CANADIAN COURT OF JUSTICE

(On appeal from the Federal Court of Appeal)

BETWEEN:

ERIC DROUIN

Appellant

and

NATIONAL PANDEMIC RESPONSE ACTION COMMITTEE

Respondent

FACTUM OF THE RESPONDENT

Counsel for the Respondent

SCHOOL NUMBER 5

Table of Contents

PART I – OVERVIEW **4**

PART II – STATEMENT OF FACTS AND JUDICIAL HISTORY **5**

Statement of Facts **5**
The Act *5*
The Committee *5*
The Vaccination Order *6*
The Decision *6*

Judicial History **7**
The Federal Court Decision *7*
The Federal Court of Appeal's Decision *8*

PART III - STATEMENT OF RESPONDENT'S POSITION CONCERNING THE POINTS IN ISSUE **8**

PART IV – ARGUMENT **9**

Le caractère véritable de la *Loi* est l'imposition des mesures qui empêchent la propagation de la grippe AH4N1 au nom de la santé publique. **9**
L'objectif de la Loi est d'atténuer l'impact de l'AH pour empêcher sa propagation avec des mesures de santé publique rapides et ciblées. *9*
Les effets juridiques et pratiques de la Loi visent la propagation de l'AH. *10*

La santé publique et l'économie nationale sont des compétences de double aspect. **11**

La *Loi* est valide en vertu du volet intérêt national de la compétence en matière de paix, d'ordre et de bon gouvernement. **12**
La transmissibilité de l'AH et son arrivée dans la foulée de COVID-19 l'ont fait évoluer en question d'intérêt national. *13*
Arrêter la propagation de l'AH est une question unique, particulière et indivisible. *13*
Le juge de première instance n'a pas tenu compte des effets de l'omission d'une province de s'occuper des aspects extra-provinciaux. *14*
Arrêter la propagation de l'AH au niveau national est conciliable avec la division des pouvoirs. *15*

La *Loi* est valide en vertu du volet urgence de compétence en matière de POBG. **16**
Ce tribunal ne devrait pas modifier le critère juridique établi par le Renvoi relative à la Loi anti-inflation pour le volet du pouvoir d'urgence en matière de POBG. *17*

La *Loi* est valide en tant que législation de nature criminelle. **18**
La protection de la santé publique est un objectif valable du droit pénal. *19*
La Loi n'est pas de nature réglementaire. *19*
Le Renvoi relatif à la Loi sur la procréation assistée peut être distingué. *20*

This case is a review of the merits of the Decision on a standard of reasonableness. **21**
Procedural Fairness is not an issue in this appeal. *21*
The Decision was internally coherent. *22*

The Decision was justified in light of the legal and factual constraints. **24**
The specific issue before the Committee was whether the Appellant demonstrated a particular risk. *24*
The absence of particular risk is a finding of fact entitled to deference. *25*
The Committee's factual findings were transparent, justified, and intelligible. *26*

The committee was not required to respond to the Appellant's *Charter* objections when granting or denying an exemption request. **28**
The Committee could not consider the validity of the Regulation during an exemption request. *28*
Charter allegations do not change the standard of reasonableness. *30*
The outcome of the decision proportionately balances statutory objectives with Charter protections even in the absence of legislative constraints. *31*

PART V – ORDER SOUGHT AND NAMES OF COUNSEL **33**

APPENDIX A: LIST OF AUTHORITIES **34**

Legislation **34**

Jurisprudence **34**

Secondary Material **35**

PART I – OVERVIEW

[1] This case concerns the constitutionality of the *Act to safeguard Canadian health and economic prosperity* [*"**Act**"*].[1] The Appellant claims that the *Act* is *ultra vires* Parliament as a matter of provincial jurisdiction, namely the regulation of businesses and healthcare.

[2] The *Act*, in pith and substance, imposes public health measures that prevent the spread of the AH4N1 Flu ("**AH**"). The spread of AH is both an emergency and a matter of national concern. Legislation directed at halting the spread of AH may be validly enacted under Parliament's power to legislate in the name of peace, order and good government ("**POGG**").

[3] The *Act* establishes minimum national standards to halt the spread of AH. Canada is not interested in managing how provinces treat AH patients or how teachers manage their classrooms. Canada is legislating for a matter that is truly a national concern and an emergency: the systemic spread of a dangerous virus within the Canadian population.

[4] In addition, the *Act* is a valid use of Parliament's criminal law power. It is drafted in the prescribed criminal law form and safeguards public health by prohibiting conduct that spreads AH. It does not seek to regulate health, businesses, or education.

[5] This case also concerns the merits of a decision made by a delegated authority under the *Act*. The Appellant challenges a decision by the National Pandemic Response Action Committee (the "**Committee**") to deny his request for exemption from a mandatory vaccination order (the "**Decision**").

[6] This is a case in which the Committee was called upon to apply regulations made under the *Act* to specific facts. The Committee was required to make a specific determination as to whether applying a mandatory vaccination order posed a particular risk in a particular case. The specific issue was constrained to whether there existed a particular risk of harm to a child. The Committee weighed the evidence before it and came to a different conclusion than the Appellant.

[7] The Committee determined that the facts of the situation did not meet the regulatory requirements, and having made this conclusion, it could not grant an exemption. A reasonable decision in these circumstances did not require the Committee to outline the regulatory framework within which the request was made, nor to respond in writing to arguments that are irrelevant to the specific issue it had the power to decide. Issues related to alleged infringement of a parent's individual rights and freedoms could only be interpreted as an invitation to review the validity of the regulatory provisions that the Committee was called upon to apply in the Decision. The *Act* specifically precluded the Committee was precluded from considering such questions when considering an individual exemption request.

[8] The outcome of the Decision most likely furthers the *Act*'s statutory purpose by immunizing an especially vulnerable child against a dangerous virus, as well as helping

---

[1] SC 2022, c 15 [*Act*].

protect other vulnerable Canadians to whom she might spread the virus. Achieving this statutory purpose is consistent with the best interests of the child, and as such it must outweigh any restriction on a parent's individual liberty or freedom of conscience. While the Appellant may disagree with the factual basis on which the Decision was made, or may object to the rules the Committee was called upon to apply, he fails to establish that Decision itself was unreasonable.

PART II – STATEMENT OF FACTS AND JUDICIAL HISTORY

Statement of Facts

The Act

[9] AH is a highly contagious influenza virus. By striking on the heels of the SARS-COV-2 ("**COVID-19**") pandemic of 2020, it threatens Canada's already vulnerable healthcare systems and economy. If insufficiently mitigated, the AH pandemic may lead to a catastrophic recession.[2]

[10] AH's economic impact stems principally from Canadians staying home, whether because they are themselves ill or to care for ill children.[3] This has caused economic productivity to drop over the past five months, particularly in the hardest-hit industries.[4]

[11] Parliament has responded by rapidly passing the *Act*. The government called a special session of Parliament, and the House of Commons rapidly passed the *Act* by majority vote.[5] The Senate approved the legislation the next day, and it received Royal Assent by the end of the week.[6]

The Committee

[12] The *Act* establishes the Committee as an administrative authority with a mandate to enact all measures and make all orders necessary to prevent and mitigate the impact of AH on Canadians health and on the national economy.[7] The Committee is chaired by Dr. Monique Evans, an appointee of the Federal Minister of Health. Dr. Evans is an esteemed epidemiologist.[8] The remainder of the committee consists of eight members appointed by

---

[2] *Drouin v National Pandemic Response Action Committee*, T-800-19 (FC) at para 12 [FC Decision].

