COURT FILE NUMBER	1301-06153
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	The Calgary Airport Authority
RESPONDENTS	Canadian Centre for Bio-Ethical Reform, Nicholas McLeod, John Does 1 - 10 and Jane Does 1 -10
DOCUMENT	**SUPPLEMENTAL SUBMISSIONS**

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SUPPLEMENTAL SUBMISSIONS REQUESTED BY JUSTICE R.G. STEVENS ON OCTOBER 30, 2013

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I. INTRODUCTION

1. These submissions address the issue of whether the CAA is government, based on the exercise of requisite government control over the entity. However, this issue is preceded by the relevance of *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 SCR 139[1] (hereafter "*Commonwealth*") and *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 SCR 141[2] (hereafter "*Montreal"*) which hold that the *Charter's* section 2(b) protects free expression rights in government-owned public places.

2. Amidst a wealth of jurisprudence, *Commonwealth* and *Montreal* stand for the simple proposition that government-owned property is subject to the *Charter*. There are no exceptions to this rule.

3. The Calgary Airport Authority (hereafter "CAA") errs in law when it argues that *Commonwealth* and *Montreal* can be distinguished on the basis of the nature of the entity that controls the government-owned public location. The peaceful expression of opinion can be prohibited at some government-owned locations (e.g. Courtrooms; judges' private chambers; inside the Parliament buildings; an airport's administrative offices) because *the nature of the location* is not conducive to expressive activity. The nature and degree of government control over the government-owned property is irrelevant.

4. One cannot lease out of the purview of the *Charter*. In order for the CAA to absolve itself of its responsibility to adhere to the *Charter*, it would need to be a privately-owned entity and it would also need to own the property in question. The CAA is not privately owned, and it does not own the public areas of the airport where the Respondents expressed their opinions. These public areas are government-owned property, and are therefore subject to the *Charter*. This is rudimentary.

[1] *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 SCR 139. [Applicant's Book of Authorities, TAB 12]
[2] *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 SCR 141. [Respondents' Book of Authorities, TAB 1]

5. If the CAA's erroneous addition of a government control test was applied by government to parks, streets and other government-owned property, the result would breach the foundational constitutional principle that government should not be permitted to abdicate its responsibilities under the *Charter* through delegation.

6. In *Montréal*, Chief Justice McLachlin and Deschamps J., writing for the majority at paragraph 61, relied on *Commonwealth* to hold that "Property may be private or public. Public property is government-owned".[3] The submission that the *Charter* applies to protect expression at the Calgary Airport on the basis of it being government-owned public property is alone dispositive of the *Charter* issue. No further argument is needed.

II. ARGUMENTS

7. The Respondents submit three arguments to demonstrate that the CAA is subject to section 2(b) of the *Charter*.

1) This Court should use Wilson J.'s three-part test to find that the CAA is government. This test was applied in *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2006 BCCA 529[4] and was upheld by the Supreme Court of Canada Deschamps J. writing for the Court) in *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, [2009] 2 SCR 295 (hereafter "*Greater Vancouver*")[5] and is as follows:

> 1) Does the legislative, executive or administrative branch of government exercise general control over the entity in question? (the "control test")
>
> 2) Does the entity perform a traditional government function or a function which in more modern times is recognized as a responsibility of the state? (the "government function" test)

[3] *Montréal*, paragraph 61. [Respondent's Book of Authorities, TAB 1]
[4] *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2006 BCCA 529. [Respondent's Supplemental Book of Authorities, TAB 1]
[5] *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, [2009] 2 SCR 295 (hereafter "*Greater Vancouver*"). [Applicant's Book of Authorities, TAB 19]

> 3) Is the entity one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest? (the "government entity" test)

The Respondents submit that the answer is "yes" to questions 1 and 3 in application to the CAA.

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2) Under part 1 of Wilson's test (the "control test"), the government exercises general control over the CAA.

