

**IN THE CANADIAN COURT OF JUSTICE  
ON APPEAL FROM THE FEDERAL COURT OF CANADA**

BETWEEN:

**JACKSON HAYES**

- and -

**LACOMBE INSTITUTION ASSOCIATION OF FARM PROGRAM INMATES**

Appellants

- and -

**ATTORNEY GENERAL OF CANADA**

Respondent

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**FACTUM OF THE APPELLANT**

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## PART I – STATEMENT OF FACTS

### The Lacombe Institution Farm Program

[1] Mr. Hayes is an inmate at the Lacombe Institution (the “Institution”), operated by the Penitentiary Service of Canada (“PSC”) pursuant to the *Penitentiary Service of Canada Act* (“PSCA”) and the *Penitentiary Service of Canada Regulations* (“PSCR”).<sup>1</sup>

[2] In accordance with its statutory mandate to operate rehabilitative programming for inmates, PSC’s employment programs rehabilitate inmates by teaching them the value of lawful work, which assists with their re-integration into the community as law-abiding citizens ready to participate in the labour market.<sup>2</sup> For employment programs to achieve their purpose, inmate work must mirror the realities of the modern working world.<sup>3</sup>

[3] Mr. Hayes’ participation in the Lacombe Institution Farm Program (“farm program”) did just that. He worked a conventional five-day work week.<sup>4</sup> He had to be on time, respect authority, and work with a team to operate a farm producing enough output to stock the Institutional cafeteria and subsidize inmate activity days.<sup>5</sup>

[4] Through farming, Mr. Hayes experienced the benefits of gainful employment. Working on the farm provided him with legitimate means to feed his family during private visits, purchase his own clothes, and make phone calls.<sup>6</sup> He learned how to work with others cooperatively, and to manage money without resorting to fraud.<sup>7</sup> Following health and food standards showed him why rules exist, and his responsibility to the community in following them.<sup>8</sup> Doing honest work gave him self-worth and confidence, and Mr. Hayes took pride in seeing the fruits of his labour feed his fellow inmates and sponsor community activities.<sup>9</sup>

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<sup>1</sup> *Penitentiary Service of Canada Act*, RLL c P-12 [PSCA]; *Penitentiary Service of Canada Regulation*, LASK 92/232 [PSCR].

<sup>2</sup> *PSCA*, *supra* note 1, s 2, 3.

<sup>3</sup> *Jackson Hayes and Lacombe Institution Association of Farm Program Inmates v Attorney General of Canada*, 2017 FC 47 at para 16 [Hayes FC].

<sup>4</sup> *Hayes FC*, *supra* note 3 at para 8.

<sup>5</sup> *Ibid* at paras 13, 14, 15.

<sup>6</sup> *Ibid* at para 7.

<sup>7</sup> *Ibid* at paras 11–15.

<sup>8</sup> *Ibid* at para 13.

<sup>9</sup> *Ibid* at paras 14, 15, 31.

[5] The farm program worked; Mr. Hayes transformed from a “bad influence” in the prison to a model employee in a real-world setting.<sup>10</sup>

[6] Since Mr. Hayes was convicted of fraud, holding legitimate employment and responsibly handling money for a sustained period of time provided direct evidence supporting Mr. Hayes’ parole application.<sup>11</sup> Mr. Hayes’ work at the farm showed that he would not present an undue risk to society by reoffending, and showed that he could be successfully reintegrated into society.<sup>12</sup>

### **The Institutional Head’s Decision to Close the Farm Program**

[7] In May 2016, Ms. Marcia Bennett (the “Institutional Head”) ended the farm program, effective the day of her decision.<sup>13</sup> There is no evidence that she notified the farm workers that the program’s cut was imminent, or that she provided them with reasons justifying it.

[8] In making the decision to cut the program, the Institutional Head consulted with the farm program’s agronomists, as their positions would be eliminated when the farm closed.<sup>14</sup> They were given an opportunity to engage in a meaningful conversation, where they made their case for keeping the program.<sup>15</sup>

[9] She also consulted with the Lacombe Institution Inmate Committee (the “Inmate Committee”).<sup>16</sup> The Inmate Committee is an elected body imposed upon all inmates by the *PSCR* and is tasked with the responsibility to represent all inmates in their dealings with the PSC.<sup>17</sup>

[10] During these consultations, the Inmate Committee was statutorily bound to represent the interests of inmates in the fourteen programs that the Institutional Head replaced, each of whom lobbied against cancellation of their program.<sup>18</sup> At the same time,

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<sup>10</sup> *Ibid* at paras 12, 15.

<sup>11</sup> *Attorney General of Canada v Jackson Hayes*, 2018 FCA 1 at para 30 [*Hayes FCA*]; *Hayes FC*, *supra* note 3 at paras 6, 11, 67.

<sup>12</sup> *Corrections and Conditional Release Act*, SC 1992 c 20, s 102 [*CCRA*]; *Hayes FC*, *supra* note 3 at para 6.

<sup>13</sup> *Hayes FC*, *supra* note 3 at para 20.

<sup>14</sup> *Ibid* at paras 18, 20.

<sup>15</sup> *Ibid* at para 18.

<sup>16</sup> *Ibid* at para 18.

<sup>17</sup> *PSCR*, *supra* note 1 s 55.

<sup>18</sup> *Hayes FC*, *supra* note 3 at para 20.

the Committee was bound to represent inmates interested in bringing in new employment programs.<sup>19</sup>

### **The aftermath of the Institutional Head's decision**

[11] With no idea why the farm program was suddenly cancelled, Mr. Hayes filed a complaint with the Committee.<sup>20</sup> The Committee refused to assist him since the decision had already been made.<sup>21</sup> Dissatisfied, Mr. Hayes and 23 farm workers (the “farm workers”) created the Lacombe Institution Association of Farm Program Inmates (the “Association”) to advocate for the reinstatement of the farm program.<sup>22</sup>

[12] The Institutional Head met with the Association in June 2016 and listened to the farm workers.<sup>23</sup> She did not explain the reasons behind her decision to close the farm.<sup>24</sup> She simply stated that her decision had been “made” and that it “would not change.”<sup>25</sup>

[13] Still having no idea why their program was cancelled, each Association member filed a grievance every day over the course of one month, following the grievance process provided for in the *PSCA*.<sup>26</sup> The Institutional Head systematically dismissed without reasons each of the thirty grievances.<sup>27</sup>

[14] The Association members, having accomplished nothing through official channels, initially engaged in protest activities permitted by the *PSCA*.<sup>28</sup> For example, inmates chose not to speak to their psychologists or parole officers.<sup>29</sup> The Institutional Head ordered the inmates to be confined in their cells, refused to reconsider her decision, and still did not tell the inmates why she cancelled the farm program.<sup>30</sup>

[15] Three months after the farm was closed, the farm workers still had no reasons, and had not been meaningfully consulted. They were confined in their nine square metre cells from 8:30am to noon, and 1:00pm to 4:30pm from Monday to Friday.<sup>31</sup> To protest

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<sup>19</sup> *Ibid* at para 19, 20.

<sup>20</sup> *Ibid* at para 21.

<sup>21</sup> *Ibid* at paras 20, 21.

<sup>22</sup> *Ibid* at para 22.

<sup>23</sup> *Ibid* para 23.

<sup>24</sup> *Ibid* at para 23.

<sup>25</sup> *Ibid* at para 23.

<sup>26</sup> *Ibid* at para 24.

<sup>27</sup> *Ibid* at para 24.

<sup>28</sup> *Ibid* at para 25; *PSCA*, *supra* note 1.

<sup>29</sup> *Hayes FC*, *supra* note 3 at para 25.

<sup>30</sup> *Ibid* at para 25.

<sup>31</sup> *Ibid* at para 8.

against the Institutional Head's actions, the farm workers collectively decided to lay down on their beds during "stand-to" counts.<sup>32</sup> This required correctional officers to enter each Association member's cell to ensure they were in good physical condition.<sup>33</sup>

[16] The Institutional Head ordered them to stand for counts.<sup>34</sup> The farm workers refused and lay down on their beds again the next day.<sup>35</sup> Consequently, the Institutional Head charged all twenty-four members of the Association with creating or participating in a situation that threatened the security of the prison and contravening a written rule governing inmate conduct, contrary to subsections 52(g) and (h) of the *PSCA*.<sup>36</sup> The farm workers were found guilty and were sentenced to three weeks in disciplinary segregation.<sup>37</sup>

[17] At no time were other inmates coerced into joining the farm workers' protest, and there is no evidence that either protest resulted in a security incident.<sup>38</sup>

### **The Deputy Minister's Response**

[18] On October 15, 2016, Mr. Hayes filed a grievance with the Deputy Minister of Homeland Security (the "Deputy Minister").<sup>39</sup> He alleged that the decision to withdraw the farm program was unreasonable, breached his procedural rights, and that the Institutional Head was required under section 2(d) of the *Charter of Rights and Freedoms* (the "*Charter*") to meaningfully consult with the farm workers through the Association.<sup>40</sup>

[19] Mr. Hayes also alleged that the Institutional Head's retaliatory conduct in the aftermath of the decision breached section 2(d) of the *Charter* and resulted in severe consequences.<sup>41</sup> He endured the physical and psychological suffering caused by three weeks in disciplinary segregation.<sup>42</sup>

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<sup>32</sup> *Ibid* at para 26; *PSCR*, *supra* note 1, ss 12, 13, 15.