[3] *Ibid* at para 11.

[4] *Ibid* at para 12.

[5] *Ibid* at paras 13-16.

[6] *Ibid* at para 16.

[7] *Act*, *supra* note 1, s 15.

[8] FC Decision, *supra* note 2 at para 21.

Dr. Evans. Two are epidemiologists or public health experts, five are economists, and one is an expert in public safety and security.[9]

The Vaccination Order

[13] Peer-reviewed studies have indicated that a vaccine developed for a similar strain of influenza may limit transmission of AH.[10] Some studies indicate that the effect is especially pronounced among children who receive the vaccination. Health Canada has reviewed the vaccine and authorized it for distribution in Canada. Having reviewed the preliminary evidence, the Committee determined that the vaccine was safe and was likely to limit transmission of the virus.[11] It further determined that mandatory vaccination of school-age children would effectively limit the transmission of AH. [12]

[14] Pursuant to its mandate and authority under the *Act*, the Committee enacted section 15 of the *Regulation respecting measures to reduce the impact of AH4N1* ["***Regulation***"].[13] Section 15 establishes a mandatory vaccination order. Children aged 5 to 18 who do not receive the vaccine within 60 days of the order's publication may not attend public school.[14] Parents who do not ensure that their children are vaccinated are liable for penalties prescribed under the *Act.*

The Decision

[15] The Appellant, Mr. Eric Drouin, is a graphic designer who has part-time custody of his daughter, Émilie Carson. Émilie is subject to the mandatory vaccination order. The Appellant applied to the Committee seeking that Émilie be exempted from the vaccination order under procedures outlined in the *Regulation* and the *Act*.[15]

[16] In his exemption request, the Appellant submitted medical records that demonstrated Émilie is immunodeficient. He further submitted a copy of one clinical study conducted by Dr. Elisabeth Olmstead (the "**Olmstead Report**") that concluded the vaccine poses a minor but statistically significant risk to children of contracting AH. No further evidence of the vaccine posing a particular risk to Émilie was submitted.

---

[9] *Ibid* at para 21.

[10] *Ibid* at para 29.

[11] *Ibid* at para 29

[12] *Ibid.*

[13] SOR/22-115 [*Regulation*].

[14] FC Decision, *supra* note 2 at para 28.

[15] FC Decision, *supra* note 2 at para 38; *Regulation*, *supra* note 13, ss 15-17; *Act*, *supra* note 1, ss 18-22.

[17] In addition to his submissions with respect to Émilie's particular susceptibility, the Appellant also submitted the following general objections to the mandatory vaccination order:

1. That the vaccination has not been proven effective against the transmission of AH.
2. The order infringes his individual freedom of conscience under section 2(b) of the *Canadian Charter of Rights and Freedoms* ["***Charter***"],[16] because his genuine belief that the vaccine presents a significant risk to immunodeficient children prevents him from permitting his daughter to receive the vaccine.
3. Mandatory vaccinations infringe his liberty as a parent to make decisions on behalf of his daughter, and thus infringes his right to liberty under section 7 of the *Charter.*

[18] The Committee denied the Appellant's exemption request. It provided reasons for its Decision via a letter (the "**Information Letter**") addressing the specific circumstances.[17] The Committee concluded that "it is likely that the vaccine will prevent [Émilie] from suffering more serious harm by preventing her from contracting AH4N1."[18] It further referenced the potential harm to society that will occur should Émilie attend school un-vaccinated and spread AH to teachers and peers.[19] The Information Letter did not respond to the objections under section 2(b) or section 7 of the *Charter*.

Judicial History

The Federal Court Decision

[19] The Appellant sought judicial review of the Decision at the Federal Court on grounds that the

1. *Act* is *ultra vires* Parliament and thus any order made under it is void, and
2. the Decision is unreasonable on its merits.

[20] The Federal Court held that the *Act* was *ultra vires* Parliament, declaring it inoperative. The matter, "limitation or mitigation of the negative effects of the AH epidemic on Canadians' health as well as their economic well-being," was held not to be a matter of national concern or a valid use of Parliament's criminal law power.[20]

---

[16] Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), c 11.

[17] FC Decision, *supra* note 2 at para 39.

[18] *Ibid.*

[19] *Ibid.*

[20] *Ibid* at paras 65, 83-85.

[21] With respect to the reasonableness of the Decision, the reviewing judge concluded that the Decision was unreasonable on grounds that the Committee inadequately assessed the particular risk of the vaccine to Émilie, and as such failed to give weight to the potential harm to the individual when weighing this against the statutory purpose.[21] The reviewing judge also found that failure to consider the Appellant's *Charter* objections independently vitiated the Decision.[22]

The Federal Court of Appeal's Decision

[22] On appeal, the Federal Court of Appeal unanimously held that the Act was *intra vires* Parliament. Two Justices held that the matter was of national concern.[23] Potashnik J held that the Act was best characterized as criminal legislation, while Torrence J also held that the matter was an emergency.[24]

[23] The Court of Appeal also reversed the reviewing judge's findings on both elements of reasonableness, finding the Decision to be reasonable in light of the legal and factual constraints. The majority found that the Committee had coherently addressed the evidence tendered by the Appellant,[25] and its conclusion was justified in light of the factual and legal constraints.[26]

PART III - STATEMENT OF RESPONDENT'S POSITION CONCERNING THE POINTS IN ISSUE

[24] Canada agrees that the appeal raises the following issues:

1. Is the *Act* a valid exercise of federal power?
2. Was the decision to deny the Appellant's application for an exemption from the mandatory vaccination order reasonable?

---

[21] FC Decision, *supra* note 2 paras 52-53.

[22] *Ibid* at paras 56-57.

[23] *Drouin v National Pandemic Response Action Committee*, A-1500-19 (FCA) at paras 25,56 [FCA Decision].

[24] *Ibid* at paras 35-36, 39.

[25] *Ibid* at para 13.

[26] *Ibid* at para 10.

PART IV – ARGUMENT

Le caractère véritable de la *Loi* est l'imposition des mesures qui empêchent la propagation de la grippe AH4N1 au nom de la santé publique.

[25] Le caractère véritable de la *Loi sur la protection de la santé nationale et de la prospérité économique* (« ***Loi*** »), défini avec précision, est d'empêcher la propagation de la grippe AH. Le caractère véritable d'une loi est sa caractéristique dominante ou plus importante[27]. Cela nécessite une pondération des aspects d'une loi pour déterminer lesquelles de ces caractéristiques sont les plus importantes[28].

