM c E10, s 16(1)(d).

73 *Education Administration Miscellaneous Provisions Regulation*, Reg 468/88 R, s 20.

74 *Education Administration Act*, CCSM c E10, s 9. See also Manitoba Text Book Bureau, *Special Operating Agency Annual Report 2012/2013*, online: Manitoba Education and Advanced Learning http://www.edu.gov.mb.ca/ar_edu_1213/mtbb/preface.pdf.

75 *Public School Act,* CCSM c P250, ss 48(1)(g), (j).

76 *Ibid*, preamble.

77 See eg *Education Act*, CQLR c I-13.3, ss 77.1, 96.5, 230, 243, 447(3), 462; *Education Act*, RSO 1990 c E.2, s 8(1)5-6; *The Education Act, 1995*, SS 1995, c E-0.2, s 3(1), 4(1), 4(3), 4(4), 87(1)(f); *Education Act*, SNS 1995-96, c 1, s 141(1)(g); *Education Act*, SNB 1997, c E-1.12, s 6(c); *School Act*, RSBC 1996, c 412, s 85(2), 168 (2).

78 *Education Administration Act*, CCSM c E10, s 16(1)(d).

79 *Ibid*, s 9.

80 *Funding of Schools Program Regulation*, Reg 259/2006, ss 10 and 37.

foundation of Canada.[81] Protecting the autonomy of provincial governments in the choice of textbooks enables them to implement and maintain public education systems that reflect their respective particular societal objectives[82] without federal impairment.

40. Interjurisdictional immunity is further consistent with the principle of subsidiarity,[83] which recognises decisions "are often best [made] at a level of government that is not only effective, but also closest to the citizens affected".[84] Education plays a central role in community life by reflecting local concerns[85] and is essential for the transmission of local minority groups' cultural values.[86] The proposed immunity therefore helps to consolidate provincial educational systems that reflect the complex and diverse political and cultural reality of Canada whilst instilling a sense of belonging to both local communities and Canada.

41. Recognising that provinces have exclusive jurisdiction over the choice of textbooks is coherent with the principle of "participation of, and accountability to, the people"[87] through Canadian public institutions. Provincial governments are solely responsible for dispensing education services to their population. If s. 12.1(b) is

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81 *re Secession*, *supra* note 50 at para 43 and 55.
82 *Ibid* at para 58.
83 *Canadian Western Bank*, *supra* note 53 at para 45; *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 3, [2001] 2 SCR 241 [*Spraytech*].
84 *Spraytech*, *supra* note 83 at para 3. See also *Lacombe*, *supra* note 53 at para 109; *re Secession*, *supra* note 50 at para 53-55.
85 *Mahe*, *supra* note 69 at 372.
86 *Ibid* at 372.
87 See *re Secession*, *supra* note 50 at para 67-68; *Saumur*, *supra* note 48 at 330.

valid, Parliament could impose textbooks in spite of provincial governments' opposition, but would not be accountable[88] for such a decision.

(ii) *The principle of cooperative federalism is not applicable*

42. The choice of textbooks is a long-standing core issue of exclusive provincial jurisdiction that does not allow for a double aspect of regulation by both levels of government.[89] Attempting to regulate the purchase and use of textbooks through economic coercion bypasses an exclusive provincial legislative power whose importance was paramount to the signing of the Constitution[90]. Furthermore, adopting such a measure without prior consultation with the provinces represents a clear violation of the Social Union Framework Agreement of 1999.[91]

(iii) *The proposed immunity does not create a federal "legal vacuum"*

43. Established provincial structures pertaining to the choice and approval of textbooks[92] present no risk of a federal "legal vacuum" by recognizing the proposed immunity. Parliament's role in the field of education is solely remedial.[93] It cannot expand since the responsibility to ensure the fulfillment of reciprocal obligations lies exclusively upon the provinces.

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88 Craig Forcese and Aaron Freeman, *The Laws of Government: The Legal Foundations of Canadian Democracy* (Toronto: Irwin Law, 2011) at 4-7.

89 See *PHS*, *supra* note 52 at para 63 and 70; *Canadian Western Bank*, *supra* note 53 at para 37 and 67.

90 Woehrling, *supra* note 51 at 578.

91 Canada, *A Framework to Improve the Social Union for Canadians*: An Agreement between the Government of Canada and the Governments of the Provinces and Territories, February 4 1999. See Peter H. Russel, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3rd ed (Toronto: Carswell, 2004) at 254.

92 *Infra* at para 37, 40-41.