<sup>33</sup> *Hayes FC*, *supra* note 3 at para 26; *PSCR*, *supra* note 1, s 15.

<sup>34</sup> *Hayes FC*, *supra* note 3 at para 27.

<sup>35</sup> *Ibid* at para 28; *PSCA*, *supra* note 1, ss 2 52(g), (h).

<sup>36</sup> *Hayes FC*, *supra* note 3 at para 28.

<sup>37</sup> *Hayes FC*, *supra* note 3 at para 28; *PSCR*, *supra* note 1, ss 73, 76.

<sup>38</sup> *Hayes FC*, *supra* note 3 at para 54.

<sup>39</sup> *Ibid* at para 29, *PSCA*, *supra* note 1, s 71.

<sup>40</sup> *Hayes FC*, *supra* note 3 at para 29; *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 [*Charter*].

<sup>41</sup> *Ibid* at paras 29-31.

<sup>42</sup> *Hayes FC*, *supra* note 3 at para 28; *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62 at para 276, 2018 CarswellBC 53 (WL Can) [*BCCLA*].

[20] The Deputy Minister dismissed the grievance, finding that while inmates had the right to assemble, it did not obligate the PSC to get “mired” in a negotiation with them.<sup>43</sup> In particular, inmates had no right to strike.<sup>44</sup> The Deputy Minister also found that the Institutional Head satisfied any obligation to consult with the farm workers by genuinely consulting with the Inmate Committee.<sup>45</sup>

[21] In the Deputy Minister’s opinion, the consequences that Mr. Hayes suffered were justified because he chose not to comply with the Institutional Head’s orders.<sup>46</sup>

### **Procedural History**

[22] Mr. Hayes filed an application for judicial review of the ruling made by the Deputy Minister.<sup>47</sup> The Federal Court found that section 2(d) of the *Charter* protects the Association members' right to associate, as well as their right to a meaningful bargaining process when the measures taken affect them.<sup>48</sup> Refusing to stand during a head count was a legitimate exercise of the section 2(d) right.<sup>49</sup> The subsequent reprisals by the PSC, which resulted in Mr. Hayes’ three weeks in solitary confinement, were therefore an unlawful breach of the inmates' *Charter* rights.<sup>50</sup> The Federal Court also found that Mr. Hayes was entitled to a fair process, which was not provided by the Institutional Head.<sup>51</sup>

[23] In light of those breaches, the Federal Court allowed the application for judicial review and ordered the decision to be sent back to the Deputy Minister.<sup>52</sup> He also awarded punitive damages to each member of the Association in the amount of \$1,000.<sup>53</sup>

[24] The Federal Court of Appeal allowed the PSC’s appeal,<sup>54</sup> finding that although section 2(d) of the *Charter* protects Mr. Hayes' right to associate,<sup>55</sup> that right had not been

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<sup>43</sup> *Hayes FC*, *supra* note 3 at para 32.

<sup>44</sup> *Ibid* at para 32.

<sup>45</sup> *Ibid* at para 32.

<sup>46</sup> *Ibid* at para 32.

<sup>47</sup> *Ibid* at para 33.

<sup>48</sup> *Ibid* at para 58.

<sup>49</sup> *Ibid* at paras 52, 54, 58.

<sup>50</sup> *Ibid* at paras 58, 94.

<sup>51</sup> *Ibid* at para 44, 83.

<sup>52</sup> *Ibid* at paras 90, 91.

<sup>53</sup> *Ibid* at para 95.

<sup>54</sup> *Hayes FCA*, *supra* note 11 at para 67.

<sup>55</sup> *Ibid* at paras 7, 42, 64.



breached.<sup>56</sup> Chief Justice Morris dissented.<sup>57</sup> It also found that the inmates' right to procedural fairness had not been breached.<sup>58</sup>

## **PARTIE II – OBJECTIONS DE L'APPELANT À L'ÉGARD DU JUGEMENT QUI FAIT L'OBJET DE L'APPEL**

[25] La décision du sous-ministre était déraisonnable, puisqu'il n'a pas convenablement considéré les manquements suivants aux droits de M. Hayes par la directrice:

1. La directrice a violé le droit de M. Hayes à une décision prise équitablement fondée sur l'article 7 de la *Charte* et sur la *common law*.
2. La directrice a violé le droit de M. Hayes à la liberté protégé par l'article 7 de la *Charte*, en rendant une décision de portée excessive, sans balancer ce dernier convenablement avec l'objectif législatif.
3. La directrice a violé le droit de M. Hayes à un processus de consultation véritable, tel que protégé par l'article 2(d) de la *Charte*, sans balancer ce dernier convenablement avec l'objectif législatif.

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<sup>56</sup> *Ibid* at paras 55, 64.

<sup>57</sup> *Ibid* at paras 7-32, Morris CJ, dissenting.

<sup>58</sup> *Ibid* at paras 20, 33, 63.

### PARTIE III – ARGUMENT

#### 1. La décision d'annuler le programme de la ferme constitue une atteinte au droit constitutionnel à la liberté de M. Hayes ne respectant pas l'équité procédurale

[26] L'article 7 de la *Charte* protège tout individu au Canada<sup>59</sup> et peut intervenir pour imposer des normes minimales de justice chaque fois qu'une telle personne est affectée par l'intervention étatique<sup>60</sup>. En l'occurrence, la décision de fermer la ferme a (1) porté atteinte au droit à la liberté de M. Hayes (2) de manière non-conforme aux principes de justice naturelle qu'est l'équité procédurale. Par conséquent, la décision du sous-ministre doit être annulée et la décision initiale de fermer la ferme doit être renvoyée devant la directrice pour réévaluation.

##### a. La décision de fermer le programme de la ferme a constitué une atteinte au droit à la liberté de M. Hayes protégé par l'article 7 de la *Charte*<sup>61</sup>

[27] En annulant le programme de la ferme, la directrice a privé M. Hayes d'un outil crucial à sa demande de libération conditionnelle. Les facteurs les plus importants pris en

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<sup>59</sup> *Singh c Ministre de l'Emploi et de l'Immigration*, [1985] 1 RCS 177 au para 202, 17 DLR (4th) 422 [*Singh*]; Henri Brun, Guy Tremblay et Eugénie Brouillet, *Droit constitutionnel*, 6e éd, (Cowansville, Que: Yvon Blais, 2014), à la p 1152 [*Brouillet*]; *Charte Canadienne des droits et libertés*, art 7, partie I de la *Loi constitutionnelle de 1982*, constituent l'annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11 [*Charte*].

<sup>60</sup> *Pearlman c Comité judiciaire de la Société du Barreau du Manitoba*, [1991] 2 RCS 869 [*Pearlman*]; *Brouillet, supra* note 59 à la p 1153.

<sup>61</sup> *Renvoi sur la Motor Vehicle Act de la C-B*, [1985] 2 RCS 486 à la page 500, 24 DLR (4th) 536 [*Motor Vehicle Act*].

considération dans l'analyse de la remise en liberté conditionnelle est la prédisposition d'un détenu à récidiver et l'habilité du détenu à se réintégrer en société<sup>62</sup>.

[28] Le programme de la ferme a permis à M. Hayes de prouver une implication soutenue dans la gestion financière de la ferme<sup>63</sup>, démontrant qu'il était invraisemblable qu'il commette une autre infraction liée à la fraude. Le programme lui permettait également d'illustrer une capacité à se réintégrer à la communauté de façon positive par le biais de l'apprentissage de compétences sociales et de travail moderne<sup>64</sup>.

[29] En l'absence d'un programme alternatif, Mr. Hayes a été sans programme, et confiné à sa cellule, pendant une période de huit mois<sup>65</sup>. Le confinement cellulaire prolongé a affecté la liberté résiduelle de M. Hayes<sup>66</sup>.