[26] Les aspects de santé publique de la *Loi* priment sur ces caractéristiques économiques. Bien que le préambule fasse référence à la fois à la santé et à l'économie, le préambule n'est pas déterminant quant au caractère véritable. L'analyse doit aller plus loin - les tribunaux devraient être prudents en s'appuyant principalement sur l'objectif déclaré[29].

[27] Le caractère véritable doit être identifié avec précision. Une caractérisation large, telle que préconisée par l'Appelant, exagérera la mesure dans laquelle la *Loi* empiète aux compétences provinciales[30]. En l'espèce, les effets juridiques et pratiques de la *Loi* définissent son caractère véritable précisément comme empêchant la propagation de l'AH.

L'objectif de la Loi *est d'atténuer l'impact de l'AH pour empêcher sa propagation avec des mesures de santé publique rapides et ciblées.*

---

[27] *Renvoi relative à la Loi sur la non-discrimination génétique*, 2020 CSC 17 au para 29 [*Re NDG*].

[28] *Ibid* au para 31.

[29] *Reference Re Firearms Act*, 1998 ABCA 305 aux paras 140-41.

[30] *Re NDG*, *supra* note 27 au para 32, citant *Renvoi relative à la Loi sur la procréation assistée*, 2010 CSC 61 au para 190 [*Re PA*].

[28] Le préambule de la *Loi* stipule que son objectif est d'atténuer l'impact de l'AH sur la santé publique et l'économie canadienne. Cependant, les preuves extrinsèques montrent que cela se fait en freinant la transmission dans la population canadienne.

[29] L'impact économique de l'AH est dû au fait que les Canadiens restent au foyer[31]. Les Canadiens qui sont exposés à l'AH se retirent de l'économie pour cause de maladie ou pour s'occuper des enfants malades. En conséquence, le Canada est confronté à une forte baisse du produit intérieur brut et à une récession catastrophique.

[30] L'objectif de la *Loi* est donc d'attaquer directement à cette cause première : la transmission de la grippe AH. L'arrêt de cette propagation atténue les impacts économiques de la grippe AH, comme indiqué dans le préambule de la *Loi*. Moins de Canadiens resteront à la maison, plus de gens pourront travailler et la confiance des consommateurs augmentera.

Les effets juridiques et pratiques de la Loi visent la propagation de l'AH.

[31] L'effet juridique de la *Loi* est de créer le Comité d'action nationale en réponse à la Pandémie (« **Comité** ») avec compétence pour émettre les ordonnances requises pour prévenir et atténuer l'impact de l'AH[32]. La contravention de ces ordonnances est passible d'une amende ou d'une peine d'emprisonnement[33].

[32] Les ordonnances du Comité ont toutes visé la transmission de l'AH. Le port obligatoire de masques dans les écoles publiques et sur certains lieux de travail vise à

---

[31] FC Decision, *supra* note 2 au para 11.

[32] *Act*, *supra* note 1, art 15.

[33] *Ibid*, art 37.

limiter la transmission. L'interdiction pour les enfants non vaccinés de fréquenter les écoles publiques vise également à limiter la transmission. Le document explicatif accompagnant l'ordonnance de vaccination indiquait que ces vaccins « la vaccination … peut limiter la capacité d'un individu <u>de transmettre</u> le AH » [34].

[33] Les effets pratiques de la *Loi* réduisent la transmission de l'AH à l'école et au travail. Tous les enfants fréquentant l'école publique doivent soit être vaccinés soit demander une dérogation au Comité. Il est très probable que cela ait entraîné une augmentation de la vaccination des enfants. En outre, rien ne prouve que la transmission de l'AH soit différente d'autres grippes. Toute école ou tout lieu de travail où le port d'un masque est obligatoire est donc moins susceptible de propager l'AH.

[34] Le caractère véritable de cette loi est d'empêcher la propagation de l'AH. C'est ainsi que la *Loi* atteint son objectif préambulaire d'atténuer l'impact sur la santé publique et l'économie canadienne. Une définition précise doit tenir compte des effets juridiques et pratiques de la *Loi*, qui visent tous la propagation de l'AH. Aucune des ordonnances émises par le Comité ne vise des préoccupations économiques.

La santé publique et l'économie nationale sont des compétences de double aspect.

[35] Après avoir déterminé le caractère véritable d'une loi contestée, l'étape suivante consiste à classer la loi par référence aux compétences fédérales et provinciales[35].

[36] Cependant, la conception moderne du fédéralisme encourage la coopération et un aspect double des compétences[36]. Le principe organisateur au Canada est le fédéralisme

---

[34] FC Decision, *supra* note 2 aux para 25, 27, 29 [nos italiques].

[35] *Re NDG*, *supra* note 27 au para 26.

[36] *Renvoi relative à la Loi sur les valeurs mobilières*, 2011 CSC 66 au para 57 [*Re VM*].

coopératif[37]. Les tribunaux ont préféré maintenir la validité des lois lorsqu'il était possible d’accommoder un chevauchement entre les lois provinciales et fédérales[38].

[37] La santé publique est un tel domaine de compétence partagée. La santé n’est pas exclusivement provinciale. Canada peut toujours légiférer en matière de santé publique dans un domaine de compétence fédérale[39].

[38] Il incombe à l'Appelant de prouver que la *Loi* ne peut être soutenue par aucune des compétences fédérales[40]. Il ne suffit pas de soutenir que la *Loi* affecte des questions d'intérêt local, de santé ou d'éducation. Cela n'est pas contesté. Mais le principe du fédéralisme coopératif est engagé si le Canada peut légiférer dans le même domaine à des fins différentes[41].

La *Loi* est valide en vertu du volet intérêt national de la compétence en matière de paix, d’ordre et de bon gouvernement.

[39] La *Loi* est valide en vertu du volet intérêt national dérivé de la compétence résiduelle en matière de la paix, le bon ordre et le bon gouvernement (« **POBG** »). Le caractère véritable de la *Loi* est une question qui a évolué en intérêt national, avec l’unicité,

---

[37] *Re NDG*, *supra* note 27 aux para 20-21.

[38] *Ibid* aux para 23-24, citant, *inter alia*, *Multiple Access Ltd c McCutcheon*, [1982] 2 RCS 161 et *Renvoi relatif à la réglementation pancanadienne des valeurs mobilières*, 2018 CSC 48 [*Re RPVM*].

[39] *Reference re Validity of Section 5 (a) Dairy Industry Act*, [1949] SCR 1 à la p 57, 1948 CanLii 2 (SCC).

[40] *Renvoi relative à la Loi sur les armes à feu (Can.)*, [2000] 1 RCS 783 au para 25, 2000 CSC 31 (CanLii) [*Re Armes à feu*], citant *Nova Scotia Board of Censors c McNeil*, [1978] 2 RCS 662, 1978 CanLii 6 (CSC).

[41] *Re RPVM*, *supra* note 38 aux para 16-19.

la particularité et l'indivisibilité requises. La *Loi* est également compatible avec la division des pouvoirs législatifs prévue par la Constitution[42].

La transmissibilité de l'AH et son arrivée dans la foulée de COVID-19 l'ont fait évoluer en question d'intérêt national.