93 *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 93 [*Constitution Act, 1982*].

c) *The proposed immunity provides a balanced way to curtail the federal government's right to spend*

44. Validating s. 12.1(b) under the federal spending power would amount to Parliament usurping "jurisdiction and authority for major public education needs in this country simply because provincial jurisdictions with far fewer resources than the federal government cannot afford to say, 'no, we don't have to agree with your conditions'".[94]

45. Otherwise, Parliament would enjoy a *de facto* paramountcy in all areas of provincial jurisdiction, destabilising Canadian federalism.[95]

46. Before the Federal Court, the respondents did not rely on the federal spending power as a ground upon which s. 12.1(b) would be valid.[96] Neither party presented evidence on the issue. The School Board did not have the opportunity to answer such an argument.

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[94] Earl L. Hurlbert and Margot A. Hurlbert, *School Law under the Charter of Rights & Freedoms*, 2nd ed (Calgary: University of Calgary Press, 1992) at 15. See also *YMHA Jewish Community Centre of Winnipeg Inc. v Brown*, [1989] 1 SCR 1532 at 1548-1551; *Attorney-General for Canada v Attorney-General for Ontario*, [1937] AC 335 at 366-367 (PC); Henri Brun, Guy Tremblay et Eugénie Brouillet, *Droit Constitutionnel*, 6e éd (Cowansville (Qc), Yvon Blais, 2014) at para VI-1.123 [Brun].

[95] Brun, *supra* note 94 at para VI-1.112 to VI-1.117; Andrew Petter, "Federalism and the Myth of the Federal Spending Power" (1989) Can Bar Rev 448 at 479.

[96] *Federal Court of Appeal Judgement*, *supra* note 32 at para 1 (Gauchetière J.A.).

III. *Subsidiarily, s. 12.1(b) is a colourable attempt to legislate over education*

47. For the aforementioned reasons, s. 12.1(b) is also a colourable attempt to legislate over education[97] and is *ultra vires* of Parliament.[98] Section 12.1(b) regulates the choice of textbooks and cannot be valid under the federal spending power.[99]

IV. *Imposing textbooks is not ancillary to promoting Canadian history and patriotism*

48. Because s. 12.1(b) seriously encroaches on the provincial legislative power over education, it must strictly be necessary to the promotion of Canadian history and patriotism to be declared valid.[100] As the 2013 internal review of the original *Act* results show, this is not the case. Parliament can successfully promote Canadian history and patriotism without imposing textbooks[101] as it did before the addition of s. 12.1(b).

V. *The constitutional challenge could only be raised before the Federal Court*

49. The Commission's structure and expertise, which is limited to the promotion of Canadian history and patriotism, rebuts the presumption that it has jurisdiction to decide constitutional issues.[102]

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97 See *re Securities Act*, *supra* note 56 at para 128.
98 *Ibid* at para 130.
99 See *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 SCR 297 at 332-333.
100 *General Motors of Canada Ltd. v City National Leasing*, [1989] 1 SCR 641 at 672; *Lacombe*, *supra* note 53 at para 42.
101 *Federal Court Judgement*, *supra* note 1 at para 20.
102 See *R v Conway*, 2010 SCC 22 at para 68 and 81, [2010] 1 SCR 765 [*Conway*]; *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 at para 36, [2003] 2 SCR 504 [*Martin*]; *Cuddy Chicks Ltd. v Ontario (Labour Relations Board)*, [1991] 2 SCR 5 at 14-15.

50. The School Board's challenge calls for a search "for evidence of facts of social context and legislative effect that goes well beyond what [was] needed"[103] to apply for a grant through the resource-allocation operating scheme of the Commission.[104]

51. The Commission's purpose is to apply "narrowly-defined statutory criteria".[105] It is required to engage in simple legal analysis[106] by conducting hearings that must not exceed three days.[107] In such short time and given the panel members' lack of legal background and expertise,[108] the panel cannot be expected to receive evidence and hear complex legal and factual arguments on constitutional issues[109] as well as grant applications and exemption requests. Even though adjudication of constitutional issues by administrative tribunals is generally regarded to provide greater transparency, uniformity and accessibility of administrative law,[110] the Commission in this case is ill-equipped to conduct such an assessment.[111]

VI. *Section 12.1(b) is invalid*

52. Section 12.1(b) is invalid because it regulates the core of the provincial exclusive jurisdiction over education. This core is immune from Parliament's encroachment

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[103] J. D. Whyte and W.R. Lederman, *Canadian Constitutional Law : Cases, notes and materials* (Toronto: Butterworths, 1977) at 5-24.