[30] La perte du programme de la ferme constitue une interférence avec les droits de M. Hayes parce qu'elle existait déjà; reconnaître l'atteinte au droit à la liberté de M. Hayes dans ce contexte n'implique pas la création d'une obligation positive à être portée par l'État<sup>67</sup>. Si la ferme n'avait jamais existé, il y aurait probablement eu un autre programme

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<sup>62</sup> *Loi sur le système correctionnel et la mise en liberté sous condition*, LC 1992, c 20, art 102.

<sup>63</sup> *Hayes FC*, *supra* note 3, aux para 13-15.

<sup>64</sup> *CCRA*, *supra* note 12, s 102; *Hayes FC*, *supra* note 3 at para 28; *Hayes FCA*, *supra* note 11 a para 30.

<sup>65</sup> *Hayes FC*, *supra* note 3, au para 21.

<sup>66</sup> *May c Ferndale Institution*, 2005 SCC 82, [2005] 3 RCS 809 aux para 25, 77 [*May*]; *Martineau c Comité de discipline de l'Institution de Matsqui*, [1980] 1 RCS 602, à la p 622 [*Martineau*]; *BCCLA*, *supra* note 42 au para 276; *Cunningham v Canada*, [1993] 2 SCR 143, 11 Admin LR (2d) 1; *Bacon v Surrey Pretrial Services Centre*, 2010 BCSC 805 au para 322, 324, 11 Admin LR (5th) 1 [*Bacon*]; G Régimbald et D Newman, *The Law of Canadian Constitution*, 2<sup>e</sup> éd, Toronto, LexisNexis Canada, Toronto, 2017, à la p 672.

<sup>67</sup> *Gosselin c Québec (PG)*, 2002 SCC 84, [2002] 4 RCS 429 au para 81.

adapté aux besoins véritables de M. Hayes auquel il aurait pu participer, lui permettant d'une part de l'utiliser dans sa demande de libération conditionnelle, et d'autre part de ne pas être confiné à sa cellule pendant la période de transition.

b. L'atteinte aux droits à la liberté de M. Hayes n'a pas été faite de manière respectueuse de l'équité procédurale

[31] Le principe de *common law* de l'équité procédurale précède l'avènement de la *Charte* et existe indépendamment de celle-ci, particulièrement dans le contexte pénitencier<sup>68</sup>. Il a également été reconnu comme faisant partie des principes de justice fondamentale auxquels réfère l'article 7 de la *Charte*<sup>69</sup>. Dans le cas de M. Hayes, le droit à l'équité procédurale qui lui était dû est souligné par le fait que sa liberté protégée par l'article 7 de la *Charte* est en jeu<sup>70</sup>.

i. *Norme de contrôle judiciaire*

[32] Un manquement à l'équité procédurale est évalué selon la norme de la décision correcte<sup>71</sup>. Une certaine jurisprudence applique plutôt une absence de norme, c'est-à-dire que la question est limitée à la détermination du caractère équitable de la procédure selon la loi et les principes de justice fondamentale<sup>72</sup>. Cette distinction est peu utile, puisque le

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<sup>68</sup> *Martineau*, supra note 66, au para 8.

<sup>69</sup> *Pearlman*, supra note 60 aux pp 884-885; *Singh*, supra note 59 au para 109.

<sup>70</sup> *Suresh c Canada (Ministre de la Citoyenneté de l'Immigration)*, 2002 CSC 1 aux para 114-18, [2002] 1 SCR 3.

<sup>71</sup> *Établissement de Mission c Khela*, 2014 CSC 24 au para 79, [2014] 1 SCR 502; *Canada (Citoyenneté et Immigration) c Khosa*, 2009 CSC 12 au para 43, [2009] 1 SCR 339; *Charles c Canada (PG)*, 2017 CF 435 au para 24; *Canada (PG) c Blackman*, 2016 CF 488 au para 38.

<sup>72</sup> *Mitten c College of Psychologists (Alberta)*, 2010 ABCA 159, aux para 16,17; *Institute of Chartered Accountants of Alberta v Barry*, 2016 ABCA 354, au para 5; *Tran v College of Physicians and Surgeons of Alberta*, 2017 ABQB 337, aux para 29, 30; *UAlberta Pro-Life v Governors of the University of Alberta*, 2017 ABQB 610, au para 29.

test demeure le suivant: est-ce que la procédure était inéquitable<sup>73</sup>? Si la réponse à cette question est positive, l'organe de révision a le devoir d'intervenir et de substituer une procédure correcte en ce qu'elle équitable<sup>74</sup>.

*ii. La décision est de nature administrative et touche les droits et privilèges d'un groupe restreint et déterminé*

[33] L'équité procédurale, contextuelle<sup>75</sup>, s'applique à la décision de fermer la ferme. Le Service est un organisme public et la décision, de nature administrative, touche les droits et privilèges des seuls détenus qui y travaillaient<sup>76</sup>.

[34] L'équité procédurale prend tout son sens dans sa zone grise entre décision judiciaire et législative, où la souplesse<sup>77</sup> de la doctrine offre une gradation dans le contenu de l'équité procédurale<sup>78</sup>. Règle générale, une décision spécifique sera considérée comme

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<sup>73</sup> *Maxwell v Department of Trade and Industry*, [1974] QB 523, à la p 133; *Martineau*, *supra* note 66, aux pp 630, 631; voir aussi Mullan D.J., "Fairness: The New Natural Justice?" (1975), 25 UTLJ 281, à la p 315.

<sup>74</sup> *Sharif c Canada (Procureur Général)*, 2017 CF 1069 au para 11; voir aussi Dave Phillip Jones et Anne S de Villars, *Principles of Administrative Law*, 6<sup>e</sup> éd. (Toronto: Carswell, 2014), à la p 266.

<sup>75</sup> *Pearlman*, *supra* note 60 à la p 882.

<sup>76</sup> *Cardinal v Institution Kent*, [1985] 2 SCR 643 au para 14, 24 DLR (4th) 44; *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817 au para 20, 174 DLR (4th) 193 [*Baker*].

<sup>77</sup> *Selvarajan v Race Relations Board*, (1976) 1 All ER 12, à la p 18; *Irvine c Canada (Commission sur les pratiques restrictives de commerce)*, [1987] 1 RCS 181, à la p 235; *Russell c Duke of Norfolk*, (1949) 1 All E.R. 109, à la p 110; *Kane c Conseil d'administration de l'Université de la Colombie-Britannique*, [1980] 1 RCS 1105, à la p 1113; voir aussi Robert Dupont et Laurent Lesage, « L'équité procédurale » (1990), 32(2) *Les Cahiers de Droit* 485, à la p 501.

<sup>78</sup> *Martineau*, *supra* note 66, à la p 629; *Furey v Conception Bay Centre Roman Catholic School Board*, [1993] N.J. No. 170, au para 25;

étant de nature administrative<sup>79</sup>, et une décision de nature législative comme de portée et de fondement générale et politique<sup>80</sup>.

[35] En l'espèce, la décision de la directrice, fondée sur un pouvoir statutaire discrétionnaire<sup>81</sup>, vise l'unique ferme de l'Établissement Lacombe. Elle impacte une poignée de détenus sous son autorité institutionnelle. Ceux-ci ne peuvent plus se présenter à la ferme; elle a d'ailleurs déjà été vendue. Il semble impossible qu'une décision d'un tel impact sur le quotidien d'individus nommés puisse être considérée comme une décision législative dont la procédure est hermétiquement immunisée contre tout contrôle judiciaire de nature administrative. Une telle conclusion serait contraire aux principes fondamentaux de justice dans lesquels la doctrine d'équité procédurale s'inscrit, puisqu'il ne faut donner une interprétation étroite aux droits dans un sens individuel<sup>82</sup>.

[36] Qui plus est, une présomption de droit administratif veut qu'une absence de procédure dans la *Loi sur le Service des pénitenciers du Canada* (la « *LSPC* ») explicitement détaillée infère une intention législative qu'elle soit équitable au sens de la *common law*<sup>83</sup>.

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<sup>79</sup> *Cardinal*, supra note 76, au para 14; *Furey*, supra note 78, au para 25.

<sup>80</sup> *Canada (PG) v Inuit Tapirisat*, [1980] 2 RCS 735, au para 758.

<sup>81</sup> *Règlement sur le Service des pénitenciers du Canada*, LASK 92/232 [*RSPC*], art 37.

<sup>82</sup> *Martineau*, supra note 66, à la p 619.

<sup>83</sup> *Loi sur le Service des pénitenciers du Canada*, LRL c P-12 [*LSPC*]; *Ministre du Revenu national c Coopers and Lybrand*, [1979] 1 RCS 495 à la p 503, 92 DLR (3d) 1; *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653 à la p 681, 69 DLR (4th) 489; *Ocean Port Hotel Ltd c Colombie-Britannique (General Manager, Liquor Control and Licensing Branch)*, 2001 CSC 52 au para 21, [2001] 2 SCR 781.