3) Under part 3 of Wilson's three-part test (the "government entity test"), the CAA acts pursuant to statutory authority in order to further the government's objective of providing air transit services to the public.

A. This Court should use the Wilson three-part test to find that the CAA is government

8. Justice Wilson's test was first introduced in *McKinney v. University of Guelph* [1990] S.C.J. No. 122(SCC) (hereafter "*McKinney*") [6] with L'Heureux-Dube and Cory JJ. concurring on this point. Though Wilson J.'s judgment was in dissent, her Ladyship's test has been adopted in jurisprudence since *McKinney*, in addition to Justice LaForest's government control test in *McKinney*.

Justice Prowse relied on Justice Wilson's Test at the B.C. Court of Appeal

9. In *Greater Vancouver*, Justice Deschamps, from paragraphs 14 to 16, starts her analysis by citing *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 84, in a portion that aptly addresses the crux of the question before this Court: Can government abdicate its responsibility under the *Charter* by delegating to the Calgary Airport Authority?

> On the face of the provision, the *Charter* applies not only to Parliament, the legislatures and the government themselves, but also to all matters within the authority of those entities. In *Godbout v. Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 S.C.R. 844, La Forest J. explained the rationale for the broad reach of s. 32 as follows (at para. 48):

[6] *McKinney v. University of Guelph* [1990] S.C.J. No. 122(SCC) (hereafter "*McKinney*"). [Applicant's Book of Authorities, TAB 14]

> Were the *Charter* to apply only to those bodies that are institutionally part of government but not to those that are — as a simple matter of fact — governmental in nature (or performing a governmental act), the federal government and the provinces could easily shirk their *Charter* obligations by conferring certain of their powers on other entities and having those entities carry out what are, in reality, governmental activities or policies. In other words, Parliament, the provincial legislatures and the federal and provincial executives could simply create bodies distinct from themselves, vest those bodies with the power to perform governmental functions and, thereby, avoid the constraints imposed upon their activities through the operation of the *Charter*. Clearly, this course of action would indirectly narrow the ambit of protection afforded by the *Charter* in a manner that could hardly have been intended and with consequences that are, to say the least, undesirable. Indeed, in view of their fundamental importance, *Charter* rights must be safeguarded from possible attempts to narrow their scope unduly or to circumvent altogether the obligations they engender.[7]

10. From paragraph 18 on, the Supreme Court of Canada upheld the reasons of Justice Prowse, who wrote for the majority at the B.C Court of Appeal, without reiterating her Ladyship's analysis.

11. At paragraphs 41-45, Prowse J.A. relies upon Wilson J.'s three-part test.

12. The analysis of Prowse J.A is both thorough and relevant, providing a detailed explanation for Justice Deschamps' conclusions.

13. At paragraph 22 of Prowse J.A.'s judgment, Her Ladyship summarized the principles used in decisions at the Supreme Court of Canada:

> Later decisions of the Supreme Court of Canada have elaborated on the meaning of "government". The trial judge referred to those decisions, and the principles he derived from them with respect to the application of s. 32, in the following extract from paras. 25-26 of his reasons for judgment:
>
> > It is apparent that the defendants are public bodies that are not expressly included in s. 32(1) of the Charter. However, in a series of decisions handed down on

[7] *Greater Vancouver*, paragraphs 14-16. [Applicant's Book of Authorities, TAB 19]

December 6, 1990, the Supreme Court of Canada held that, in certain circumstances, the Charter could apply to the actions of entities that were not expressly included in s. 32(1). See McKinney v. University of Guelph 1990 CanLII 60 (SCC), [1990] 3 S.C.R. 229; Harrison v. University of British Columbia 1990 CanLII 61 (SCC), [1990] 3 S.C.R. 451; Stoffman v. Vancouver General Hospital 1990 CanLII 62 (SCC), [1990] 3 S.C.R. 483; and Douglas/Kwantlen Faculty Association v. Douglas College 1990 CanLII 63 (SCC), [1990] 3 S.C.R. 570.

