

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

**JOHN VABUOLAS, PAUL SIDHU, GRAND FORKS CONGREGATION OF
JEHOVAH'S WITNESSES, COLDSTREAM CONGREGATION OF JEHOVAH'S
WITNESSES, AND WATCH TOWER BIBLE AND TRACT SOCIETY OF CANADA**

APPELLANTS

AND

**INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA, THE
ATTORNEY GENERAL OF BRITISH COLUMBIA, GABRIEL-LIBERTY WALL, AND
GREGORY WESTGARDE**

RESPONDENTS

AND

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CHRISTIAN CHARITIES, DAVID ASPER CENTRE FOR CONSTITUTIONAL
RIGHTS, CANADIAN CIVIL LIBERTIES ASSOCIATION, AND INFORMATION AND
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**FACTUM OF THE INTERVENER, THE DAVID ASPER
CENTRE FOR CONSTITUTIONAL RIGHTS**

PART I – OVERVIEW

1. This appeal provides this Court with an opportunity to clarify the proper application of the framework from *Slaight Communications Inc. v. Davidson* for determining whether a grant of discretion includes the power to infringe the *Charter* and consequently, whether it is the enabling provision or the exercise of discretion that is the source of the infringement of *Charter* rights. As this Court held in *Slaight Communications*, where legislation confers an imprecise discretion on a decision-maker, that discretion does not include the power to infringe the *Charter* unless that power is conferred “expressly or by necessary implication”.¹

2. In applying the *Slaight Communications* framework, the guiding consideration remains legislative intent, discerned through application of the modern principle of statutory interpretation. Residual principles of statutory interpretation, including the presumption that the legislature intends to enact legislation that conforms with the *Charter*, are only to be applied where the legislature’s intention remains genuinely ambiguous following rigorous application of the modern principle. The presumption of *Charter* conformity cannot overwhelm other clear indicators of legislative intent. To do so risks the courts straying into the legislature’s policymaking role, introducing inconsistency into the statutory scheme, and potentially shielding constitutionally suspect legislation from appropriately rigorous judicial scrutiny.

3. The rule of law requires that legislation limiting constitutional rights be subject to judicial scrutiny. The determination of whether it is the enabling legislation or the exercise of discretion

¹ *Slaight Communications Inc. v. Davidson*, [1989] [1 S.C.R. 1038](#), at para. 93.

that infringes *Charter* rights is a “constitutional question” where the rule of law requires a clear and final answer. Accordingly, this should be subject to review on a correctness standard.

PART II – QUESTIONS IN ISSUE

4. The David Asper Centre for Constitutional Rights (the “**Asper Centre**”) intervenes on the question raised by the Appellants of whether s. 23(1)(a) and s. 38(1)(b) of the *Personal Information Protection Act*² (“**PIPA**”) infringe the elders’ rights under s. 2(a) of the *Charter*, and more specifically, seeks to assist this Court by focusing its submissions on:

- (a) Whether the source of the alleged *Charter* violation is *PIPA* or the adjudicator’s exercise of discretion;³ and
- (b) The appropriate standard of review to be applied to the determination of whether the enabling statute or the decision-maker’s exercise of discretion is the source of an infringement of *Charter* rights.⁴

PART III – ARGUMENT

A. Whether a Statute Authorizes a Charter Infringement is a Matter of Statutory Interpretation

i. *The presumption of Charter conformity only applies if there is genuine ambiguity*

5. Whether an alleged *Charter* infringement arises from the enabling statute or from the administrative decision-maker’s exercise of discretion dictates the analytical framework that applies. Central to that determination is whether the particular grant of discretion includes — expressly or by necessary implication — the power to infringe *Charter* rights. In making that determination, the guiding consideration should be legislative intent, discerned through robust

² *Personal Information Protection Act*, S.B.C. 2003, c. 63, ss. [23\(1\)\(a\)](#), [38\(1\)\(b\)](#).

³ See Factum of the Appellant, at para. 52.

⁴ See Factum of the Appellant, at paras. 52, 89.

application of the modern principle of statutory interpretation. The analysis must take into all of the text, purpose, and overall context of the impugned provision and the broader statutory scheme to arrive at an interpretation of the provision; this must be done *prior* to resorting to the presumption of *Charter* conformity, which only plays a role if the provision is truly ambiguous.