[104] See *Attorney General of Alberta v Attorney General of Canada*, [1939] AC 117 at para 5-6 (PC); *Reference Re The Residential Tenancies Act*, [1981] 1 SCR 714 at 721-723; *Reference Re Anti-Inflation Act*, [1976] 2 SCR 373 at 389-391 and 422-423; *Johannesson et al, v Rural Municipality West St Paul et al*, [1952] 1 SCR 292 at 308.

[105] *Martin*, *supra* note 102 at para 48; *Ontario (Attorney General) v Patient*, [2005] OJ No 631 (QL) at para 39 (SCDC) [*Patient*].

[106] See *Conway*, *supra* note 102 at para 69. See also *Martin*, *supra* note 102 at para 41; *Patient*, *supra* note 105 at para 39.

[107] *PCPHA*, *supra* note 2, s 14.

[108] *PCPHA*, *supra* note 2, s 11. See Guy Régimbald, *Canadian Administrative Law*, 1st ed (Markham: LexisNexis, 2008) at 65 [Régimbald].

[109] See *Tétreault-Gadoury v Canada (Employment and Immigration Commission),* [1991] 2 SCR 22 at 35.

[110] *Conway*, *supra* note 102 at para 66.

[111] Régimbald, *supra* note 108 at 70, citing Deborah K. Lovett, "Issues and the New Administrative Tribunals Act" (2005) 63 The Advocate 2 at 190-191.

and colourable invasion under the guise of its spending power. Section 12.1(b) cannot be justified by Parliament's ancillary power to promote Canadian history and patriotism.

B. THE DECISION TO DENY A GRANT SHOULD BE QUASHED

I. *The standard of appellate review: correctness and reasonableness*

53. When appellate courts review decisions rendered by lower courts, it must validate (1) if the standard of review applied by the court is the proper one and (2) if it has been applied appropriately.[112]

II. *The Commission did not act with fairness towards the School Board*

a) *The Commissions' duty of procedural fairness is reviewable on a standard of correctness*

54. The Commission members' limited expertise to establish procedures encompassing legal considerations[113] and the fact that a recent legislation is at stake[114] reinforces the presumption that violations of procedural fairness attract the correctness standard of review.[115]

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[112] *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 45, [2013] 2 SCR 559; *Canada (Revenue Agency) v Telfer*, 2009 FCA 23 at para 18.

[113] *PCPHA*, *supra* note 2, s 12.1(b).

[114] See *Island Press Ltd. v Prince Edward Island (Information and Privacy Commissioner)*, 2004 PESCTD 69 at para 4 and 13.

[115] See *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, [2008] 1 SCR 190 [*Dunsmuir*]; *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 50, [2003] 1 SCR 247; *Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 33; *Air Canada v Greenglass*, 2014 FCA 288 at para 26; *Sea-Scape Landscaping v New Brunswick (Workplace Health, Safety and Compensation Commission)*, 2004 NBCA 64 at para 4.

b) *The ex parte consultation of scholars raises a reasonable apprehension of bias*

(i) *The Commission members' impartiality must be evaluated according to the reasonable apprehension of bias test*

55. Independent and impartial decision-making is the "cornerstone of the common law duty of procedural fairness".[116] Following the 2013 Amendment, the Commission is in a position to "judge [its] own cause".[117] The more stringent test of reasonable apprehension of bias must apply.[118] This Court must determine "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude".[119]

56. Under the reasonable apprehension of bias standard, the School Board has the absolute right[120] to have its application heard by a decision maker that is unbiased or perceived as such.[121] Otherwise, the decision cannot stand even if it is correct.[122]

(ii) *The Commission's failure to address the ex parte consultation in its decision raises a reasonable apprehension of bias*

57. The merit of the textbook was the sole issue addressed at the hearing.[123] Before making its decision, the Commission came "to the conclusion that [it] should

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[116] *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 32, [2007] 1 SCR 350 [*Charkaoui*].
[117] Régimbald, *supra* note 108 at 329, citing S.A. De Smith H. Woolf & J.L. Jowell, *Principles of Judicial Review* (London: Sweet & Maxwell, 1999) at 416.
[118] *2747-3174 Québec Inc. v Québec (Régie des permis d'alcool)*, [1996] 3 SCR 919 at para 112-115, 129.
[119] *R v S (R.D)*, [1997] 3 SCR 484 at 489; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 47 [*Baker*].
[120] See *Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 at 645 [*Newfoundland Telephone*].
[121] *Ibid* at 636.
[122] See *Ibid* at 645.
[123] *Federal Court Judgement*, *supra* note 1 at para 30.

consult certain other scholars on certain matters".[124] As a matter of fact, the Commission asked further questions on the issue at the second hearing, notably its local impact on the way history classes would be taught.[125]

58. From the foregoing, a reasonable person (1) would infer that the consultation pertained only to the merit of the textbook, (2) would expect the Commission to address the outcome of the consultation at the second hearing and (3) would expect the decision to specifically address that issue.