[40] L'AH est devenue une question d'intérêt national en raison de la vulnérabilité du Canada à une deuxième pandémie. Le Canada ne prétend pas que toutes les pandémies, ni même que toutes les grippes sont des intérêts nationaux. Toutefois, si les pandémies ne sont pas nouvelles, l'AH est et elle a frappé dans la foulée de la pandémie COVID-19, dont le Canada reste particulièrement vulnérable à ses répercussions. Cette combinaison de facteurs - une nouvelle grippe extrêmement infectieuse, ainsi qu'un système de soins de santé et une économie vulnérable - fait de l'AH un intérêt national.

Arrêter la propagation de l'AH est une question unique, particulière et indivisible.

[41] Le caractère véritable de la *Loi* vise à empêcher la propagation de l'AH. Comme l'a déclaré la Cour d'appel, ce caractère s'agit d'une question unique, même si elle est traitée par divers moyens[43]. Les mesures prises par le Comité sont toutes liées à la propagation de l'AH. Les moyens choisis peuvent être larges, mais ils sont à juste titre limités à une seule question d'intérêt national.

---

[42] *R c Crown Zellerbach Canada Ltd.*, [1988] 1 RCS 401 aux pp 431-32, 1988 CanLii 63 (CSC) [*Crown Zellerbach*].

[43] FCA Decision, *supra* note 23 au para 23.

[42] La grippe AH est également distincte. AH est une nouvelle grippe, et les scientifiques ont étudié ses effets en particulier[44]. La capacité à définir scientifiquement la grippe AH lui confère la spécificité requise.

[43] En ciblant la transmission de l'AH, le Parlement a réduit la question au point d'indivisibilité. Le juge de première instance n'a pas reconnu que le caractère véritable de la *Loi* n'est pas simplement toutes questions liées à l'AH[45]. Les ordonnances du Comité précisent le caractère véritable de la *Loi* : la vaccination, le masquage et le nettoyage entre les quarts de travail visent tous la propagation de l'AH.

Le juge de première instance n'a pas tenu compte des effets de l'omission d'une province de s'occuper des aspects extra-provinciaux.

[44] L'analyse des effets extra-provinciaux est hypothétique - le test consiste à déterminer si le retrait d'une province d'un régime coopératif <u>pourrait</u> sérieusement nuire à la capacité de ce régime[46]. Il ne s'agit pas de trouver des preuves qu'une province est incapable de gérer la pandémie de l'AH. La question est plutôt s'il est possible que la réponse du Canada à l'AH soit compromise par une omission provinciale.

[45] La nature d'une pandémie est que l'échec d'une seule province pourrait compromettre la capacité des autres provinces et du gouvernement fédéral à contenir le virus. Les virus ne respectent pas les frontières. Ils voyagent avec des personnes et des marchandises, dont beaucoup traversent les frontières provinciales chaque jour. Une propagation non maîtrisée dans une province affectera inévitablement les autres provinces.

---

[44] FC Decision, *supra* note 2 au para 29.

[45] *Ibid* au para 80.

[46] *Re RPVM*, *supra* note 38 au para 113 [nos italiques].

[46] Si les actions des provinces de l'Atlantique face au COVID-19 sont la preuve que, dans une certaine mesure, les provinces peuvent s'isoler de l'effet d'un virus dans d'autres provinces, la bulle a également échoué. Une fois que le virus atteint un certain niveau de prévalence dans la population d'une province, son impact sur les autres provinces est inévitable. Le gouvernement fédéral doit intervenir pour établir des normes minimales entre les provinces afin d'éviter que la pandémie n'atteigne ce point.

Arrêter la propagation de l'AH au niveau national est conciliable avec la division des pouvoirs.

[47] Une question d'intérêt national n'est pas plénière. Bien que le gouvernement fédéral puisse revendiquer la compétence, cela n'empêche pas un double aspect. Par exemple, dans la région de la capitale nationale, la compétence fédérale n'empêche pas l'imposition des codes de construction, des règlements en matière de santé ou des normes d'emploi[47].

[48] Une approche coopérative, dans laquelle les provinces traitent des questions relevant de leurs compétences et le Parlement des préoccupations nationales, est conciliable avec la division des pouvoirs[48]. Cela est typique des questions de santé, où les gouvernements « travaillent souvent ensemble pour satisfaire des intérêts communes »[49]. Le Canada ne souhaite pas dire aux provinces comment traiter les patients avec l'AH ou gérer le système de santé. Le Canada légifère dans l'intérêt national : mettre fin à la propagation systémique de l'AH au sein de la population canadienne.

---

[47] *Munro v National Capital Commission*, [1966] SCR 663, 57 DLR (3d) 753.

[48] *Re RPVM*, *supra* note 38 au para 17, citant *Rogers Communications Inc c Châteauguay (Ville)*, 2016 CSC 23.

[49] *Re NDG*, *supra* note 27 au para 93, citant *R c Hydro-Québec*, [1997] 3 RCS 213 au para 131, 1997 CanLii 318 (CSC).

[49] Cette approche est analogue à l'arrêt *Crown Zellerbach*[50]. Le Canada cherche à arrêter la propagation d'un élément spécifique - la grippe AH ou la pollution marine - dans une sphère plus large de compétence partagée, comme l'environnement ou la santé. L'arrêt *Crown Zellerbach* n'a pas donné au Canada la compétence pour réglementer toutes les questions relatives à l'environnement. Les exigences d'unicité, de particularité et d'indivisibilité limitent la portée de la compétence fédérale.

La *Loi* est valide en vertu du volet urgence de la compétence en matière de POBG.

[50] La *Loi* constitue une utilisation valable du volet d'urgence de la compétence en matière de POBG. Il existe une base rationnelle permettant au Parlement de conclure que l'AH est une urgence. La *Loi* est également temporaire, reflétant la durée de l'urgence[51].

[51] Le Parlement avait une base rationnelle pour conclure que l'AH constitue une urgence pour la santé et l'économie canadienne. La juge Torrence a pris connaissance d'office du fait « … évident que la possibilité d'un impact énorme du AH sur la santé des Canadiens et l'économie … constitue un état d'urgence »[52]. Le Parlement a également reçu des conseils d'économistes qui ont prédit une récession catastrophique.

[52] La hâte des travaux parlementaires est une preuve supplémentaire de l'urgence. La *Loi* a été adoptée lors d'une session extraordinaire. Après son adoption par la Chambre des communes, le Sénat l'a approuvé le lendemain, et elle a reçu la sanction royale dans un

---

[50] *Crown Zellerbach*, *supra* note 42.

[51] *Renvoi relative à la Loi anti-inflation*, [1976] 2 RCS, 1976 CanLii 16 (CSC) à la p 427.

[52] FCA Decision, *supra* note 23 au para 35.

délai d'une semaine[53]. Tout au long des débats, les membres des parlements ont exprimé le souhait d'une réponse fédérale rapide et robuste à cause de la présence d'une urgence[54].