[37] Il faut donc conclure qu'une décision de nature administrative n'attire pas les garanties d'équité procédurale que si elle est individualisée, et qu'en l'espèce, la procédure décisionnelle de la directrice doit pouvoir faire l'objet d'un contrôle judiciaire.

*iii. Une importante équité procédurale était due à M. Hayes*

[38] L'analyse des facteurs proposés dans *Baker*<sup>84</sup> suggère que la directrice devait à M. Hayes avis, consultation et motifs.

[39] **La nature de la décision:** Il s'agit d'une décision de nature administrative basée sur des considérations politiques. Ceci indique qu'au lieu de procédures s'apparentant à un processus judiciaire, l'équité procédurale dans les circonstances de l'espèce obligeait la directrice à recueillir de l'information pertinente de différentes sources avant de prendre sa décision, en plus de consulter et d'aviser les parties intéressées<sup>85</sup>.

[40] **La nature du régime législatif et la discrétion qu'il accorde au Service:** la LSPC prévoit spécifiquement que la mise sur pied des programmes offerts, compte tenu des besoins véritables des détenus, est à la discrétion du Service<sup>86</sup>.

[41] Finalement, bien que la législature prévoit une procédure pour le dépôt d'une plainte permettant en théorie de réviser la décision prise par la directrice<sup>87</sup>, une des premières raisons offertes par le sous-ministre justifiant son rejet de la plainte est que

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<sup>84</sup> *Baker*, *supra* note 76.

<sup>85</sup> *Gardner v Williams Lake (City)*, [2006] BCJ No 1389 (BCCA); *Potter v Halifax Regional School Board*, [2002] NSJ No 297 (N.S.C.A.), autorisation de pourvoi à la CSC refusée, [2002] SCCA No 306; voir aussi Sara Blake, *Administrative Law in Canada*, 6<sup>e</sup> éd., (Toronto: LexisNexis Canada, 2017).

<sup>86</sup> *LSPC*, *supra* note 83, art 3(b) ; *RSPC*, *supra* note 81 art 37.

<sup>87</sup> *LSPC*, *supra* note 83, art 71.

compte tenu du fait que la ferme a déjà été vendue et que les experts agronomes ont été renvoyés, il serait trop coûteux de rouvrir la ferme<sup>88</sup>. Il est difficile de conclure qu'il s'agissait d'un véritable droit d'appel si annuler la décision prise signifie engendrer « une dépense importante de fonds publics »<sup>89</sup>. Puisqu'il n'y avait pas de possibilité d'appel à proprement dit, ou à tout le moins vu que cette possibilité d'appel était fortement affectée par le contexte particulier de l'espèce, il faut conclure que les détenus auraient dû avoir l'opportunité de faire entendre leur point de vue avant que la décision ne soit prise et appliquée de manière irrémédiable.

[42] **L'importance des droits et privilèges visés:** L'importance de la décision pour les personnes visées a toujours été largement traitée comme un critère particulièrement significatif, voir prépondérant, par les Cours canadiennes<sup>90</sup>. En l'espèce, la preuve démontre que la décision de fermer la ferme est d'importance capitale pour les détenus visés. Au-delà de ses effets objectivement mesurables, tels que les bénéfices monétaires perdus, le confinement en cellule et l'impact négatif sur leur libération conditionnelle, la décision a enlevé aux détenus un programme prisé. Mr. Hayes, en particulier, a perdu un programme qui lui a appris la valeur du travail bien fait, en plus de lui donner fierté et confiance en lui, deux éléments qui lui manquaient cruellement avant son incarcération et qui aideraient certainement à sa réintégration future en société. Ces considérations militent pour une protection procédurale importante.

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<sup>88</sup> *Hayes FC*, *supra* note 3, au para 32.

<sup>89</sup> *Ibid* au para 32.

<sup>90</sup> *Baker*, *supra* note 76 at para 15; *Canada (Procureur générale) c Mavi*, 2011 CSC 30, [2011] 2 RSC 504 [*Mavi*]; *Abel v Ontario (Advisory Review Board)*, 119 DLR (3d) 101 (CA); *Nicholson c Haldimand-Norfolk (Regional Municipality) Commissioners of Police*, [1979] 1 SCR 311, au para 20 [*Nicholson*].



*iv. M. Hayes avait le droit à un avis, une audience et des motifs; aucune de ces garanties procédurales ne lui ont été fournies*

[43] M. Hayes n'a pas reçu d'avis et n'a pas eu l'opportunité de s'exprimer préalablement à la décision, deux éléments qui sont pourtant minimalement nécessaires pour que soit rendue une décision équitable<sup>91</sup>.

[44] Sachant que la décision n'était ni pressante ni urgente, et qu'elle affecterait certainement de manière significative le quotidien des travailleurs de la ferme et leur seule source de revenus, il est difficile de justifier un tel choix de procédure<sup>92</sup>. Plusieurs options s'offraient à la directrice: l'envoi d'un avis, un affichage dans le pénitencier, la convocation d'une assemblée, pour ne nommer que ceux-ci. Toutes ces options sont faciles d'application et rapides à effectuer, et auraient permis aux travailleurs de la ferme d'être informés que celle-ci était en danger. Un tel avis leur aurait aussi donné l'occasion d'exprimer à la directrice à quel point il s'agissait d'un programme spécial et gratifiant. En ce sens, loin d'être extravagant, ce choix de procédure aurait permis à la directrice d'évaluer les besoins véritables des détenus gouvernant sa décision<sup>93</sup> tels qu'envisagés par les principaux concernés.

[45] Par ailleurs, une absence de motifs est difficilement justifiable lorsque la décision revêt une grande importance pour les personnes<sup>94</sup>, et qu'il existe un droit d'appel statutaire<sup>95</sup>, comme en l'espèce.

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<sup>91</sup> *Nicholson, supra* note 90, par 316.

<sup>92</sup> *Cardinal, supra* note 76 au para 16.

<sup>93</sup> *LSPC, supra* note 83, art 44.

<sup>94</sup> *Suresh, supra* note 70 aux para 118, 126; *Baker, supra* note 76, au para 25.

<sup>95</sup> *Baker, supra* note 76, au para 43.

[46] Rappelons que la directrice a eu maintes opportunités de communiquer des motifs à M. Hayes et a choisi de ne pas le faire<sup>96</sup>. Offrir des motifs aurait pourtant permis d'entretenir la confiance des détenus envers l'administration de leur établissement<sup>97</sup>, et ce sans entraver la capacité de celle-ci à prendre des décisions de manière efficace<sup>98</sup>. En outre, il ne s'agissait pas d'une obligation extravagante pour "un service public conscient des inquiétudes des individus"<sup>99</sup>.

[47] La directrice a agi de manière fondamentalement inéquitable en fournissant à M. Hayes ni avis, ni possibilité de consultation et ni motifs. Le sous-ministre était tenu de faire état de cette importante contravention aux droits procéduraux de M. Hayes.

[48] Le sous-ministre était tenu de faire état de cette importante contravention aux droits procéduraux de M. Hayes et de répondre positivement à la plainte formulée contre la directrice; puisqu'il ne l'a pas fait, sa décision doit être annulée et la décision initiale de mettre fin au programme de la ferme doit être renvoyée devant Mme. Bennett.

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<sup>96</sup> Voir les para 12, 15 de ce *mémoire*.

<sup>97</sup> *Congrégation des Témoins de Jéhovah de St-Jérôme-Lafontaine c Lafontaine (Municipalité)*, 2004 SCC 48, [2004] 2 RCS 48, au par 13.

<sup>98</sup> *Canadian Arab Federation v. Canada (Minister of Citizenship and Immigration)*, 2015 CAF 168, au par 14.

<sup>99</sup> *Prasad c Canada (Ministre de l'Emploi et de l'Immigration)*, [1989] 1 RCS 560, à la p 590, juge L'Heureux-Dubé.

## 2. L'atteinte à la liberté de M. Hayes par la portée excessive de la décision de fermer la ferme

[49] L'atteinte au droit à la liberté de M. Hayes a été discuté ci-dessus<sup>100</sup>. En plus d'avoir été enfreint en contravention avec son droit à l'équité procédurale, il l'a été en contravention de son droit substantif à une décision de portée raisonnable.

### a. La norme de contrôle judiciaire

[50] Le contrôle judiciaire d'une décision administrative comme en l'espèce doit évaluer si le décideur discrétionnaire a été raisonnable, c'est-à-dire s'il a mis en balance comme il se doit le droit protégé par la *Charte* mis en cause et l'objectif législatif<sup>101</sup>. C'est une question de proportionnalité<sup>102</sup>. La trouvaille d'une atteinte à la liberté de M. Hayes, faite avec une portée excessive, présuppose que le balancement n'a pas été fait de manière raisonnable<sup>103</sup>.