59. The Commission's final decision completely draws aside any disagreement over the merit of the textbook and negates the very possibility to request an exemption on this ground. The Commission's decision retrospectively[126] leads a reasonable person to conclude that it had decided right from the start to maintain the imposition of the textbook it chose in spite of the School Board's exemption request.

[124] *Federal Court Judgement*, *supra* note 1 at para 31.
[125] *Ibid* at para 32.
[126] See *eg Baker*, *supra* note 119 at para 45-48.

c) *The Commission had to disclose its policy regarding the "exceptional circumstances" standard*

(i) *The factors relevant to determining the level of participation rights*

60. The standard of procedural fairness is a continuum. It seeks a balance between the operational considerations of the administrative body and the protection of the interests of the individuals affected.[127]

61. Five non-cumulative[128] contextual[129] factors can be used to determine the appropriate level of procedural fairness: (1) the nature of the decision and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision for the individual(s) affected; (4) the legitimate expectations of the individual(s) challenging the decision; (5) the choices of procedure made by the agency itself.[130]

62. The Commission must observe high standards of procedural fairness considering it follows a process similar to a judicial process, and its decisions have an adverse impact on the School Board's activities and *Charter* rights. The revocation of discretionary benefits or "privileges" warrants procedural protections.[131]

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[127] See *IWA v Consolidated-Bathurst Packaging Ltd*., [1990] 1 SCR 282 at 305 [*Consolidated Bathurst*].
[128] *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 42, [2011] 2 SCR 504.
[129] *Dunsmuir*, *supra* note 115 at para 79; *Baker*, *supra* note 119 at para 28.
[130] *Congrégation des Témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 at para 5, [2004] 2 SCR 650 [*Congrégation des Témoins de Jéhovah*]; *Baker*, *supra* note 119 at para 23-27.
[131] See *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at para 14 [*Cardinal*]; *Cottrell v Chippewas of Rama Mnjikaning First Nation*, 2009 FC 261 at para 43; *Re Webb and Ontario Housing Corporation*, (1978) 22 OR (2d) 257 at para 21-23 (ONCA). See also Régimbald, *supra* note 108 at 237-238.

1. *The applicants have a statutory right to a hearing before the Commission*

63. The Commission must provide applicants with (1) the opportunity to be heard orally for up to three days;[132] (2) the possibility to adduce evidence in support of its application;[133] and (3) a written decision providing a summary of reasons.[134]

2. *The Commission's final decision results in the loss of funding for the 2015-2016 school year*

64. The Commission is vested with two roles: (1) select mandatory textbooks[135] and (2) decide if exceptional circumstances warrant certain exemptions.[136] It is in a position to impose its own choice of textbooks despite legitimate concerns expressed by politically accountable applicants.[137] Its decisions are final[138] and binding for one school year.[139] Applicants are even prevented from submitting a revised application.

65. Such a process has "a very serious impact"[140] on the School Board. Considering that the grant application for the 2015-2016 school year was denied in June 2014, the School Board had time to, but could not amend its application to exclude funding for classes where the use of the mandatory textbook is contested. Because

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[132] *PCPHA*, *supra* note 2, s 13.
[133] *Ibid*, s 14.
[134] *Federal Court Judgement*, *supra* note 1 at para 10.
[135] *PCPHA*, *supra* note 2, s 12.1(b).
[136] *Ibid,* s 12.1(c).
[137] *Municipal Councils and School Boards Elections Act*, CCSM c M257, ss 21.50-26(7).
[138] *PCPHA*, *supra* note 2, s 15. See also *Baker*, *supra* note 119 at para 24; *Old St. Boniface Residents Assn. Inc. v Winnipeg (City)*, [1990] 3 SCR 1170 at 1191.
[139] *PCPHA*, *supra* note 2, s 15.
[140] *Federal Court Judgement*, supra note 1 at para 17.

it sought to be exempted from using a textbook that depicts Louis Riel as a traitor, the School Board is now left empty-handed.