In my opinion, the principles which were established in these decisions (and confirmed in Lavigne v. Ontario Public Service Employees' Union 1991 CanLII 68 (SCC), [1991] 2 S.C.R. 211 and Godbout v. Longueuil (City) 1997 CanLII 335 (SCC), [1997] 3 S.C.R. 844) may be summarized as follows:

> (a) Entities that are not self-evidently part of the government will nevertheless be subject to the Charter, if the entity is "governmental in nature".
> (b) An entity (other than Parliament, the provincial legislatures, and the federal and provincial governments) will be governmental in nature:
> (i) if the entity is wholly, or substantially, controlled by government; or
> (ii) if all of the essential functions they perform are governmental in nature.
> (c) Even if an entity is not governmental in nature, if it has and exercises statutory power to engage in one or more activities which are governmental functions, or which amount to the implementation of government policy, then those particular activities of the entity will be subject to the Charter [emphasis added in the original].[8]

Justice Wilson's Test has been adopted in numerous lower court decisions

14. Justice Wilson's test has been adopted in addition to the control test articulated by Justice LaFores in *McKinney*, in numerous lower court decisions, including the following:

a) The Court in *Noel v. Botkin*[9] referred to Justice Wilson's government entity test to find the RCMP a government entity as operating under statutory authority.

[8] *Greater Vancouver*. [Respondent's Supplemental Book of Authorities, TAB 1]
[9] *Noel v.Botkin*, 1995 CarswellBC 228 5 B.C.L.R. (3d) 317 (BCSC). [Respondent's Supplemental Book of Authorities, TAB 2]

b) In *Byers v. Clancy*,[10] at the B.C. Supreme Court, the Court, held: "On either the test ascribed by LaForest, J. or that of Wilson, J. and others referred to earlier", the Insurance Corporation of British Columbia was "clearly then an agency of government".

c) *Krznaric v. Chevrette*, at the Ontario Court of Justice, held: "Adopting the language of Wilson J. in *McKinney v. University of Guelph*, 76 D.L.R. 4th 545 at 592, Police Services Boards act pursuant to statutory authority specifically granted to it to enable it to further an objective that the government seeks to promote in the broader public interest". [11]

d) In *Harvey v. Law Society of Newfoundland*,[12] the Court relied upon Justice Wilson's test to hold that law societies come under the purview of the *Charter*.

15. Justice Prowse's reliance on Justice Wilson's test is not unique, it is typical of jurisprudence.

<u>The CAA's reliance on constating attributes is not recognized in jurisprudence</u>

16. The Applicant differentiates "constating attributes" from "ongoing control". The Applicant's differentiation is not provided for, or grounded in, jurisprudence. The Courts in *Greater Vancouver* (at all three levels) did not differentiate on this basis, and instead looked at the relevant legislation to determine whether the government exercised the requisite level of control over the entities in question.

17. While no Court has recognized as relevant a distinction between "constating requirements" and "ongoing operational control", the jurisprudence does differentiate *de jure* control from *de facto* control. The former is relevant, the latter is not.

[10] *Buers v.Clancy* 1992 CarswellBC 391, 75 B.C.L.R. (2d) 334. [Respondent's Supplemental Book of Authorities, TAB 3], paragraphs 37-52
[11] *Krznaric v. Chevrette* 1997 CarswellOnt 4294, 154 D.L.R. (4th) 527, (sub nom. Krznaric v. Timmins Police Services Board), paragraph 28. [Respondent's Supplemental Book of Authorities, TAB 4]
[12] *Harvey v. Law Society of Newfoundland* 1992 Carswell Nfld 169 2 Admin. L.R. (2d) 306 1992 CanLii 2774, paragraph 49. [Respondent's Supplemental Book of Authorities, TAB 5)