### b. La décision de la directrice est de portée excessive

[51] La décision de la directrice est contraire aux principes de justice fondamentale visée à l'article 7 de la *Charte*, car elle porte atteinte à la liberté de M. Hayes pour des motifs qui sont étrangers à son objectif<sup>104</sup>. Par conséquent, l'affirmation du sous-ministre à l'effet que « [l]es conséquences que subit M. Hayes découlent malheureusement peut-

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<sup>100</sup> Voir para 27-30 de ce *mémoire*.

<sup>101</sup> *Doré c Barreau du Québec*, 2012 SCC 12 au para 58 [2012] 1 RCS 395 [*Doré*].

<sup>102</sup> *Ibid*, aux para 57 et 58; *Multani c Commission scolaire Marguerite- Bourgeoys*, 2006 CSC 6, [2001] 1 RCS 256, au para 155.

<sup>103</sup> Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012), à la p 5; Errol Mendes and Stéphane Beaulac, *Charte canadienne des droits et libertés*, 5e éd. (Markham: LexisNexis, 2013) à la p 690.

<sup>104</sup> *R c Safarzadeh-Markhali*, 2016 CSC 14 au para 22, [2016] 1 RCS 180 [*Markhali*].

être de cette décision, mais ne justifient pas l'intervention du sous-ministre »<sup>105</sup> était déraisonnable.

[52] La décision d'annuler le programme de la ferme était de portée excessive, car son effet sur M. Hayes était sans lien rationnel avec l'objectif législatif en cause<sup>106</sup>, soit la réhabilitation des détenus grâce à des programmes qui correspondent à leurs besoins véritables<sup>107</sup>. Notons incidemment que la version anglaise de l'art. 37 du *RSPC* omet de préciser que le choix doit être fait selon les véritables besoins des détenus. Les deux versions linguistiques ont la même valeur ou force de loi<sup>108</sup>. Par contre, puisque la version française s'avère être beaucoup plus claire<sup>109</sup> et qu'elle s'inscrit directement dans l'objectif législatif<sup>110</sup>, c'est la version qui doit prévaloir.

[53] La ferme a été fermée pour faire place à des programmes envisagés comme répondant mieux aux besoins véritables des détenus du pénitencier Lacombe<sup>111</sup>. Or, parce que la ferme a été fermée, M. Hayes a vu ses chances d'obtenir une libération conditionnelle réduites de manière significative<sup>112</sup>, a perdu le travail gratifiant auquel il se

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<sup>105</sup> *Hayes CF*, *supra* note 3, au para 32.

<sup>106</sup> *Markhali*, *supra* note 104, aux paras 24, 50; *Carter c Canada (PG)*, 2015 CSC 5, [2015] 1 RCS 331, au para 85; *Canada (PG) c Bedford*, 2013 CSC 72, [2013] 3 RCS 1101, aux para 112-113.

<sup>107</sup> *LSPC*, *supra* note 83, art 2; *RSPC*, *supra* note 81, art 37.

<sup>108</sup> *Loi sur les langues officielles*, LRC 1985, c 31 (4<sup>e</sup> supp), art 13.

<sup>109</sup> *Canada (PG) c Barnes*, 2002 CAF 413, au para 20.

<sup>110</sup> *Beothuk Data Systems Ltd, Seawatch Division v Dean*, [1998] 1 CF 433, au para 31 (CAF); Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2<sup>e</sup> éd, Cowansville, Yvon Blais, 1991, à la p 276.

<sup>111</sup> *Jackson Hayes et al c Procureur général du Canada*, 2017 CF 47, para 16, 19, 20 [*Hayes CF*].

<sup>112</sup> *Hayes CF*, *supra* note 3, aux para 14, 67.

livrait jusqu'à lors sur une base quotidienne et qui lui apportait compétences et satisfaction<sup>113</sup>, a perdu une importante source de revenus<sup>114</sup>.

[54] De manière plus significative, M. Hayes a dû être confiné à sa cellule<sup>115</sup>. Il n'existe aucun lien rationnel entre l'objectif en cause, soit la réhabilitation des détenus, et les conséquences catastrophiques sur M. Hayes. Il faut donc conclure que l'objet de la décision était sans lien rationnel avec l'effet sur M. Hayes<sup>116</sup>.

### **3. The Deputy Minister's decision to dismiss Mr. Hayes' grievance is unreasonable**

[55] In dismissing Mr. Hayes' grievance, the Deputy Minister concluded that "while inmates have the right to assemble [...] that right does not obligate the Service to get mired in a negotiation with them."<sup>117</sup> The Deputy Minister failed entirely to grapple with the *Charter* values at stake. He failed to take the *Charter* claim seriously; he failed to ask what the *Charter* meant in this context; and he failed to balance the *Charter* values at stake in light of the statutory objectives.<sup>118</sup> A reasonable balancing with the *PSCA*'s statutory objectives would lead to the conclusion that the Institutional Head must reconsider her decision and meaningfully consult with Mr. Hayes and the Association.<sup>119</sup>

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<sup>113</sup> *Hayes CF*, *supra* note 111, au para 15; *RSPC*, *supra* note 81, art 37.

<sup>114</sup> *Hayes CF*, *supra* note 111, au para 7.

<sup>115</sup> *Hayes CF*, *supra* note 111, au para 21.

<sup>116</sup> *Markhali*, *supra* note 104 au para 51; *Canada (PG) c Bedford*, 2013 CSC 72, [2013] 3 RCS 1101, aux para 112,113.

<sup>117</sup> *Hayes FC*, *supra* note 3 at para 32.

<sup>118</sup> *Doré v Barreau de Québec*, 2012 SCC at paras 55-56, [2012] 1 SCR 395 [*Doré*].

<sup>119</sup> *Doré*, *supra* note 118, at para 55-56; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 13, [2015] 1 SCR 613, at para 4.

- a. The Institutional Head's actions engaged the *Charter* by limiting the farm workers' freedom of association

[56] A reasonable balancing in the spirit of *Oakes* required the Deputy Minister to allow the grievance.<sup>120</sup> The Institutional Head needed to exercise her discretion in a manner that respected the farm workers' rights (1) to make representations and have them considered in good faith (2) to choose an independent representative, and (3) to engage in peaceful protest in support of their positions.

- i. *The farm program is an essential component of Mr. Hayes' identity, self worth, and emotional well-being*

[57] The Deputy Minister and Institutional Head did not properly consider the context in which they made their decisions. Both reasonableness and associational rights take colour from their context.<sup>121</sup> Instead of identifying the unique status of the farm workers who were engaged in an employment program from other inmates, the Deputy Minister proclaimed that in no circumstances was the PSC obliged to negotiate with any inmate associations.<sup>122</sup> A contextual inquiry would reveal that since the rehabilitative purpose of prison employment programs is to instill the values of lawful employment as an essential part of inmates' lives, Mr. Hayes' participation in the farm program became an essential component of his identity, self-worth and emotional well-being.<sup>123</sup>

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<sup>120</sup> *Doré*, *supra* note 118 at paras 55-56; *Loyola*, *supra* note 119 at para 4.

<sup>121</sup> *Mounted Police Association of Ontario c Canada (PG)*, 2015 SCC 1, [2015] 1 SCR 3, at para 93 [*MPAO*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339; *Catalyst Paper Corp c North Cowichan (District)*, 2012 SCC 2, [2012] 1 SCR 5, at para 18 [*Catalyst Paper*].

<sup>122</sup> *MPAO*, *supra* note 121 at para 47; *Catalyst Paper*, *supra* note 121 at para 18; *Doré*, *supra* note 120 at para 41.

<sup>123</sup> *Hayes FC*, *supra* note 3 at para 2, 5, 15; *PSCA*, *supra* note 1, s 2; see paras 4-7 of this *factum*; *Health Services and Support – Facilities Subsector Bargaining Assn v British*

[58] By realizing his capabilities and contributing in a way society determined to be useful, work came to represent the means by which Mr. Hayes could lay claim to an equal right of respect and of concern from others.<sup>124</sup> Like every working individual, the farm program provided Mr. Hayes with a means of financial support and, as importantly, a contributory role in society. Accordingly, the conditions in which he worked became highly significant in shaping the whole compendium of psychological, emotional and physical elements of his dignity and self respect.<sup>125</sup>

[59] Employers' obligations to employees under section 2(d) stem from the importance of work as a fundamentally important dimension of an individual's life.<sup>126</sup> Empowering employees with the right to influence the establishment of workplace rules and thereby gain some control over this crucially important aspect of their lives enhances their dignity, liberty and autonomy.<sup>127</sup> The Institutional Head's refusal to meaningfully consult with the farm workers in good faith therefore engages the same *Charter values* that underlie employees' associational guarantees in the workplace: human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy.<sup>128</sup>

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*Columbia*, 2007 SCC 27 at para 82, [2007] 2 SCR 391 [*Health Services*]; *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 368, [1987] SCJ No 10, Dickson CJ, dissenting [*Alberta Reference*]

<sup>124</sup> *Alberta Reference*, *supra* note 123 at 368, Dickson CJ, dissenting.