6. The determination of whether a grant of discretion includes the power to infringe *Charter* rights should not focus unduly on whether or not the discretion is “imprecise” — a term that, ironically, carries its own nebulous boundaries. Regardless of whether a discretion is broad or narrow, the guiding question will always be whether the legislature intended to confer the power to infringe *Charter* rights. As set out in *Sullivan on the Construction of Statutes*, an intention is “necessarily implied if (1) it can be established using ordinary interpretation techniques and (2) the implication is essential to make sense of the legislation or to implement its scheme”.⁵

7. The *Slaight Communications* framework should not be interpreted as derogating from the modern principle of statutory interpretation nor as elevating residual interpretive principles, such as the presumption of *Charter* conformity, to a position of primacy. Rather, *Slaight Communications* merely recognizes that when it comes to broad grants of discretion that contain fewer express indicators of legislative intent within the provision itself, it will often be particularly important to consider the role played by the discretionary provision within the statutory scheme in arriving at a proper interpretation of the provision’s purpose and scope.

8. That did not happen here. While the Court of Appeal acknowledged that the grant of discretion under s. 38(1)(b) of the *Personal Information Protection Act* (“**PIPA**”) should not be

⁵ *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis, 2008), p. 183, Tab 1, Book of Authorities.

interpreted in isolation from the rest of the statutory scheme,⁶ its interpretation of that scheme did not follow the modern principle. Instead, the Court of Appeal elevated the principle of *Charter* conformity to a primary—rather than secondary—principle of interpretation, and in doing so allowed it to overwhelm clear indicators of legislative intent in the statutory scheme.

9. In holding that “the *Charter* necessarily acts as an implicit limit on the absolute duty of an organization under s. 23(1)(a) to provide access to personal information on request”,⁷ the Court of Appeal failed to give effect to the mandatory language used under s. 23(1)(a) of *PIPA*. That language makes clear that the list of exceptions to the disclosure obligation is closed and not open-ended, such that religious belief or other grounds engaging *Charter* rights are not an available basis on which an organization is entitled to refuse production.

10. The Court of Appeal recognized that ss. 38(1)(b) and 52(2)(b) of *PIPA* are intended to enforce the underlying obligations contained in s. 23(1). Yet the Court of Appeal’s approach ultimately interprets these procedural enforcement tools in isolation from their underlying obligations by focusing not on how the legislature intended these tools to work together to achieve the purposes of these provisions and of *PIPA* more broadly, but on whether their individual language is capable of bearing meanings that would avoid limiting *Charter* rights.⁸

11. As the Respondent Information and Privacy Commissioner of British Columbia notes, it is only when the words of the statute remain genuinely ambiguous — *after* due consideration of the

⁶ *Vabuolas v. British Columbia (Information and Privacy Commissioner)*, [2025 BCCA 83](#), at para. [101](#).

⁷ *Vabuolas v. British Columbia (Information and Privacy Commissioner)*, [2025 BCCA 83](#), at para. [104](#).

⁸ See *Vabuolas v. British Columbia (Information and Privacy Commissioner)*, [2025 BCCA 83](#), at paras. [102-104](#).

words, in their proper context, and having regard to the purpose of the provision and the broader statutory scheme — that resort may be had to secondary interpretive principles, such as the strict construction of penal laws or the presumption of *Charter* conformity.⁹

12. This Court’s posture towards the application of the presumption of *Charter* conformity and other residual presumptions of statutory interpretation has consistently, and properly, been one of restraint. In *R. v. Kloubakov*, this Court held that the impugned offences were “unambiguous” after application of the modern principle, thus there was “no need to resort to the presumption that Parliament intended to comply with the Charter”.¹⁰ In *Piekut v. Canada (National Revenue)*, this Court declined to apply the residual presumption of restrictive interpretation, reaffirming that residual principles of statutory interpretation must not be given primacy over the modern principle and have “no role to play” unless the court has concluded that the provision in question is genuinely ambiguous.¹¹ The modern principle remains the “prime directive” of statutory interpretation.¹²

13. Even when dealing with a grant of “imprecise” discretion, the presumption of *Charter* conformity cannot be used to overwhelm other clear indicators of legislative intent, particularly the text of the statute, “which remains the anchor of the interpretive exercise.”¹³ Conflating this distinction, and resorting too readily to the presumption of *Charter* conformity, risks administrative decision-makers and courts straying into the legislature’s policymaking role.