18. In *New Brunswick Association of Nursing Homes,* the Court applied Justice Wilson's test to determine that nursing homes are not government under s. 32 of the *Charter*. This conclusion hinges on the differentiation between *de facto* and *de jure* control, as noted by Professor Hogg and cited at paragraph 44:

> As stated in Liability of the Crown Second Edition, 1989, Hogg, P. at page 252:
>
> > For the purpose of the control test, control means de jure control, not de facto control. It is the degree of control that the minister is legally entitled to exercise that is relevant, not the degree of control that is in fact exercised. The question is therefore resolved by an examination of the corporation's empowering statute, and does not involve an assessment of the actual relationship between the corporation and the government. The clearest example of de jure control is the case where a minister actually heads that corporation. Another clear example is the case where there is a statutory requirement of the approval of a minister or of the cabinet for important transactions. Such matters as the power to appoint directors and to supply transactions and to supply funding, although they may provide opportunities for de facto control of the corporation's activities, are not sufficient by themselves to establish de jure control.[13]

19. The fact that the Minister has not exercised, or is not exercising, some aspect of statutory power is not evidence of a lack of control by government.

20. Through the *RAA Act*, the provincial government exercises *de jure* control over the CAA, even if it does not exercise *de facto* control.

B. The government exercises general control over the CAA

The first part of Wilson J.'s three-part test (the "control test") asks: Does the legislative, executive or administrative branch of government exercise general control over the entity in question?

The Provincial Government controls the CAA by approving the CAA's articles, by-laws, and other "arrangements"

21. The approval of by-laws or rules that determine how an entity must carry out its mandate is

[13] *New Brunswick Association of Nursing Homes Inc. v. Superintendent of Pensions,* 2007 CarswellNB 229, 60 C.C.P.B. 174, paragraphs 41-49. [Respondent's Supplemental Book of Authorities, TAB 6]

one of the criteria which the Court considered in *Greater Vancouver*, applying the first part of Wilson J.'s three-part test.[14]

22. These rules may take the form of regulations. On that point, Prowse J. A. found that B.C Transit experienced the LGIC's broad powers to make regulations affecting the operations of B.C. Transit.

23. At paragraph 91, Prowse J.A. concluded that government exercised substantial control over Translink due to both the ratification of Tranlink's Strategic Plan and bylaw approval: "These provisions suggest that the GVRD enjoys a substantial degree of control over TransLink's basic day-to-day planning and activities".[15]

24. The provincial government controls the CAA as follows:

A) The Minister may grant or deny the authority's petition to form if "the proposed arrangements are conducive to the attainment of the authority's purposes and will be generally beneficial to the public in the region". [16] This general power to approve or reject *any* of the arrangements of the creation of the authority cannot be underestimated.

B) The Minister must approve the articles of the authority and any amendments to these articles have "no effect until the Lieutenant Governor in Council, on the recommendation of the Minister, makes an order giving effect to it."[17] The Minister has both initial and continuing *de jure* authority over the articles of the CAA. Unless the articles of the CAA have no actual application to the operation of the CAA, which would be disingenuous to assert, this Ministerial power inherently affects the CAA on a significant and routine basis.

C) In paragraph 67 of *Greater Vancouver*, Prowse J.A. points to the government's power to make regulations for B.C Transit as being especially relevant to the finding of requisite

[14] *McKinney*, paragraphs 224-227. [Applicant's Book of Authorities, TAB 14]
[15] *Greater Vancouver*, paragraph 91. [Applicant's Book of Authorities, TAB 19]
[16] *RAA Act*, Section 5 (1). [Applicant's Book of Authorities, TAB 1]
[17] *RAA Act*, Section 6 (1) and section 11 (2). [Applicant's Book of Authorities, TAB 1]

government control. The *RAA Act* at section 40(1) sets out an exhaustive list of matters in regard to which the LGIC can make regulations for the CAA, including "prescribing any matter or thing that by this Act may or is to be prescribed."[18] The ability to make regulations of this magnitude demonstrates significant government control.