3. *The Commission's decision affects the School Board's, the parents' and the students' Charter rights and the protection of minorities*

66. The School Board's exemption request is rooted in the seeking and attainment of truth.[141] It opposes the use of the mandatory textbook on account that it provides an unfair and unbalanced account of events of Canadian history. It also conveys that individual fulfilment through education can take diverse forms in order to reflect the concerns voiced in local communities to whom school boards are politically accountable.[142] It thus evokes in lay terms a *Charter*-protected freedom of expression issue.[143]

67. The School Board's exemption request is also grounded in parents' rights related to the transmission of cultural values of minority groups that reflect the unwritten principle of protection of minority.[144] It seeks to avoid children being subjected to content undermining important Manitoban minority rights issues, notably Métis

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[141] See *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927 at 976 [*Irwin Toy*].
[142] See *Ibid* at 976.
[143] *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK)*, 1982, c 11, s 2(b) [*Charter*]; See *Congrégation des Témoins de Jéhovah*, *supra* note 130 at para 9.
[144] *Ibid,* s 23. See *Mahe*, *supra* note 69 at 372; *re Secession*, *supra* note 50 at para 80-81; Paul T. Clarke, "The Judicial Contours of Minority Language Educational Rights under the *Charter*", in Michael Manley-Casimir and Kirsten Manley-Casimir, eds, *The Courts, the Charter and the Schools* (Toronto: University of Toronto Press, 2009) at 215.

culture. Some parents already stated that they would not permit their children to attend classes using the disputed textbook.[145]

(ii) *The Commission's failure to disclose its policy regarding the meaning of "exceptional circumstances" voids its decision*

68. To be meaningful, participation in the hearing process must be based on information sufficient[146] to provide with the opportunity to deal with material that may influence the Commission.[147] Disclosure of the case to be met is implied in every statute.[148]

69. Section 12.1(c) vests the Commission with the discretionary power to exempt applicants from minimal curriculum requirements and mandatory textbooks based on "exceptional circumstances".[149] The *Act* does not define that expression.

70. Considering the impact of the decision and the impossibility to submit a further application for the 2015-2016 school year, the Commission had to disclose an exemption policy[150] so the School Board could adequately prepare and present its application.[151]

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[145] *Federal Court Judgement*, *supra* note 1 at para 28.
[146] *In re le Conseil de la Radio-Télévision canadienne et in re la London Cable TV Ltd*., [1976] 2 FC 621 at 624-25; *Quebec (Attorney General) v Canada (National Energy Board)*, [1994] 1 SCR 159 at 181.
[147] *Consolidated-Bathurst Packaging*, *supra* note 127 at 298.
[148] *Alibey v Canada (Minister of Citizenship and Immigration)*, 2004 FC 305 at para 81; See *R v Gaming Board for Great Britain, ex parte Benaim and Khaida*, [1970] 2 QB 417 at para 21 (CA).
[149] *PCPHA, supra* note 2, s 12.1(c).
[150] Pierre Issalys and Denis Lemieux, *L'action gouvernementale: Précis de droit des institutions administratives*, 3rd ed. (Cowansville: Éditions Yvon Blais, 2009) at 1260-1262.
[151] *Consolidated-Bathurst*, *supra* note 127 at 339. See also *Innisfil Township v Vespra Township*, [1981] 2 SCR 145 at 164; *Cardinal*, *supra* note 131 at para 23; *Charkaoui*, *supra* note 116 at para 53; *St-Hilaire v A.C.A.*, J.E. 90-333 at 12 (SC).

71. Non-disclosure of an exemption policy misled the School Board into submitting a grant application that had no effective chance of success. The School Board unknowingly forfeited any opportunity to receive essential financial support. The Commission's non-disclosure leads to an application of the *Act*'s new regime that is unfair for the School Board.[152]

d) *Reasonable apprehension of bias and non-disclosure of an exemption policy could only be raised for the first time before the Federal Court*

72. There is no way the School Board could have known that the Commission would disregard the scholars' opinion and arguments on the merit of the textbook. Raising this issue for the first time before the Federal Court was the only possibility for the School Board.[153]

73. The same applies to the failure to disclose the exemption policy. It is only when the final decision was rendered that the School Board could realise that a disagreement over the content of textbooks is not a sufficient exemption ground.

III. *The Commission's decision is unreasonable*

a) *The standard of judicial review is reasonableness*

74. The School Board's application raised questions of mixed fact and law. The Commission's assessment of grant applications is discretionary. Due to the Commission's relative expertise in the matter, and the existence of a privative

[152] See *May v Ferndale Institution*, 2005 SCC 82 at para 90, [2005] 3 SCR 809; *Ruby v Canada (Solicitor General)*, 2002 SCC 75 at para 39, [2002] 4 SCR 3. See also Régimbald, *supra* note 108 at 260.