[53] Le caractère temporaire de l'urgence est implicite dans son lien avec la pandémie de l'AH. Le Comité est compétent uniquement pour adopter les mesures nécessaires pour prévenir et atténuer l'impact de l'AH[55]. Une fois que la pandémie passe, ces mesures ne seront plus nécessaires. Toute mesure adoptée par le Comité en dehors d'une urgence serait *ultra vires*.

Ce tribunal ne devrait pas modifier le critère juridique établi par le Renvoi relative à la Loi anti-inflation *pour le volet du pouvoir d'urgence en matière de POBG.*

[54] Le critère juridique pour établir une urgence doit rester déférent. Le juge Dautry à la Cour d'appel modifierait ce critère, en exigeant que les tribunaux prennent en considération des situations similaires qui n'ont pas été considérées comme des urgences.

[55] Ce critère est trop hypothétique. Les tribunaux ne disposeront pas d'un dossier adéquat pour juger des motivations des actions ou de l'inaction du gouvernement dans des scénarios autres que l'affaire dont ils sont saisis.

[56] La nature hypothétique de cet exercice est illustrée par le fait que le juge Dautry s'appuie sur la décision du gouvernement fédéral de ne pas invoquer une urgence nationale pour la pandémie COVID-19. Cela pourrait être preuve que le Parlement n'a pas considérée COVID-19 comme une urgence. Cependant, il est tout aussi probable que le Parlement a considéré COVID-19 comme une urgence, mais n'a pas estimé que les pouvoirs de la *Loi*

---

[53] FC Decision, *supra* note 2 au para 16.

[54] *Ibid* au para 14; FCA Decision, *supra* note 23 au para 35.

[55] *Act*, *supra* note 1, art 15.

sur les urgences étaient nécessaires pour y faire face. Ce tribunal ne dispose pas du dossier nécessaire pour trancher cette question. Toute conclusion tirée serait une simple spéculation.

[57] Le critère modifié encouragerait Canada à promulguer toutes les lois possibles en tant que législation d'urgence, même si d'autres compétences seraient plus appropriées. Par exemple, le gouvernement a promulgué un grand nombre de lois en 2020 concernant le COVID-19. Selon le critère du juge Dautry, le Canada devrait préciser dans chaque cas qu'il s'agit d'une urgence, afin de ne pas l'empêcher de pouvoir légiférer à l'avenir.

[58] Ce recours fréquent à ce qui devrait être une compétence rarement utilisée perturberait irrémédiablement la division constitutionnelle des pouvoirs. Contrairement à l'intérêt national, le pouvoir d'urgence déplace le fédéralisme coopératif et permet au gouvernement fédéral de légiférer dans des domaines qui, normalement, relèvent de la compétence des provinces.

La *Loi* est valide en tant que législation de nature criminelle.

[59] La *Loi* est une utilisation valable du pouvoir du Parlement en matière de droit pénal, car elle consiste d'une interdiction accompagnée d'une sanction et elle a un objectif de droit pénal[56].

[60] La *Loi* conforme aux exigences de forme, car elle consiste d'une interdiction accompagnée d'une sanction. Les tribunaux inférieurs ont conclu qu'elle était conforme à cette forme[57]. La *Loi* érige en infraction la contravention d'une mesure ou d'un ordre émis

---

[56] *Re Armes à feu*, *supra* note 40 au para 27.

[57] FC Decision, *supra* note 2 au para 71; FCA Decision, *supra* note 23 au para 39.

par le Comité[58]. Alors que les ordres émis par le Comité exigent certaines actions positives, telles que le port d'un masque et la vaccination, ces ordres sont des interdictions d'actions qui contribuent à la propagation de l'AH[59].

La protection de la santé publique est un objectif valable du droit pénal.

[61] Un objectif de droit pénal valable présente deux caractéristiques : il doit viser un effet nuisible ou indésirable pour le public et il doit servir une ou plusieurs des fins publiques traditionnellement sauvegardées par le droit pénal[60]. La santé publique étant l'un de ces intérêts[61], la question en litige est si l'AH pose un effet nuisible ou indésirable sur le public.

[62] Bien que l'Appelant souligne que l'AH n'a pas causé une augmentation des hospitalisations, elle s'agit néanmoins d'une maladie grave. Toute grippe représente un danger pour la santé d'au moins certains Canadiens - sa mortalité n'est pas nulle. Certains cas nécessitent une hospitalisation, et dans de nombreux cas tragiques, les patients meurent. Les décès sont clairement nuisibles ou indésirables. Si le gouvernement estime que le nombre de décès causés par l'AH justifie une réponse, il est en droit d'agir en vertu du droit pénal.

La Loi n'est pas de nature réglementaire.

---

[58] *Act*, *supra* note 1, art 37.

[59] FCA Decision, *supra* note 23 au para 42.

[60] *Re NDG*, *supra* note 27 au para 72.

[61] FCA Decision, *supra* note 23 au para 43, citant *RJR-MacDonald* c *Canada (Procureur général)*, [1995] 3 RCS 199, 1995 CanLii 64 (CSC) [*RJR-MacDonald*]

[63] L'Appelant prétend que la *Loi* est de nature réglementaire et ne vise pas la suppression d'un « mal ». Avec respect, cet argument n'est qu'une répétition de la position selon laquelle une grippe n'est pas nuisible.

[64] L'AH donne lieu à une appréhension raisonnée du danger pour certains Canadiens. Le droit pénal protège souvent les plus vulnérables d'entre nous. Alors que le l'Appelant estime que sa fille ne risque pas de créer un mal, la décision du Comité exprime l'avis contraire. Les tribunaux devraient considérer cette conclusion avec déférence. Tant que l'appréhension du danger est raisonnée et l'action législative est en réponse, le Parlement dispose d'une « grande latitude pour décider de la nature et le l'importance du préjudice auquel il souhaite remédier au moyen de sa compétence en matière de droit criminel »[62].

Le Renvoi relatif à la Loi sur la procréation assistée *peut être distingué.*

[65] Le droit pénal n'a pas besoin d'agir contre l'immoralité. L'intérêt public en l'espèce est la santé publique, et non les valeurs morales. Les ordonnances contestées de la Commission concernent la santé publique. Le masquage, le nettoyage des lieux de travail et la vaccination sont tous logiquement liés à la propagation de la grippe AH.

[66] Cela distingue le *Renvoi relatif à la Loi sur la procréation assistée*, pour laquelle le Canada a pris la position que la loi était nécessaire pour interdire les pratiques qui portent atteinte aux valeurs morales[63]. En l'espèce, le Canada ne fait pas valoir que la *Loi* protège les valeurs morales; nous appuyons plutôt sur l'appréhension raisonnée d'un danger pour certains Canadiens.

---

[62] *Re NDG*, *supra* note 27 au para 78, citant, *inter alia*, *RJR-MacDonald, ibid*, au para 44, et *Re Armes à feu*, *supra* note 40 au para 39.

[63] *Re PA*, *supra* note 30.

[67] En outre, dans *Re PA*, il y avait une « réglementation par le menu de chacune des facettes de la recherche et de la l'activité clinique et ne font pas qu'interdire les 'activités néfastes' »[64]. En l'espèce, toutes les dispositions de la *Loi* visent des comportements nuisibles.