D) Justice Wilson specified that these rules are particularly pertinent when they apply to determine "how that entity is to carry out its mandate".

E) Section 4(5) requires that the petition must be accompanied by the authority's proposed bylaws, indicating that these bylaws must also receive Ministerial approval in order for the authority to be created. The *RAA Act* requires the CAA to receive Ministerial approval of both its petition and its bylaws.

25. In paragraphs 88 and 89, Prowse J.A. underlines how Translink's government purpose indicates substantial control:

> 88 The purpose of TransLink is set forth in s. 3 of the *GVTA Act*:
> 3. The purpose of the authority is to provide a regional transportation system that
> (a) moves people and goods, and
> (b) supports
> (i) the regional growth strategy [of the GVRD], and (ii) the air quality objectives and economic development of the transportation service region.
> 89 In other words, TransLink is clearly intended to carry out a government purpose or function, although that is only one of several factors to consider in determining whether an entity is government.[19]

26. This purpose statement is remarkably similar to that of the CAA, as set out in section 21 of the *RAA Act*.

27. On this point, the *RAA Act* sets out that the CAA is to operate so as "to carry out its mandate"[20] (in Wilson J.'s words), not to operate for profit and to apply all its surpluses toward promoting the Authority's purpose. The *Act* itself requires adherence to the purpose

[18] *RAA Act*, section 40 (1). [Applicant's Book of Authorities, TAB 1]
[19] *Greater Vancouver*, paragraphs 88-89. [Applicant's Book of Authorities, TAB 19]
[20] *RAA Act*, section 22. [Applicant's Book of Authorities, TAB 1]

set by the provincial government. Contrary to private corporations, which set and follow their own purposes, the CAA cannot depart from its legislated purpose.

28. In and of itself, the non-profit nature of the CAA does not attract the *Charter*'s application; the *Charter* does not apply to private non-profit societies. The CAA is a government entity because the *RAA Act requires* that the CAA advance its legislated government purpose for the general benefit of the public.

29. The CAA argues that the provincial government does not exert "actual and continuing control" over the CAA's operations. But this test proposed by the CAA has no support in jurisprudence, which establishes that *de jure* control is adequate without *de facto* control.

30. Similar, but arguably more extensive than Translink receiving approval for its strategic plan, *all of the CAA's arrangements* must meet its legislated purpose which is stipulated by the provincial government, as well as approved by the Minister.

31. The formation of Translink is relevant to Prowse J.'s finding of requisite government control. In paragraph 79, her Ladyship notes that "TransLink is an entity created through the cooperation of both the province and the GVRD, designed to fulfill both provincial and local government responsibilities, including local and regional transportation and AirCare. Transit, on the other hand, was clearly designed and stated to be an agent solely of the provincial government".[21]

32. The similarity to the CAA is striking. In *R. v. Booyink*, Judge Fradsham held:

> In my view, the Calgary Airport Authority is "government" as that term is used by the Supreme Court of Canada in paragraph 16 of *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, *supra*. I find that substantial control over the Authority is exercised by governments (Federal, Provincial, and Municipal).[22]

[21] *Greater Vancouver*, paragraph 79. [Applicant's Book of Authorities, TAB 19]
[22] *R. v. Booyink*, 2013 ABPC 185, paragraph 109. [Applicant's Book of Authorities, TAB 24]

The Provincial Government controls the CAA by approving the personnel that run the CAA

33. Justice Wilson also states at paragraphs 224-227 in *McKinney* that government control can be found by approving the personnel that run the entity.

34. The appointment of personnel that run the entity indicates that the government is effectively running an entity through the personnel of which they approve. As in *Godbout v. Longueuil (City)*, a statutory creature is one which….