[153] See *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 at 942; *Ménard c Gardner*, 2012 QCCA 1546 at para 52.

clause in s. 15 of the *Act*,[154] courts must act with deference when reviewing such decision. Reasonableness is the applicable standard of review.[155]

b) *The Commission's decision did not consider Charter rights and the protection of minorities*

75. Although they derive from a discretionary power, administrative decisions must take sufficient account of the *Charter*-protected fundamental freedom of expression[156] and the unwritten principle of protection of minorities.[157]

(i) *The Commission's decision disregarded the School Board's fundamental freedom of expression*

76. Section 2(b) of the *Charter* protects "free expression in order to promote truth, political and social participation, and self-fulfilment".[158] It must be given a broad and purposive interpretation.[159] Hence, as "long as an activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee" of freedom of expression.[160]

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[154] *Mont-Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at para 58, [2001] 2 SCR 281 [*Mont-Sinai*].

[155] *Dunsmuir*, *supra* note 115 at para 53; *Doré v Barreau du Québec*, 2012 SCC 12 at para 49, [2012] 1 SCR 395 [*Doré*]; *Baker, supra* note 119 at para 53; *Chamberlain v Surrey School District No 36*, 2002 SCC 86 at para 14, [2002] 4 SCR 710 [*Chamberlain*]; *Mont-Sinai*, *supra* note 154 at para 58; *Association des courtiers et agents immobiliers du Québec v Proprio Direct inc*., 2008 SCC 32 at para 18, [2008] 2 SCR 195; *Tervita Corp. v Canada (Commissioner of Competition)*, 2015 SCC 3 at para 40.

[156] *Charter*, *supra* note 143, s 2(b). See *Doré*, *supra* note 154 at para 29, 32, 35; *Baker*, *supra* note 119 at para 56.

[157] *re Secession*, *supra* note 50 at 80-81; *Lalonde v Ontario (Commission de restructuration des services de santé)* (2001) 56 OR (3d) 505 at 186 (ONCA).

[158] *R v Zundel*, [1992] 2 SCR 731 at 752.

[159] *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 at 766-67; *Irwin Toy*, *supra* note 141 at 1006.

[160] *Irwin Toy*, *supra* note 141 at 969; *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825 at 831-32 [*Ross*].

77. The classroom is not only where children learn a provincially predetermined curriculum that exposes them to the "widest possible range of viewpoints";[161] it is also where they learn by example the value of unfettered speech in the search for truth.[162] A school is an "arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate".[163]

78. The freedom of expression issue underlying the School Board's exemption request should have been taken into account in the Commission's decision. By refusing to exempt the School Board from the controversial viewpoint of Métis culture, the Commission "strikes directly at the content and at the viewpoints"[164] of Manitoban parents. The Commission's systematic "[v]iewpoint-based abridgment of speech"[165] is not justifiable.

(ii) *The Commission's decision failed to give weight to the cultural significance underlying the School Board's exemption request*

79. Education is among others the "instrument through which cultures perpetuate themselves".[166] Along with the forging of personality, the transmission, conservation, and extension of culture are among the most important functions of

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[161] See *R v Keegstra*, [1990] 3 SCR 697 at 817, 863 (McLachlin J. (now CJ), dissenting) [*Keegstra*].
[162] Earl L. Hurlbert, Margot A. Hurlbert, *School Law under the Charter of Rights & Freedoms*, 2nd ed (Calgary: University of Calgary Press, 1992) at 221. See *Baier v Alberta*, 2006 ABCA 137 at para 40.
[163] *Ross*, *supra* note 160 at 856-857. See also *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 SCR 772 at 801.
[164] See *Keegstra*, *supra* note 161 at 863 (McLachlin J., dissenting).
[165] See *Ibid* at 817 (McLachlin J., dissenting).
[166] *Quebec c Commission Scolaire Crie*, [2001] RJQ 2128 at para 97 (CA) [*Commission Scolaire Crie*], citing J.J. Quillen, "Problems and Prospects" in *Education and Culture, Anthropological Approaches,* G.D. Spindler, ed (New York: Holt, Rinehart and Winston, 1963) at 50 [Quillen].

the school.[167] A school board is "an instrument by which, in the absence of an already clearly developed consensus at the provincial level (whether pertaining to curriculum subject matter or to education resource materials), consensus is developed locally, a reflection of what parents deem is in their children's best interests".[168]