[68] En conclusion, la *Loi* est valide en vertu de la compétence résiduelle du Parlement en matière de POBG. Le Parlement a légiféré dans l'intérêt national, et il dispose d'une base rationnelle pour conclure que l'AH est une urgence. La *Loi* est en outre valable en tant que droit pénal, en raison de sa conformité aux exigences de forme et de fond.

This case is a review of the merits of the Decision on a standard of reasonableness.

[69] Canada agrees with the Appellant that reasonableness is the appropriate standard for a judicial review of the Decision. Following the Court's direction in *Vavilov*, reasonableness is the presumed standard.[65] No factors in this case rebut that presumption.

Procedural Fairness is not an issue in this appeal.

[70] While acknowledging the standard of reasonableness, the Appellant also appears to submit that the Decision failed to meet the common law duty of procedural fairness.[66] The Appellant argues that because the reasons did not disclose the medical evidence upon which the Decision relied and did not fully address his *Charter* objections, the Committee has failed to meet the duty of fairness.[67]

---

[64] *Ibid* au para 286.

[65] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 16 [*Vavilov*].

[66] Factum of the Appellant (Team 2) at paras 54, 65, 81-99 [Team 2 Factum].

[67] *Ibid* at para 99.

[71] A unanimous Supreme Court dismissed a nearly identical argument in *Newfoundland Nurses*. The Appellant in that case argued that because an arbitrator's decision disclosed no line of reasoning that could lead to the conclusion, this amounted "no reasons" and thus a failure of procedural fairness.[68] Abella J wrote on behalf the Court:

> It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review....
>
> Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.[69]

[72] As in *Newfoundland Nurses,* this is not a case in which the decision maker failed to provide any reasons at all. The Information Letter and its context offer sufficient reasons to understand the basis for the Decision, and to allow a court to review it. Respectful attention to those reasons is required.[70] This is not a procedural fairness case. The issue before this Court is whether the reasons are internally coherent and justified in the factual and legal circumstances.[71]

The Decision was internally coherent.

[73] Between the Federal Court and the Court of Appeal, a total of four justices have considered the Decision and none have taken issue specifically with the internal coherence of the reasoning. The Appellant, however, submits on appeal that the Decision lacks the

---

[68] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 19 [*Newfoundland Nurses*].

[69] *Ibid* at paras 21-22 [emphasis in original].

[70] *Ibid* at para 16; *Vavilov*, *supra* note 65 at paras 76-81.

[71] *Vavilov*, *supra* note 65 at para 99.

internal coherence required by the standard of reasonableness.[72] The Appellant appears to argue that because the Information Letter does not, in his estimation, reveal a line of analysis that can reasonably lead to the Committee's conclusion, this amounted to incoherent reasoning.

[74] When read with the requisite sensitivity to the administrative regime in which they were given,[73] the reasons demonstrate an internally coherent and logical line of reasoning that was based on the following rules and facts:

1. When a parent seeks an exemption on behalf of a child, the parent must demonstrate that the child is particularly susceptible to possible side effects from the vaccine.
2. No other considerations are relevant to the specific decision to grant or deny an exemption.
3. The evidence did not demonstrate that Émilie was particularly susceptible to possible side effects from the vaccine in question.
4. The vaccine is likely to protect Émilie from a potentially serious AH infection.

[75] Identifying this line of reasoning does not require the Court to speculate. The first two rules are found in the plain language of the legislation under which the Decision was rendered, and under which the Appellant submitted his request.[74] The remaining two factual findings are clearly communicated in the second paragraph of the Information

---

[72] Team 2 Factum, *supra* note 66 at para 64; Factum of the Appellant (Team 12) at paras 41-43 [Team 12 Factum].

[73] *Vavilov*, *supra* note 65 at paras 89-96.

[74] *Regulation*, *supra* note 13, ss 16-17.

Letter.[75] As the reviewing judge and Court of Appeal both found, the proper focus of this review is not the coherence of this reasoning. The proper focus is whether the Committee's findings were justified in light of the legal and factual context.[76]

The Decision was justified in light of the legal and factual constraints.

[76] It is trite law that a reasonableness review requires respectful attention to the reasons of the administrative decision maker.[77] As a preliminary step, the Federal Court of Appeal has found that a judicial review should first identify "the precise issue that was before the administrative decision-maker, noting any legislative methodologies or authorizing provisions that must be followed."[78] Only once the precise issue and its context are identified can a court correctly review the decision on its merits. This approach remains a helpful way to ensure that the review respects *Vavilov*'s dictum that a decision must not be divorced from its institutional context.[79]

The specific issue before the Committee was whether the Appellant demonstrated a particular risk.

[77] As a creature of statute, the Committee is bound by the laws of its enabling legislation. Statutory and regulatory requirements are legal constraints within which it must operate. In this case, the Court of Appeal has correctly identified the precise issue

---

[75] FC Decision, *supra* note 2 at para 39.

[76] *Ibid* at para 4; *FCA Decision*, *supra* note 23 at para 10.

[77] *Vavilov*, *supra* note 65 at para 84; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 48.

[78] *Delios v Canada (Attorney General),* 2015 FCA 117 at para 26; see also *Canada (Attorney General) v Boogard*, 2015 FCA 150 at paras 35-37.

[79] *Vavilov*, *supra* note 65 at 91.

before the Committee: whether the request "fit the statutory and regulatory requirements for an exemption from the mandatory vaccination."[80]

[78] The relevant legislative requirements are found in the very regulation from which the exemption was sought. The *Regulation*, being a validly enacted law, establishes a mandatory procedure when an exemption is sought by a parent on behalf of a child. Section 16 provides that the parent "must demonstrate that the child is already in a poor or weakened state of health and thus particularly susceptible to any potential side effects of the vaccine."[81]

[79] This language is clear and non-discretionary. When considering an exemption request made by a parent on behalf of a child, the parent must demonstrate that the child is particularly susceptible to side effects. If the parent does not demonstrate the child is particularly susceptible, the Committee cannot grant an exemption.

The absence of particular risk is a finding of fact entitled to deference.

[80] Whether an individual or class of individuals is particularly susceptible to potential side effects from a vaccine is a purely factual determination. The Committee is an expert body that was created to weigh and evaluate scientific research in order to address precisely these kinds of questions. The Committee is chaired by an esteemed epidemiologist. All its members are scientifically literate, and nearly half are epidemiologists, public health experts, or public safety and security experts.

---

[80] FCA Decision, *supra* note 23 at para 9.

[81] *Regulation*, *supra* note 13, s 16 [emphasis added].

[81] The Committee determined that immunodeficiency does not create an elevated risk of side effects for the vaccine in question. It further determined that immunodeficient individuals are at an acute risk of serious harm from an AH infection, and that the vaccine was likely to protect these individuals from harm. The Appellant, who has no scientific training, came to opposite conclusions on the basis of a single report.

[82] Only exceptional circumstances will justify a court's intervention in an administrative decision-maker's factual findings.[82] The Appellant is entitled to his opinion, but he is not entitled to intervention from the Federal Court absent evidence the Committee reached its conclusion "in a perverse or capricious manner or without regard for the material before it."[83] He provides no such evidence.