⁹ See Factum of the Respondent Information and Privacy Commissioner of British Columbia, at para. 60; see also *La Presse Inc. v. Quebec*, [2023 SCC 22](#), at para. [24](#); *Piekut v. Canada (National Revenue)*, [2025 SCC 13](#), at para. [48](#), citing *Bell ExpressVu Limited Partnership v. Rex*, [2002 SCC 42](#), at para. [29](#).

¹⁰ *R. v. Kloubakov*, [2025 SCC 25](#), at para. [133](#).

¹¹ *Piekut v. Canada (National Revenue)*, at paras. [108-110](#).

¹² *Piekut v. Canada (National Revenue)*, at para. [49](#); *R. v. Wilson*, [2025 SCC 32](#), at para. [135](#) (Jamal J., dissenting, but not on that point).

¹³ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, [2024 SCC 43](#), at para. [24](#).

ii. The presumption of Charter conformity must play an interpretive, not remedial, role

14. To be clear, the presumption of *Charter* conformity still has an important interpretive role to play in cases of genuine ambiguity. But where legislation is not genuinely ambiguous, applying the presumption of *Charter* conformity to select a *Charter*-conforming interpretation over the rights-limiting interpretation that the legislature intended is remedial, not interpretive. Constitutional remedies such as reading down are only available where an infringement exists *and* the state has failed to demonstrate that infringement as justified under s. 1 of the *Charter*.

15. Moreover, reading down legislation as a remedy to avoid the infringement of *Charter* rights should only be employed where doing so would not unjustly intrude into the role of the legislature. The focus of that inquiry is, once again, on legislative intent.¹⁴

16. In *R. v. Seaboyer*, after concluding that the old s. 276 regime under the *Criminal Code* infringed s. 7 and was not justified under s. 1, the majority of this Court considered whether the doctrine of constitutional exemption could be applied to import into the statutory scheme some measure of discretion on the part of the trial judge in order to avoid the constitutional violation. The majority rejected this remedy, concluding that it “would not achieve the end of substantially upholding the law which Parliament enacted” and would import into the legislation “an element which the legislature specifically chose to exclude – the discretion of the trial judge”.¹⁵ Where legislation suffers from constitutional defects, the legislature has far greater flexibility than the courts to craft solutions that will cure those defects while still achieving the legislative objective.

17. Legislative provisions should only be read down in this manner to cure a constitutional violation “where it can be fairly assumed that ‘the legislature would have passed the

¹⁴ *Schachter v. Canada*, [1992] 2 S.C.R. 679, at paras. 58-64.

¹⁵ *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at paras. 88-89.

constitutionally sound part of the scheme without the unsound part’ and where it is possible to precisely define the unconstitutional aspect of the law”.¹⁶ The required precision cannot be achieved at the outset of the interpretive analysis, where there has been no real investigation of the actual nature or extent of the rights infringement.

iii. Overreliance on the presumption of Charter conformity strays into the legislative role

18. There may be legitimate policy reasons for limiting *Charter* rights. This is particularly the case when it comes to *Charter* rights that contain few internal limits, such as the right to freedom of conscience and religion under s. 2(a), where this Court has “consistently refrained from formulating internal limits to the scope of freedom of religion in cases where the constitutionality of a legislative scheme was raised.”¹⁷ Where *Charter* rights contain few internal limits, the range of state action capable of amounting to a *prima facie* infringement is vast. The range of circumstances where the pursuit of other pressing and substantial objectives will necessitate at least some level of interference with those rights is similarly broad.

19. Section 1’s allowance for reasonable limits on rights is part of the *Charter*’s internal architecture. A provision that limits *Charter* rights subject to s. 1 does not, in itself, fail to conform to the *Charter*. The interpretive exercise must stay alive to the reality that the legislature often does intentionally limit *Charter* rights in the pursuit of its objectives.

20. Indeed, those objectives may include the protection or enhancement of other *Charter* rights or values. In the present case, for example, the Adjudicator relied on this Court’s decision in *Alberta (IPC) v. United Food and Commercial Workers, Local 401* and observed that *PIPA* seeks to provide individuals with some measure of control over their personal information, which is

¹⁶ *Ontario (Attorney General) v. G.*, [2020 SCC 38](#), at para. 114.

¹⁷ *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [\[1995\] 1 SCR 315](#), at pp. 383-384.