> …is appointed pursuant to a legislative provision and derives all his power from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter, unless, of course, that power is expressly conferred or necessarily implied. . . . Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the Charter. . . . [Emphasis added.] [23]

35. The CAA's Articles (which had to be approved by the government, and cannot be changed without an order of the Lieutenant Governor in Council) stipulate that the City of Calgary, the Municipal District of Rocky View No. 44, and the Government of Canada shall have the right to appoint six directors. Further, the LGIC may make regulations under the *RAA Act* "establishing the basis for and the manner of the making of appointments of directors, including the filing of vacancies on the board and respecting the removal of directors from office", "respecting the duties and liabilities of members, directors, officers and employees of" the CAA, and "respecting the circumstances under which appointers may or are to cease to hold their status as appointers".[24]

36. Section 3 of the CAA's Articles stipulates that a unique body designated "appointers" will appoint the directors, who will be from the Calgary Chamber of Commerce (described as a body corporate), and the City of Calgary, the Municipal District of Rocky View No. 44, and

[23] *Godbout v. Longueuil (City)* [1997] 3 S.C.R. 844, paragraph 54. [Applicant's Book of Authorities, TAB 23]
[24] *RAA Act*, section 40. [Applicant's Book of Authorities, TAB 1]

Her Majesty the Queen in Right of Canada represented by the Federal Minister of Transport, the latter three being described as "governments".

37. The provincial government exercises substantial control over the CAA through the approval of the personnel that run the entity, a factor through which government control is found.

38. At paragraph 93, Prowse J.A. concludes her analysis of Translink, by noting "It has no independent agenda other than that provided in its constituent *Act* and no history of being an entity independent of government".[25] In similar fashion, the CAA was created to fulfill the government's objective to provide air transit services, it has no other purpose, and it has no history of independence outside of government. To maintain that the CAA is a corporation devoid of government control is fanciful.

39. Section 3(1) of the *RAA Act* states "Regional airports authorities may be formed and created pursuant to this Act".[26] The Applicant argues that the use of the term "may" is permissive and suggests that one may form and create a regional airport authority without legislative and Ministerial approval. But the word "may" in the *RAA Act* does not allow an airport authority to be formed and created apart from, or outside of, the *RAA Act*. Rather, the word "may" allows the Minister to exercise discretion to agree or disagree with the recommendation of the Lieutenant Governor in Council. The Minister may issue – or choose not to issue – an Order to "create the regional airports authority as a corporation that is to be subject to this Act".[27] The CAA is subject to the *Act*, and the Minister is not required to agree to its formation. As Judge Fradsham states in *Booyink*: "Sections 4 and 5 of the *RAA Act* set out the process which *must* be followed in the creation of a regional airport authority" [emphasis added].[28]

40. The word "may" is used similarly in the *Post-Secondary Learning Act* (Statutes of Alberta, 2003, Chapter P-19.5), of which section 3 states: "The Lieutenant Governor in Council may

[25] *Greater Vancouver*, paragraph 93. [Applicant's Book of Authorities, TAB 19]
[26] *RAA Act*, section 3(1). [Applicant's Book of Authorities, TAB 1]
[27] *RAA Act*, section 5(2). [Applicant's Book of Authorities, TAB 1]
[28] *Booyink*, paragraph 91. [Applicant's Book of Authorities, TAB 24]

by order establish a university and shall designate the name of a university so established".[29] Obviously the word "may" does not indicate that a university has the authority to be established outside of its enabling legislation. So too with the CAA. It cannot form without Ministerial permission, and cannot function without adhering to its enabling legislation.

Conclusion: The CAA is government on Wilson's Control Test

41. The words of Justice Wilson in *McKinney*, paragraphs 225-227, are relevant to the case before this Court. Justice Wilson notes that the control test may not function as stringently as in its application to Douglas College, in instances where the entity is, in some respects, at arm's-length from government:

> In many instances, it may be that the relevant branch of government does not exercise control over the entity's activities in as direct a way as in the Douglas College case, but that the entity is nonetheless a governmental actor. One need only think of those bodies that are created by statute, that depend heavily on government funding and that receive broad policy directives concerning their overall mandate from one of the branches of government, but that are deliberately placed at arm's length and given the freedom to make a wide range of choices about how to implement particular policies. This kind of arrangement is hardly novel, particularly in areas where ministers and government departments do not wish to be involved in complex and politically sensitive decisions concerning the allocation of government funds or the specific application of particular policies. Decisions of these kinds often require choosing between irreconcilable demands, and governments have therefore frequently found it prudent to create agencies or tribunals that can make these decisions free from political pressure. Thus, even although such arm's length organizations have often been created with a view to performing tasks that a government department had previously performed or might otherwise have performed, one cannot necessarily point to a nexus between the government and the arm's length organization's day-to-day activities.
>
> In my view, it is therefore far from obvious that a body should automatically be deemed to be non-governmental simply because one cannot point to a specific nexus of the kind seen in Douglas College. To conclude that bodies that are in an arm's length relationship with the executive or administrative branches of government are automatically non-governmental would mean that a wide range of entities that are created but not controlled by the legislative branch of government would escape Charter review. This would hardly provide the kind of "unremitting protection" of rights and liberties that the Charter was meant to secure.

[29] *Post-Secondary Learning Act*, SA 2003, c. P-19.5 (*PSL Act*)

> In other words, the problem with a restrictive application of the control test is that it risks leaving open to government the option to delegate wide powers to arm's length agencies and then to insulate those bodies from Charter review by limiting government involvement in those bodies' day-to-day decision-making processes. An unduly restrictive version of the control test would thereby leave it open to government to exclude significant areas of activity from Charter review. [30]

C) The CAA acts pursuant to statutory authority

42. In *Pridgen*[31] at the Alberta Court of Appeal, Paperny J.A. held that the University of Calgary's disciplinary proceedings were subject to the *Charter* on either of two bases: that the University was a statutory actor or the University was carrying out a specific governmental objective and was subject to *Charter* scrutiny in the manner in which it carries out that objective, under the *Eldridge* analysis. The difference between the two analyses is whether the entity is exercising a power of compulsion.

43. Paperny J.A. differentiates the University of Calgary's facts from those pertaining to hospitals in *Eldridge*. The hospital authorities in *Eldridge* were not exercising the power of statutory compulsion when denying sign languages services, but her Ladyship found that the University of Calgary was exercising this power of statutory compulsion when disciplining students for their postings on Facebook.

44. At paragraph 90 on, Paperny J. A. gives various examples of bodies exercising powers of statutory compulsion, noting at paragraph 91:

> Where a statutory authority is being exercised, the *Charter* will apply not only to rules and regulations enacted pursuant to that authority, but also to the application and interpretation of those rules in making decisions: *Slaight Communications.* At 1077-78 of that case, Lamer J. articulated the principle as follows (quoted with approval recently by Bastarache J. in *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v Canada*, 2008 SCC 15 (CanLII), 2008 SCC 15, [2008] 1 SCR 383 at para 20):

[30] *McKinney*, paragraphs 225-227. [Applicant's Book of Authorities, TAB 14]
[31] *Pridgen v. University of Calgary*, [2012] A.J. No. 443 (Alta. C.A.). [Applicant's Book of Authorities, TAB 21]

> *The fact that the Charter applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question.* The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, *it is impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter*, unless, of course, that power is expressly conferred or necessarily implied .... *Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the Charter, and he exceeds his jurisdiction if he does so.*[32]
>
> (emphasis of Bastarache J.)

45. In short, the *Charter* applies to not only to the application of specific legislative provisions, but to actions taken under the discretion afforded a statutory decision-maker.

46. Paperny J.A. notes that "In *Greater Vancouver Transit Authority*, the corporations in question were characterized as government actors but, as Professor Hogg points out, it is also possible to view them as exercising powers of statutory compulsion. Less obvious cases may require a court to consider and weigh all of the factors to determine if the *Charter* should apply".[33] The transit authorities had policies that were applied to prohibit the advertisements in question, which were not expressly or specifically authorized by statutory provisions. The authorities' actions were discretionary actions that prohibited a public right, authorized by its own policy rather than by a specific statute.