<sup>125</sup> *Health Services*, *supra* note 123 at para 84; *Alberta Reference*, *supra* note 123 at 334, 368, Dickson CJ dissenting.

<sup>126</sup> *Slaight Communications Inc v Davidson Health Services*, [1989] 1 SCR 1038 at 1051, [1989] SCJ No 45; *Health Services* *supra* note 123 at para 82.

<sup>127</sup> *Health Services*, *supra* note 123 at para 82.

<sup>128</sup> *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 1, [2015] 1 SCR 245 [*SFL*]; *Health Services*, *supra* note 123 at para 90; *Ontario (Attorney General) v Fraser*, 2011 SCC 20 para 51, [2011] 2 SCR 3 [*Fraser*].

ii. *The Institutional Head needed to meaningfully consult with the farm workers*

[60] The Deputy Minister's decision did not consider the *Charter* values of dignity, equality and enhancing democracy, which created a positive obligation for the Institutional Head to listen to the Association's representations and consider them in good faith.<sup>129</sup>

[61] It is impossible to affirm workers' dignity by giving them the right to speak about workplace rules without also protecting their right to be meaningfully heard by a more powerful employer.<sup>130</sup> The power imbalance structuring the relationship between the farm workers and the PSC is wider than that of a traditional employee and employer.<sup>131</sup> In a traditional, profit-driven workplace, employers have a stronger incentive to meet with employees, as the threat of a collective withdrawal of services threatens their bottom line.<sup>132</sup>

[62] In contrast, the farm workers' collective workplace goals are at the complete mercy of the Institutional Head, who has no incentive to meaningfully engage with them on workplace matters. Without a positive obligation for the Institutional Head to listen to the farm workers' collective representations in good faith, inequality in bargaining power

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<sup>129</sup> *R v Oakes*, [1986] 1 SCR 103 at 136, [1986] SCJ No 7 [*Oakes*]; *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211 at 260, 261, [1991] SCJ No 52; *Alberta Reference*, *supra* note 123 at 369, Dickson CJ, dissenting.

<sup>130</sup> *Health Services*, *supra* note 123 at para 82.

<sup>131</sup> *Health Services*, *supra* note 123 at para 84; *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701, at para. 93, [1997] SCJ No 94.

<sup>132</sup> *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 SCC 62 at para 35, [2013] 3 SCR 733; *SFL*, *supra* note 128 at para 55; *Alberta Reference*, *supra* note 123 at para 368, Dickson CJ, dissenting.



renders the meaningful pursuit of workplace goals impossible, and effectively nullifies the farm workers' associational guarantees.<sup>133</sup>

[63] A positive obligation for good faith consultation creates a social context in which industrial democracy can exist.<sup>134</sup> Just as the right to vote is meaningless if voting does not advance self-government, the right to influence workplace decisions is meaningless if an employer has the power to completely ignore employees.<sup>135</sup>

[64] Conducting a one-sided conversation, where the Institutional Head responded to the Association's collective representations with an affirmation of her closed mind, did not satisfy her positive obligation to consult with the farm workers in good faith.<sup>136</sup> Nor did her systematic dismissal of thirty of the farm workers' grievances. The Institutional Head's inflexible and intransigent conduct eliminated the existence of meaningful consultation, constituting a breach of the farm workers' freedom of association.<sup>137</sup>

*iii. The Institutional Head needed to reconsider her decision*

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<sup>133</sup> *Health Services*, *supra* note 123 at para 38; *MPAO*, *supra* note 123 at para 74; *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989 at para 67, [1999] SCJ No 43, Cory and Iacobucci JJ, dissenting; *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at paras 41, 117, [2001] 3 SCR 1016 [*Dunmore*].

<sup>134</sup> *MPAO*, *supra* note 123 at para 64; *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, at para 31, [2002] 3 SCR 519 [*Sauvé*].

<sup>135</sup> *MPAO*, *supra* note 123 at para 64; *Sauvé*, *supra* note 1134 at paras 64.

<sup>136</sup> *Hayes FC*, *supra* note 3 at para 23.

<sup>137</sup> *Royal Oak Mines Inc v Canada (Labour Relations Board)*, [1996] 1 SCR 369 at para 46, [1996] SCJ No 14; *Canadian Union of Public Employees v Nova Scotia (Labour Relations Board)*, [1983] 2 SCR 311 at 341, [1983] SCJ No 75; *Health Services*, *supra* note 123 at para 104.

[65] The Deputy Minister's decision failed to consider the *Charter* values of dignity and enhancing democracy, which required the Institutional Head to fulfil her obligation to meaningfully consult with the farm workers through an association of their choosing.

[66] In the workplace, respect for individuals' dignity is facilitated through industrial democracy.<sup>138</sup> It is impossible to affirm workers' dignity by giving them a place at the table, while taking away their right to choose their representative.<sup>139</sup> In light of these values, the Institutional Head's consultation with the Inmate Committee did not fulfill her positive obligation to meaningfully negotiate, as it denied the farm workers the degree of choice and independence sufficient to enable them to determine and pursue their collective interests.<sup>140</sup>

[67] The degree of independence required by the *Charter* for collective bargaining purposes is one that ensures that the activities of the association are aligned with the interests of its members.<sup>141</sup> The Inmate Committee's statutory mandate required it to represent the conflicting interests of inmates seeking to preserve their respective programs over others, and inmates seeking new employment programs.<sup>142</sup> Its loyalty lay with the interests of the inmate population as a whole, preventing it from representing the particular interests of the farm workers.<sup>143</sup>

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<sup>138</sup> *Health Services*, *supra* note 123 at paras 57, 85; *Sauvé*, *supra* note 134 at para 15; *R v Morgentaler*, [1988] 1 SCR 30 at 166.

<sup>139</sup> *Health Services*, *supra* note 123 at para 82. [1988] SCJ No 1, Wilson J dissenting [*Morgentaler*]; *Sauvé*, *supra* note 134 at para 44.

<sup>140</sup> *MPAO*, *supra* note 123 at paras 5, 81, 82.

<sup>141</sup> *MPAO*, *supra* note 123 at para 83.

<sup>142</sup> *PSCR*, *supra* note 1, s 54; *Hayes FC*, *supra* note 3 at para 20.

<sup>143</sup> *MPAO*, *supra* note 123 at para 5, 81.

[68] The Inmate Committee also lacks independence from management, as the Institution and *PSCR* govern all interactions between inmates and the Inmate Committee. For example, the chair of the Inmate Committee must receive the Institutional Head's permission to visit an inmate in segregation.<sup>144</sup> It also would not intervene on behalf of the farm workers because the Institutional Head had already made her decision.<sup>145</sup>

[69] Agreeing to vote for the makeup of the Inmate Committee cannot reasonably be construed as a waiver of the inmates' ability to choose how to effectively advance their particular workplace goals through association.<sup>146</sup> Once the farm workers realized that the structure of the Committee was a deficient vehicle for meaningful consultation, they decided to create the Association, as was their right.<sup>147</sup>

[70] Since the Institutional Head's meeting with the Inmate Committee did not constitute a meaningful consultation with the farm workers, the Institutional Head needed to reconsider her decision and meaningfully consult the farm workers through the Association. Her refusal to do so limited the farm workers' freedom of association.<sup>148</sup>

*iv. The farm workers had the right to engage in minimally disruptive protest activity in the face of the Institutional Head's bad faith*

[71] The Deputy Minister's decision failed to consider the *Charter* values of dignity, equality, and autonomy, which required that the Institutional Head tolerate a degree of

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<sup>144</sup> *PSCR*, *supra* note 1 s 62.

<sup>145</sup> *Hayes FC*, *supra* note 3 at paras 21.

<sup>146</sup> *MPAO*, *supra* note 123 at para 120.

<sup>147</sup> *Hayes FC*, *supra* note 3 at para 22.