“intimately connected to their individual autonomy, dignity and privacy”. These are “fundamental values” that “lie at the heart of a democracy”.¹⁸

21. Whether the legislature has struck an appropriate balance between these competing goals, rights, and values in our democracy is a matter that should be subject to rigorous analysis under the *Oakes* test, if and when such legislation is challenged. It is not only the ultimate answer to this inquiry, but also the justification exercise that enhances the rule of law. The state must know that it will be called upon to justify any intrusions into constitutional rights, and respect for the rule of law is enhanced when those justifications are set out and tested transparently in the public forum of an open courtroom. Overreliance on the presumption of *Charter* conformity risks obviating this justification exercise by interpreting those limitations away at the outset of the analysis, and effectively shielding them from constitutional scrutiny.

22. In this case, the Court of Appeal’s approach effectively imported into the disclosure obligation under s. 23 an additional exception — a “safety valve” for *Charter* rights — that the legislature deliberately excluded in structuring s. 23 as a mandatory obligation subject to a closed list of narrow, targeted exceptions. It takes the balance struck by the legislature between competing rights and social values and seeks to calibrate it differently. But the proper role of the courts where legislation is challenged is not to rewrite that legislation to make it more *Charter*-friendly; it is to properly ascertain whether a *Charter* right is infringed, and then subject the legislation to appropriately rigorous constitutional scrutiny to determine whether that infringement is justified.

¹⁸ See *Vabuolas v. British Columbia (Information and Privacy Commissioner)*, [2025 BCCA 83](#), at para. [41](#), quoting *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013 SCC 62](#), at para. [19](#).

B. The Determination of the Source of a *Charter* Infringement Is Subject to Review on a Correctness Standard

23. The determination of whether it is the enabling legislation, or the exercise of an administrative decision-maker's discretion that is the source of the alleged *Charter* infringement is a "constitutional question" that should be subject to correctness review. In *Vavilov*, this Court set out a number of established categories where the rule of law demands that the presumption of reasonableness review be rebutted and correctness review applied. These include "constitutional questions", general questions of law of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies.¹⁹

24. The question of whether a statutory provision authorizes an administrative decision-maker to infringe *Charter* rights — and accordingly whether it is the enabling provision or the exercise of discretion that is the source of the infringement — is the kind of constitutional question requiring clarity and consistency. The Constitution "dictates the limits of all state action".²⁰ The legislature cannot delegate powers to administrative decision-makers that it does not constitutionally have. If the enabling legislation is the true source of a limit on constitutional rights, then the rule of law demands that the legislation be subject to constitutional scrutiny. It is that legislation that confers on the administrative decision-maker the authority to act. As this Court held in *Vavilov*, "The constitutional authority to act must have determinate, defined and consistent limits".²¹

25. Determination of whether it is the legislation or the exercise of discretion that is the source of the rights infringement will have significant ramifications for the constitutional analysis,

¹⁹ *Canada (Minister of Immigration and Citizenship) v. Vavilov*, [2019 SCC 65](#), at para. 17.

²⁰ *Canada (Minister of Immigration and Citizenship) v. Vavilov*, [2019 SCC 65](#), at para. 56.

²¹ *Canada (Minister of Immigration and Citizenship) v. Vavilov*, [2019 SCC 65](#), at para. 56.

including dictating whether the *Oakes* test or the *Doré* framework should apply. The choice of framework directly implicates the rule of law. Among other things, under *Oakes*, the government must prove that its legislation limiting rights is demonstrably justified; under *Doré*, however, the burden remains on the rights claimant to persuade the administrative decision-maker that the order being contemplated does not represent a proportionate balancing of their *Charter* rights against legislative objectives in question.

26. The availability of reasonableness review also creates the possibility of contrary conclusions on the same issue each being held to be reasonable. If the legislation itself is unconstitutional, then it cannot validly serve as the basis for an administrative decision-maker's authority, and it cannot be insulated from judicial scrutiny. The determination as to whether the legislation is or is not the source of the rights infringement must be subject to correctness review.

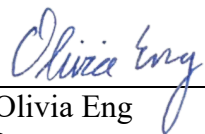
PART IV – SUBMISSIONS RESPECTING COSTS

27. The Asper Centre does not seek costs and asks that no costs be awarded against it.

PART V – ORDER REQUESTED

28. The Asper Centre takes no position on the order to be made.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 23RD DAY OF JUNE, 2026



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