80. By not addressing the local concerns conveyed by the School Board regarding the controversial depiction of Louis Riel in its decision, the Commission failed to consider the specificity of the Manitoban cultural minorities, namely the Métis. It is difficult to conceive a more exceptional circumstance. The Commission disregarded the unwritten principle of protection of minorities.

c) *The Commission's decision amounts to a fettering of discretion*

81. An administrative decision maker fetters its discretion[169] if the decision is made mechanically, without accounting for the particulars of each case.[170]

82. The School Board's application was denied on the ground that accepting any disagreement as an "exceptional circumstance" would bring upon the Commission an endless amount of hearings. However, there exists no connectivity between this ground and the objectives of s. 12.1(c). The decision fails to properly consider (1) the particulars of the School Board's exemption request, and (2) the fact that each applicant is statutorily entitled to a hearing and a decision. In fact, the

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[167] *Commission Scolaire Crie*, *supra* note 166 at para 97, citing Quillen, *supra* note 166 at 50.
[168] See *Chamberlain*, *supra* note 155 at para 154.
[169] See *Thamotharem v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 at para 33, [2008] 1 RCF 385.
[170] See *Maple Lodge Farms Ltd. v Canada*, [1982] 2 SCR 2 at 4.

Commission refused to assess the merit the textbook despite its expertise in Canadian history, and based its decision on an inflexible policy[171] that proved to be determinative in denying funding.[172]

83. If all disagreements with the content of mandatory textbooks fall outside the scope of "exceptional circumstances", the interlocking application of ss. 12.1(b) and (c) becomes unreasonably confined. It discards what should be one of the most fundamental exemption grounds: the opposition of a publicly accountable school board and concerned parents to the unacceptable content of the mandatory textbook.

IV. *Overall, the decision is unreasonable*

84. The Commission failed to consider what should have been the most relevant criterion in its assessment of the School Board's application: the community's opposition, conveyed by the School Board, to the objectionable depiction of a central Canadian historical figure dear to Manitoba's Métis and French-speaking communities.

85. In doing so, (1) it failed to take into account the fundamental freedom of expression and the unwritten principle of protection of minorities, and (2) the Commission fettered its discretion by failing to consider that a disagreement over the content of the textbook as an exceptional circumstance. Its decision is unreasonable.

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[171] Sara Blake, *Administrative Law in Canada*, 3rd ed (Toronto: Butterworths, 2001) at 98.

[172] See *Dassonville-Trudel (Guardian ad litem of) v Halifax Regional School Board*, 2004 NSCA 82 at para 55, 224 NSR (2d) 294; *Canada (Attorney General) v Georgian College of Applied Arts and Technology*, 2003 FCA 199 at para 37-38, [2003] 4 FC 525; Maurice Rosenberg, "Judicial Discretion of the Trial Court, Viewed from Above", (1971) 22 Syracuse L Rev 635 at 665-666.

PART IV: ORDER SOUGHT AND NAMES OF COUNSEL

86. The School Board requests that the Canadian Court of Justice:

GRANT the School Board's application for judicial review;

QUASH the decision to dismiss the School Board's grant application and **RETURN** the matter before the Commission for redetermination;

DECLARE s. 12.1(b) of the *Promotion of Canadian History and Patriotism Act* invalid;

Should s. 12.1(b) be declared valid, **ORDER** the Commission to disclose its exemption policy to the School Board;

WITH COSTS throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, January 26. 2015.

Martin Langlois and Alexandra Bouchard
Team No. 1
Counsel for the Appellant

APPENDIX A — LIST OF AUTHORITIES

LEGISLATION

Acte pour abroger certains Actes y mentionnés, et pourvoir plus amplement à I'établissement et au maintien des Écoles Publiques en cette Province, SC 1841, c 18.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Constitution Act, 1867 (U.K.), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

Education Act, CQLR c I-13.3.

Education Act, RSO 1990 c E.2.

Education Act, SNB 1997, c E-1.12.

Education Act, SNS 1995-96, c 1.

Education Administration Act, CCSM c E10.

Education Administration Miscellaneous Provisions Regulation, Reg 468/88 R.

Funding of Schools Program Regulation, Reg 259/2006.

Manitoba Act, (An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba), 1870, 33 Vict., c. 3 (Can.).

Municipal Councils and School Boards Elections Act, CCSM c M257.

Promotion of Canadian History and Patriotism Act.

Public School Act, CCSM c P250.

School Act, RSBC 1996, c 412.

The Constitution Act, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

The Education Act, 1995, SS 1995, c E-0.2.

JURISPRUDENCE

114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town), 2001 SCC 40, [2001] 2 SCR 241.