<sup>148</sup> *MPAO*, *supra* note 123 at para 75.

inconvenience caused by the farm workers' protests, which were in reaction to the bad faith she showed in refusing to come to the table.<sup>149</sup>

[72] In the workplace, the right to strike is the “irreducible minimum” of freedom of association, because it permits workers to withdraw their labour in concert when the process reaches an impasse.<sup>150</sup> This collective action at the moment of impasse affirms the dignity and autonomy of employees in their working lives.<sup>151</sup>

[73] The Deputy Minister failed to consider that the Institutional Head created an impasse by refusing to have a meaningful consultation with the farm workers. Unlike employees, the farm workers could not exercise the irreducible minimum of their associational guarantee through collective withdrawal of their services. He also failed to consider that the farm workers' filed thirty grievances as a mechanism to resolve the impasse and enforce their right to a meaningful consultation, but the Institutional Head systematically dismissed all grievances without reasons.<sup>152</sup>

[74] The Institutional Head has the power to charge inmates with the disciplinary offences of contravening a written rule governing inmate conduct and participating in a situation that threatened the security of the prison.<sup>153</sup> As a public official, her discretion had to be exercised in a way that honoured the farm workers' freedom of association.

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<sup>149</sup> *Doré, supra* note 118 at para 65.

<sup>150</sup> *SFL, supra* note 128 at para 61.

<sup>151</sup> *Ibid* at para 54.

<sup>152</sup> *Hayes FC, supra* note 3 at para 24.

<sup>153</sup> *PSCA, supra* note 1 at s 52.

[75] The farm workers disobeyed a written order and inconvenienced the correctional officers by lying down during a stand-to count. However, the severity of the conduct must be interpreted in light of the associational rights guaranteed by the *Charter*, and in particular, the importance of having a means of recourse should the employer not bargain in good faith.<sup>154</sup> The goal of the farm workers' peaceful protest was clear. The farm workers lay down during their stand-to counts, which inconvenienced the correctional officers involved. At no time were other inmates coerced into joining, and there is no evidence that the protest resulted in a security incident.

[76] Proper respect for the farm workers' section 2(d) rights involved authorities tolerating a degree of inconvenience, especially if it was caused by their own refusal to come to the table in good faith.<sup>155</sup> Punishing the farm workers for minimally impairing protest activity taken as a last resort against the Institutional Head's bad faith effectively nullified their freedom of association.<sup>156</sup>

*v. The farm workers could not be unlawfully deprived of their liberty*

[77] Placement in segregation is a severe deprivation that automatically infringes the residual liberty rights retained by inmates.<sup>157</sup> Segregation places inmates at significant risk of serious psychological harm.<sup>158</sup> Such deprivations of liberty must only be made in accordance with the principles of fundamental justice.<sup>159</sup>

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<sup>154</sup> *Doré, supra* note 118 at para 63; *SFL, supra* note 128 at para 1.

<sup>155</sup> *Doré, supra* note 118 at para 65.

<sup>156</sup> *Health Services, supra* note 123 at para 75.

<sup>157</sup> *BCCLA, supra* note 42 at para 276.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Oakes, supra* note 129 at 136.

[78] The Institutional Head unlawfully charged the farm workers, and directly caused their three week confinement in segregation.<sup>160</sup> This limited their residual rights to liberty.

b. The PSCA's Statutory Objectives

[79] The PSC operates under the statutory framework of the *PSCA* and *PSCR*.<sup>161</sup> Its objective is to carry out sentences imposed by the courts in a manner that ensures the safe and humane custody of inmates, while assisting the rehabilitation and reintegration of inmates as law-abiding citizens through programs in its penitentiaries.<sup>162</sup>

[80] The purpose of the Institutional disciplinary system is to foster internal prison discipline as a means of ensuring the safe custody of inmates.<sup>163</sup> The PSC has a responsibility to protect the bodily and psychological integrity of inmates.<sup>164</sup> Furthermore, in correctional facilities, restricting *Charter* rights is the exception, not the rule. Inmates retain the rights set out in the *Charter* except those that are, as a consequence of the sentence, lawfully and necessarily removed.<sup>165</sup> Finally, the Institutional Head has the discretion to choose programs to rehabilitate inmates in a manner that assists inmates' reintegration into the community as law-abiding citizens.<sup>166</sup>

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<sup>160</sup> *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 19, [2010] 1 SCR 44 [Khadr]; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 54, [2002] 1 SCR 3.

<sup>161</sup> *PSCA*, *supra* note 1; *PCRR*, *supra* note 1.

<sup>162</sup> *PSCA*, *supra* note 1, s 2.

<sup>163</sup> *R v Shubley*, [1990] 1 SCR 3 at 23, [1990] SCJ No 1.

<sup>164</sup> *PSCA*, *supra* note 1, s 2; *Miller v Canada (Attorney General)*, 2015 ONSC 669 at paras 16-18, [2015] OJ No 427; *Carr v R*, 2009 FC 576 at para 95, [2009] FCJ No 769.

<sup>165</sup> *PSCA*, *supra* note 1, s 4.

<sup>166</sup> *Ibid*, s 2.

c. The Minister failed to properly balance *Charter* values with statutory objectives

[81] The Deputy Minister should have been troubled by the Institutional Head's hostility to the inmates' freedom of association. However, his failure to correctly identify the *Charter* values and consider all relevant statutory objectives resulted in a flawed balancing and unreasonable decision.<sup>167</sup>

i. *Refusing to consult in good faith was unjustified*

[82] The Deputy Minister justified the Institutional Head's bad faith by finding that inmates' right to assemble did not obligate the PSC to get "mired in a negotiation with them" and invoked the cost of buying another farm.<sup>168</sup> His reasons demonstrate disregard for the farm workers' right to a meaningful consultation and his own duty to minimally impair the farm workers' freedom of association in pursuit of the *PSCA*'s objectives.<sup>169</sup>

[83] There are no safety concerns with having a good faith consultation with the farm workers concerning workplace matters.<sup>170</sup> The purpose of the Association is peaceful – it does not seek to subvert the inmate-warden relationship. It merely requests a single, meaningful discussion about a matter of great importance to the farm workers.<sup>171</sup>

[84] By depriving at-risk individuals of their associational guarantees in the workplace, the Institutional Head frustrated her mandate to rehabilitate inmates.<sup>172</sup> The right to participate in meaningful discussion on workplace matters teaches farm workers

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<sup>167</sup> *Doré, supra* note 118 at para 6; *Loyola, supra* note 119 at para 79.

<sup>168</sup> *Hayes FC, supra* note 3 at para 32.

<sup>169</sup> *Health Services, supra* note 123 at para 90.

<sup>170</sup> *Hayes FCA, supra* note 11 at para 65.

<sup>171</sup> *Ibid* at para 65.

<sup>172</sup> *Sauvé, supra* note 134 at para 38.

to resolve conflicts like law-abiding citizens, through respectful dialogue. Exploiting power imbalances to undermine the dignity of vulnerable persons does not.

[85] While budgetary concerns are relevant to decisions about programs, they are not an appropriate justification for the Institutional Head's refusal to meaningfully consult the farm workers.<sup>173</sup> This is especially so when the Institutional Head was herself the architect of these budgetary concerns. She chose to sell the farm, fire the agronomists, and sign a contract with a food vendor without meaningfully consulting the Association.<sup>174</sup>

*ii. Refusing to re-consider the Institutional Head's decision was unjustified*

[86] The Deputy Minister incorrectly justified the Institutional Head's refusal to reconsider her decision by finding that the Institutional Head genuinely consulted with the Inmate Committee.<sup>175</sup>

[87] The Institutional Head may have had legitimate concerns about the difficulty of consulting every single employee. However, mere administrative expediency cannot be sufficiently pressing and substantial to override a *Charter* right.<sup>176</sup> Furthermore, since this *Charter* right flows from the unique circumstances of the employment programs, the Institutional Head's duty of meaningful consultation would only be in relation to those particular programs.

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<sup>173</sup> *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 94, [1997] SCJ No 86.

<sup>174</sup> *Hayes FC*, *supra* note 3 at paras 17-20; *Nova Scotia (Workers' Compensation Board) v Martin*; *Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 at para 110, [2003] 2 SCR 504 [*Martin*].

<sup>175</sup> *Hayes FC*, *supra* note 3 at para 32.

<sup>176</sup> *Martin*, *supra* note 174 at para 110.



[88] Depriving at-risk individuals of their sense of collective identity and membership in workplace communities does not facilitate rehabilitation.<sup>177</sup> Participation in industrial democracy teaches democratic values and social responsibility; it can even constitute the beginning of an inmate's return to the social contract.<sup>178</sup>

*iii. Exposing the farm workers to segregation for engaging in minimally disruptive protest activity was unjustified*

[89] The Deputy Minister justified the Institutional Head's decision to charge the farm workers with disciplinary offences by finding that if inmates "chose not to comply with their obligations, they must suffer the consequences."<sup>179</sup>

[90] Considering the Institutional Head's refusal to honour her positive obligation to meaningfully consult with the farm workers, tolerating a degree of peaceful, mild inconvenience to the Institution constituted a minimally impairing reconciliation between the farm workers' freedom of association and the statutory objective of safety.<sup>180</sup> A remote possibility that the peaceful protest could prevent correctional officers from attending to another inmate's emergency does not justify the decision to charge the farm workers, especially since they were acting in response to the Institutional Head's bad faith.<sup>181</sup>

[91] In light of the mild nature of the farm workers' expressive behaviour, the Deputy Minister should have recognized that the Institutional Head's treatment of Mr. Hayes and

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<sup>177</sup> *Sauvé*, *supra* note 134 at para 38.