The Committee's factual findings were transparent, justified, and intelligible.

[83] The Appellant continues to assert before this Court that the vaccine posed a heightened risk of complications for Émilie.[84] This remains solely his opinion. No such fact was found by the Committee.

[84] The medical records demonstrated that Émilie was immunodeficient. The only evidence the Appellant submitted to the Committee that could connect immunodeficiency to a particular risk of side effects was the Olmstead Report, which tentatively concluded that "in a small but statistically significant number of cases, the vaccine can cause an even

---

[82] *Vavilov*, *supra* note 65 at 125.

[83] *Federal Courts Act*, RSC 1985, c F-7, s 18.1(4)(d).

[84] Team 2 Factum, *supra* note 66 at para 63; Team 12 Factum, *supra* note 72 at paras 1, 84, 88.

more severe infection of AH."[85] No additional studies supplemented the record before the reviewing judge. To the extent that the Appellant suggests that other studies support his opinion,[86] he misstates the facts on record.

[85] The Committee reviewed all the relevant evidence in the exemption request, including the Olmstead Report. The Information Letter disclosed why the Committee found the Olmstead Report of little to no evidentiary weight. It was based on a single clinical trial, the reliability of which was low. Its findings were therefore significantly outweighed by directly contradictory evidence that the vaccine protected children from AH rather than increased their risk of infection. Contrary to the Appellant's submissions,[87] this contradictory evidence was very much before the Committee in this Decision. It was the basis for the Committee's determination that issuing the vaccination order was in the best interest of Canadians, a presumption which an applicant for an exemption must rebut.

[86] *Vavilov* is clear that reasons should not be assessed against a standard of perfection.[88] The Committee cannot be expected to reply to every exemption request by providing the studies and analyses that led it to issue the vaccination order, or to provide an even more detailed explanation of why the Olmstead Report was not reliable.[89] This administrative burden would effectively paralyze the Committee's ability to grant exemption requests. The Committee weighed all the evidence before it and disclosed the relevant facts that justified its decision. It met the standard of reasonableness.

---

[85] FC Decision, *supra* note 2 at para 30.

[86] Team 2 Factum, *supra* note 66 at para 21.

[87] Team 12 Factum, *supra* note 72 at para 50.

[88] *Vavilov*, *supra* note 65 at para 91.

[89] *Ibid* at para 128; *Newfoundland Nurses, supra* note 69 at para 16.

The committee was not required to respond to the Appellant's *Charter* objections when granting or denying an exemption request.

[87] The Appellant appears to submit that because the Committee did not provide reasons that responded directly to his arguments that enforcing the mandatory vaccination order violates his *Charter* rights, this omission vitiates the Decision independent of whether or not he met the regulatory requirement.[90] To the extent that this argument would suggest that the Committee unreasonably excluded a central factor in deciding the specific issue of whether his request met the regulatory requirements, the argument cannot stand.

[88] Section 16 of the *Regulation* provides that a parent "<u>must</u> demonstrate that the child is already in a poor or weakened state of health and thus particularly susceptible to any potential side effects of the vaccine."[91] Section 17 further clarifies that "[n]o other considerations are deemed relevant to the evaluation of an application for an exemption..." A reasonable decision cannot consider irrelevant factors. The *Regulation* deemed the Appellant's *Charter* arguments irrelevant to the specific issue before the Committee.

[89] While the Response Letter may have omitted an explanation of this legislative fact, the omission can hardly be said to render the entire Decision unreasonable. Recognizing that the Decision was constrained by the *Regulation* does not amount to supplying reasons when the Decision concerned the application of an order made under the *Regulation* itself.

The Committee could not consider the validity of the Regulation *during an exemption request.*

---

[90] Team 12 Factum, *supra* note 72 at para 52.

[91] *Regulation*, *supra* note 13, s 16 [emphasis added].

[90] The Appellant appears to submit in the alternative that declining to consider the validity of allegedly *Charter*-infringing provisions in the *Regulation* represents an unreasonable omission that vitiates the Decision.

[91] Canada recognizes the well-established principle, identified in *R v Conway,* that "an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction."[92] However, *Conway* also specifically qualified this principle as applying only to tribunals with the power to decide questions of law.[93]

[92] The validity of a statutory provision is a clear question of law.[94] Section 22 of the *Act* expressly prevents the Committee from considering questions of law in the context of deciding whether to grant or deny an exemption.

[93] This is not a case in which the constitutional issue could be resolved by simply construing the *Regulation* in a manner that would not infringe the Appellant's *Charter* rights, as both the Appellant and Dautry J appear to have suggested.[95] The Committee did not have discretion to depart from clear, mandatory language in its governing legislation. Having determined that the request had not met the requirement to demonstrate particular susceptibility, the Committee could not issue an exemption solely on the basis of the Appellant's *Charter* arguments. To do so, it would have had to determine that the deeming provisions of the *Regulation* were invalid.

---

[92] 2010 SCC 22 at para 79.

[93] *Ibid* at para 80; see also *Nova Scotia (Workers' Compensation Board) v Martin,* 2003 SCC 54 at para 36.

[94] *Vavilov*, *supra* note 65 at para 57.

[95] Team 12 Factum, *supra* note 72 at para 55; FCA Decision, *supra* note 23 at para 59.

[94] The Federal Court of Appeal dealt with this very issue in *Davitt v Canada*.[96] The Court found that the statutory decision maker in that case had rendered a decision within a statutory procedure that did not permit it to consider the constitutionality of the regulations it was called upon to apply. Since, as in this case, the Appellant had challenged the merits of the decision and not the validity of the regulation, there were no grounds for a reviewing court to intervene.

[95] Individual exemption requests are meant to determine whether the specific facts of an individual situation raise particular concerns that justify departing from the general, broadly applied, rule of the vaccination order. They are not a forum for vaccine-hesitant individuals to volley constitutional questions regarding the enabling provisions. By enacting section 22, Parliament intended that such questions should be brought before a court, not the Committee.

Charter *allegations do not change the standard of reasonableness.*

[96] Allegations that an administrative decision unjustifiably limited a *Charter* right do not fundamentally change the single standard of reasonableness.[97] This includes the need to consider the legislative context.

[97] Canadian courts have never applied the *Dore* proportionality framework to assess the reasonableness of a decision made under legislation that explicitly excludes consideration of the alleged *Charter* infringement. *Dore* itself only referred to *Charter*

---

[96] 2009 FCA 362.

[97] *Vavilov*, *supra* note 65 at 57; *Doré v Barreau d Québec*, 2012 SCC 12 at para 46 [*Doré*].

protections that are relevant in the context of the particular administrative decision.[98] In this case, the *Regulation* deems a parent's *Charter* rights not relevant in deciding whether a child should or should not be vaccinated.

[98] The Appellant appears to argue that, since section 21 of the *Act* provides broader discretion than the *Regulation*, fettering this discretion in a way that excludes his *Charter* rights automatically renders the Decision unreasonable. While this may be true where a decision maker blindly applies policy without regard for individual circumstances,[99] the rule against fettering has never applied where the rule applied is a validly enacted regulation.[100] Unlike policy, regulations are binding on the administrative decision-maker. The issue on appeal is the reasonableness of the Committee's application of the law, not of the law itself.