2747-3174 Québec Inc. v Québec (Régie des permis d'alcool), [1996] 3 SCR 919.

Agraira v Canada (Public Safety and Emergency Preparedness), 2013 SCC 36, [2013] 2 SCR 559.

Air Canada v Greenglass, 2014 FCA 288.

Association des courtiers et agents immobiliers du Québec v Proprio Direct inc., 2008 SCC 32, [2008] 2 SCR 195.

Attorney General of Manitoba v Forest, [1979] 2 SCR 1032.

Attorney-General for Canada v Attorney-General for Ontario, [1937] AC 335.

Baier v Alberta, 2006 ABCA 137.

Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817.

Bell Canada v Québec (CSST), [1988] 1 SCR 749.

Brian Dickson Memorial School Board v Commission for Promotion of Canadian History and Patriotism and Attorney General of Canada, 2014 FC.

Brophy v Attorney General of Manitoba, [1895] AC 20.

Canada (Revenue Agency) v Telfer, 2009 FCA 23.

Canada (Attorney General) v Georgian College of Applied Arts and Technology, 2003 FCA 199, [2003] 4 FC 525.

Canada (Attorney General) v Mavi, 2011 SCC 30, [2011] 2 SCR 504.

Canada (Attorney General) v PHS Community Services Society, 2011 SCC 44, [2011] 3 SCR 134.

Canada (Human Rights Commission) v Taylor, [1990] 3 SCR 892.

Canadian Western Bank v Alberta, 2007 SCC 22, [2007] 2 SCR 3.

Cardinal v Director of Kent Institution, [1985] 2 SCR 643.

Caron v The King, [1924] AC 999.

Chamberlain v Surrey School District No 36, 2002 SCC 86, [2002] 4 SCR 710.

Charkaoui v Canada (Citizenship and Immigration), 2007 SCC 9, [2007] 1 SCR 350.

Commission for Promotion of Canadian History and Patriotism and Attorney General of Canada v Brian Dickson Memorial School Board, 2014 FCA.

Congrégation des Témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village), 2004 SCC 48, [2004] 2 SCR 650.

Cottrell v Chippewas of Rama Mnjikaning First Nation, 2009 FC 261.

Cuddy Chicks Ltd. v Ontario (Labour Relations Board), [1991] 2 SCR 5.

Dassonville-Trudel (Guardian ad litem of) v Halifax Regional School Board, 2004 NSCA 82, 224 NSR (2d) 294.

Doré v Barreau du Québec, 2012 SCC 12, [2012] 1 SCR 395.

Dunsmuir v New Brunswick, 2008 SCC 9, [2008] 1 SCR 190.

Ford v Quebec (Attorney General), [1988] 2 SCR 712.

General Motors of Canada Ltd. v City National Leasing, [1989] 1 SCR 641.

Hirsch et al v Protestant Board of School Commissioners of Montreal, [1928] AC 200.

Innisfil Township v Vespra Township, [1981] 2 SCR 145.

Irwin Toy Ltd. v Quebec (Attorney General), [1989] 1 SCR 927.

Island Press Ltd. v Prince Edward Island (Information and Privacy Commissioner), 2004 PESCTD 69.

IWA v Consolidated-Bathurst Packaging Ltd., [1990] 1 SCR 282.

Johannesson et al, v Rural Municipality West St Paul et al, [1952] 1 SCR 292.

Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture), 2002 SCC 31, [2002] 2 SCR 146.

Lalonde v Ontario (Commission de restructuration des services de santé) (2001) 56 OR (3d) 505 (ONCA).

Law Society of New Brunswick v Ryan, 2003 SCC 20, [2003] 1 SCR 247.

Mahe v Alberta, [1990] 1 SCR 342.

Maple Lodge Farms Ltd. v Canada, [1982] 2 SCR 2.

May v Ferndale Institution, 2005 SCC 82, [2005] 3 SCR 809.

Ménard c Gardner, 2012 QCCA 1546.

Mission Institution v Khela, 2014 SCC 24, [2014] 1 SCR 502.

Mont-Sinai Hospital Center v Quebec (Minister of Health and Social Services), 2001 SCC 41 [2001] 2 SCR 281.

Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 SCR 623.

Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur, 2003 SCC 54, [2003] 2 SCR 504.

Old St. Boniface Residents Assn. Inc. v Winnipeg (City), [1990] 3 SCR 1170.

Ontario (Attorney General) v Patient, [2005] OJ No 631 (QL).

Protestant School Board of Greater Montreal v Quebec (A.G.), [1989] 1 SCR 377.

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