<sup>178</sup> *MPAO*, *supra* note 123 at para 49; *Health Services*, *supra* note 123 at paras 57, 85.

<sup>179</sup> *Hayes FC*, *supra* note 3 at para 32.

<sup>180</sup> *Doré* *supra* note 118 at para 6, *Loyola*, *supra* note 119 at para 79.

<sup>181</sup> *Hayes FCA*, *supra* note 11 at paras 66, 67.

the other members of the Association directly and unlawfully caused them to be placed in segregation for a disproportionate amount of time.<sup>182</sup>

#### **PART IV – ORDER SOUGHT**

[92] The evidence on the record leads to a foregone conclusion.<sup>183</sup> The PSC owed a constitutional and common law duty of procedural fairness and a constitutional duty to meaningfully consult with the farm workers about the farm program's closure.<sup>184</sup> It did not satisfy either duty. It follows that the farm program was not lawfully shut down. On the footing that, at law, Mr. Hayes never lost his position as a farm worker, he should receive his pay since April 2016, less earnings from participation in other PSC programming.

[93] The Appellant requests that the Canadian Court of Justice:

**ALLOW** the appeal of the Federal Court of Appeal's affirmation of the Deputy Minister's decision;

**DECLARE** that the Institutional Head's refusal to meaningfully negotiate with the Association infringed Hayes' section 2(d) rights;

**DECLARE** that the Institutional Head's actions infringed Mr. Hayes' section 7 rights in a procedurally unfair and overbroad manner;

**ORDER** the Deputy Minister to award Mr. Hayes with his pay as a farm worker since April 2016, less earnings from participation in other PSC programming;

**REMIT** the matter to the Deputy Minister for reconsideration; and

**AWARD** costs throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of February, 2018.

**Counsel #1**  
Sophie Courville-Le Bouyonnec

**Counsel #2**  
Benjamin Wong

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<sup>182</sup> *Khadr*, *supra* note 160 at para 19; *Suresh*, *supra* note 160 at para 54.

<sup>183</sup> *D'Errico v Canada (Attorney General)*, 2014 FCA 95 at para 16, [2014] FCJ No 370.

<sup>184</sup> *Wong v College of Traditional Chinese Medicine Practitioners & Acupuncturists (British Columbia)*, 2005 BCCA 509 at 28-31.

## **ANNEX A – LIST OF AUTHORITIES REFERRED TO**

### LEGISLATION

*Corrections and Conditional Release Act*, SC 1992 c 20.

*Loi sur le Service des pénitenciers du Canada*, LRL, c P-12.

*Loi sur le système correctionnel et la mise en liberté sous condition*, LC 1992, c 20.

*Loi sur les langues officielles*, LRC 1985, c 31 (4<sup>e</sup> supp).

*Penitentiary Service of Canada Act*, RLL c P-12.

*Penitentiary Service of Canada Regulation*, LASK 92/232.

*Règlement sur le Service des pénitenciers du Canada*, LASK 92/232.

*Renvoi sur la Motor Vehicle Act de la C-B*, [1985] 2 RCS 486.

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*Abel v. Ontario (Advisory Review Board)*, 119 DLR (3d) 101 (CA).

*Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 SCR 733.

*Attorney General of Canada v Jackson Hayes*, 2018 FCA 1.

*Bacon v Surrey Pretrial Services Centre*, 2010 BCSC 805.

*Baker c Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 RCS 817.

*Beothuk Data Systems Ltd., Seawatch Division v Dean*, [1998] 1 CF 433.

*British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62, 2018 CarswellBC 53.

*Canada (Citoyenneté et Immigration) c Khosa*, 2009 CSC 12.

*Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44.

*Canada (Procureur général) c Barnes*, 2002 CAF 413.

*Canada (Procureur général) c Bedford*, 2013 CSC 72, [2013] 3 RCS 1101.

*Canada (Procureur général) v Blackman*, 2016 CF 488.

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*Canada (Procureur général) c Mavi* 2011 CSC 30, [2011] 2 RSC 504.

*Canadian Arab Federation v. Canada (Minister of Citizenship and Immigration)*, 2015 CAF 168.

*Canadian Union of Public Employees v Nova Scotia (Labour Relations Board)*, [1983] 2 SCR 311, [1983] SCJ No 75.

*Cardinal c Institution Kent*, [1985] 2 SCR 643.

*Carr v R*, 2009 FC 576, [2009] FCJ No 769.

*Carter c Canada (Procureur général)*, 2015 CSC 5, [2015] 1 RCS 331.

*Catalyst Paper Corp c North Cowichan (District)*, 2012 SCC 2, [2012] 1 SCR 5.

*Charles c Canada (Procureur général)*, 2017 CF 435.

*Congrégation des Témoins de Jéhovah de St-Jérôme-Lafontaine c Lafontaine (Municipalité)*, 2004 SCC 48, [2004] 2 RCS 48.

*Cooper v. Wandsworth Board of Works*, (1863) 143 ER 414 (Eng CP).

*Cunningham v Canada*, [1993] SCJ No 47, [1993] 2 SCR 143.

*Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989, [1999] SCJ No 43.

*D'Errico v Canada (Attorney General)*, 2014 FCA 95, [2014] FCJ No 370.

*Doré c Barreau du Québec*, 2012 SCC 12, [2012] 1 RCS 395.

*Dunmore v Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 SCR 1016.

*Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, [1997] SCJ No 86.

*Établissement de Mission c Khela*, 2014 CSC 24, [2014] 1 RCS 502.

*Furey v Conception Bay Centre Roman Catholic School Board*, [1993] N.J. No. 170.

*Gardner v Williams Lake (City)*, [2006] BCJ No 1389 (BCCA).

*Gosselin c Québec (Procureur général)*, 2002 SCC 84, [2002] 4 RCS 429.

*Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391.

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*Jackson Hayes and Lacombe Institution Association of Farm Program Inmates v Attorney General of Canada*, 2017 FC 47.

*Kane c Conseil d'administration de l'Université de la Colombie-Britannique*, [1980] 1 RCS 1105.

*Knight c Indian Head School Division No. 19*, 1 CSC 653, [1990] 1 RCS 653.

*Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211, [1991] SCJ No 52.

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*Maxwell v Department of Trade and Industry*, [1974] QB 523.

*May c Ferndale Institution*, 2005 SCC 82, [2005] 3 RSC 809.

*Miller v Canada (Attorney General)*, 2015 ONSC 669, [2015] OJ No 427.

*Ministre du Revenu national c Coopers and Lybrand*, [1979] 1 RCS 495, [1978] SCJ No. 97.

*Mitten c College of Psychologists (Alberta)*, 2010 ABCA 159.

*Mounted Police Association of Ontario c Canada (PG)*, 2015 SCC 1, [2015] 1 SCR 3.

*Multani c Commission scolaire Marguerite-Bourgeoys*, 2006 CSC 6, [2001] 1 RCS 256.

*Nicholson c Haldimand-Norfolk (Regional Municipality) Commissioners of Police*, [1979] 1 SCR 311.

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

*Ocean Port Hotel Ltd. c Colombie-Britannique (General Manager, Liquor Control and Licensing Branch)*, 2001 CSC 52, [2001] 2 RCS 781.

*Ontario (Attorney General) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3.

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*Prasad c Canada (Ministre de l'Emploi et de l'Immigration)*, [1989] 1 RCS 560.

*R v Oakes*, [1986] 1 SCR 103, [1986] SCJ No 7.

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*R c Safarzadeh-Markhali*, 2016 CSC 14, [2016] 1 RCS 180.

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*Royal Oak Mines Inc v Canada (Labour Relations Board)*, [1996] 1 SCR 369, [1996] SCJ No 14.

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*Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245.

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*Singh c Ministre de l'Emploi et de l'Immigration*, [1985] 1 RCS 177.

*Slight Communications Inc v Davidson Health Services*, [1989] 1 SCR 1038, [1989] SCJ No 45.

*Suresh c Canada (Ministre de la Citoyenneté de l'Immigration)*, 2002 CSC 1, [2002] 1 RCS 3.

*Tran v College of Physicians and Surgeons of Alberta*, 2017 ABQB 337.

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