The outcome of the decision proportionately balances statutory objectives with Charter *protections even in the absence of legislative constraints.*

[99] Canada submits in the alternative that, even if the Committee had been empowered to weigh the Appellant's *Charter* protections against the statutory purpose of the *Act* without regard for the legal constraints of the *Regulation*, the same Decision would be justified in light of the factual context.

---

[98] *Doré*, *supra* note 97 at para 54.

[99] *Maple Lodge Farms Ltd. v Government of Canada*, 1982 CanLII 24 (SCC), [1982] 2 SCR 2 at 6; but see *Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299.

[100] Donald J.M. Brown, Q.C. & The Honourable John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Thompson Reuters, 2013)(loose-leaf 2019 supplement), ch 12 at 12-38; *BC College of Optics Inc. v The College of Opticians of British Columbia*, 2015 BCCA 85 at para 33.

[100] The outcome of the Decision advances the *Act*'s purpose by preventing the spread of AH. The most immediate and significant contribution to this purpose is that Émilie herself will likely be immune to a virus that poses a significant risk to her health. The Decision also reduces the chance she will spread the disease to other vulnerable Canadians who cannot be immunized. Both effects slow the spread of the disease and help maintain normal economic activity in her community.

[101] Although it was the Appellant who applied for the exemption, he did so on behalf of his daughter. The Committee determined that Émilie was at risk of serious harm should she remain unvaccinated. In a decision directly affecting a child, the child's *Charter* rights must be considered alongside the parent's. Émilie's *Charter* protections, including her right to life, were also at play the Decision.

[102] In a situation involving competing *Charter* protections, there is a clearly established principle that courts must focus on the best interests of the child.[101] Canadian courts have consistently found that where medical experts have determined the benefits of vaccination to the child significantly outweigh the risks, the best interests of the child will outweigh the *Charter* objections of the parent.[102]

[103] In this case, an administrative authority was required under its enabling legislation to make a decision in the best interests of the child. It weighed the evidence before it and came to different conclusions than the Appellant. It is not the position of the reviewing

---

[101] *B(R) v Children's Aid Society of Metropolitan Toronto*, [1994] SCJ No 24, [1994] 1 SCR 315 at paras 432-433.

[102] See e.g. *DRB v DAT*, 2019 BCPC 334 at para 38; *Children's Aid Society of Peel Region v H(TMC)*, 2008 ONCJ 20; *BLO v LJB*, 2019 ONCJ 534; *JP (Re)*, 2010 ABPC 379.

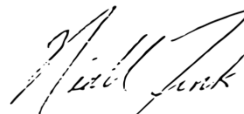
court to reweigh this evidence. A decision is not unreasonable because it does not reproduce all the research and analyses that supported its factual findings. A decision is not unreasonable because it does not reproduce all the legislative provisions that constrained it. While the Appellant may disagree with the outcome, the Decision itself was justified, transparent, and intelligible given the legal and factual constraints. The Court of Appeal correctly determined that it met the standard of reasonableness.

PART V – ORDER SOUGHT AND NAMES OF COUNSEL

[104] The Attorney General of Canada requests that the Canadian Court of Justice

> **DISMISS** this appeal in its entirety,
> **UPHOLD** the decision of the Federal Court of Appeal,
> **DECLARE** the *Act to safeguard Canadian health and prosperity* to be *intra vires* the Federal Government of Canada, and
> **DECLARE** the decision to deny an exemption from the mandatory vaccination order a reasonable exercise of the Committee's discretion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of February, 2021.



Neil Burnside

Counsel #1 for the Respondent

Niall Fink

Counsel #2 for the Respondent

APPENDIX A: LIST OF AUTHORITIES

Legislation

Act to safeguard Canadian health and economic prosperity, SC 2022, c 15.

Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), c 11.

Federal Courts Act, RSC 1985, c F-7.

Regulation respecting measures to reduce the impact of AH4N1, SOR/22-115.

Jurisprudence

BC College of Optics Inc. v The College of Opticians of British Columbia, 2015 BCCA 85.

BLO v LJB, 2019 ONCJ 534.

B(R) v Children's Aid Society of Metropolitan Toronto, [1994] SCJ No 24, [1994] 1 SCR 315.

Canada (Attorney General) v Boogard, 2015 FCA 150.

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65.

Children's Aid Society of Peel Region v H(TMC), 2008 ONCJ 20.

Davitt v Canada, 2009 FCA 362.

Delios v Canada (Attorney General), 2015 FCA 117.

Doré v Barreau d Québec, 2012 SCC 12.

DRB v DAT, 2019 BCPC 334.

Drouin v National Pandemic Response Action Committee, T-800-19 (FC).

Drouin v National Pandemic Response Action Committee, A-1500-19 (FCA).

Dunsmuir v New Brunswick, 2008 SCC 9.

JP (Re), 2010 ABPC 379.

Maple Lodge Farms Ltd. v Government of Canada, 1982 CanLII 24 (SCC), [1982] 2 SCR 2.

Multiple Access Ltd c McCutcheon, [1982] 2 RCS 161.

Munro v National Capital Commission, [1966] SCR 663, 57 DLR (3d) 753.

Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62.

Nova Scotia Board of Censors c McNeil, [1978] 2 RCS 662, 1978 CanLii 6 (CSC).

Nova Scotia (Workers' Compensation Board) v Martin, 2003 SCC 54.

R c Crown Zellerbach Canada Ltd., [1988] 1 RCS 401, 1988 CanLii 63 (CSC).

R c Hydro-Québec, [1997] 3 RCS 213 au para 131, 1997 CanLii 318 (CSC).

Reference Re Firearms Act, 1998 ABCA 305.

Reference re Validity of Section 5 (a) Dairy Industry Act, [1949] SCR 1, 1948 CanLii 2 (SCC).

Renvoi relative à la Loi anti-inflation, [1976] 2 RCS, 1976 CanLii 16 (CSC).

Renvoi relative à la Loi sur la non-discrimination génétique, 2020 CSC 17.

Renvoi relative à la Loi sur la procréation assistée, 2010 CSC 61.

Renvoi relative à la Loi sur les valeurs mobilières, 2011 CSC 66.

Renvoi relatif à la réglementation pancanadienne des valeurs mobilières, 2018 CSC 48.

Renvoi relative à la Loi sur les armes à feu (Can.), [2000] 1 RCS 783, 2000 CSC 31 (CanLii).

RJR-MacDonald c *Canada (Procureur général)*, [1995] 3 RCS 199, 1995 CanLii 64 (CSC).

Rogers Communications Inc c Châteauguay (Ville), 2016 CSC 23.

R v Conway, 2010 SCC 22.

Stemijon Investments Ltd. v Canada (Attorney General), 2011 FCA 299.

Secondary Material

Donald J.M. Brown, Q.C. & The Honourable John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Thompson Reuters, 2013)(loose-leaf 2019 supplement).