<u>The CAA is acting to further a government objective</u>

47. Under the "government entity test", (the "third part of Wilson J.'s test), it is also necessary to ask if the entity acts to further a government objective.

[32] *Pridgen*. [Applicant's Book of Authorities, TAB 21]
[33] *Pridgen*, paragraph 99. [Applicant's Book of Authorities, TAB 21]

48. The responsibility for aeronautics resides with government, this power affirmed recently in *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536. [34]

49. In *Pridgen v. University of Calgary*, 2010 ABQB 644, Strekaf J. found the following, which was upheld by Paperny J.A:

> ... I find that the University is tasked with implementing a specific government policy for the provision of accessible post secondary education to the public in Alberta, thus bringing the facts of this case into line with *Eldridge*. The structure of the *PSL Act* reveals that in providing post-secondary education, universities in Alberta carry out a specific government objective. Universities may be autonomous in their day-to-day operations, as both universities and hospitals were found to be when dealing with employment issues involving mandatory retirement, however, they act as the agent for the government in facilitating access to those post-secondary education services contemplated in the *PSL Act*, just as the hospitals in *Eldridge* were found to be acting as the agent for the government in providing medical services under the *Hospital Insurance Act*, RSBC 1979, c 180 (now RSBC 1996, c 204).[35]

50. Paperny J.A. notes the following:

> This is a logical approach. On the basis of the *Eldridge* analysis, the provision of post-secondary education by universities is not dissimilar from the provision of medical services by hospitals. As Wilson J. noted in dissent in *McKinney*, "education at every level has been a traditional function of governments in Canada." She stated at para 272:
>
> > It is beyond dispute that the universities perform an important public function which government has decided to have performed and, indeed, regards it as its responsibility to have performed. ... Moreover, justification for state activity in this area is not hard to find. The state's interest in education in today's society does not and cannot stop at the point of ensuring basic literacy. The promotion of higher learning and the provision of access to opportunities for study at this level is clearly in the public interest. The state readily acknowledges the important role universities play not only in the education of our young people but also more generally in the advancement and free exchange of ideas in our society.[36]

[34] *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536. [Respondent's Supplemental Book of Authorities, TAB 7]
[35] *Pridgen v. University of Calgary*, 2010 ABQB 644. {Respondent's Book of Authorities, TAB 16]
[36] *Pridgen*, paragraph 103. [Applicant's Book of Authorities, TAB 21]

51. The Applicant submits repeatedly that both *McKinney* and *Stoffman* are crucial to resolving this issue, asserting that the hospitals in *Stoffman* did not come under government control due to a variety of reasons. However, Paperny J.A. in *Pridgen* notes that the hospitals in *Stoffman* were not found as government, because the hospital in *Stoffman* was implementing an internal regulation: "Pursuant to what I have said above, I would think it clear that Reg. 5.04, concerned as it is with the retirement of medical staff, is not delegated legislation, but is quintessentially a "rule or directive of internal management".[37]

52. Paperny J.A. states at paragraph 47:

> The Court concluded that private entities may be subject to *Charter* scrutiny in respect of certain actions where such actions are inherently governmental or are in furtherance of a specific government policy or program (at paragraph 44) [emphasis in original]:
>
> > The Court found that while *Stoffman* established that the Vancouver General Hospital was not a part of the government even though it engaged in the public function of providing healthcare, the hospital in *Eldridge* was implementing a governmental policy which brought it under the *Charter* with respect to that action alone, as opposed to its other private activities.[38]

53. The hospitals in *Eldridge* fell under the scrutiny of the *Charter* due to their implementation of a government policy via legislation. In *McKinney*, the University was implementing an internal policy regarding retirement. In both cases, the Court has ruled that internal policies do not constitute government programs.

54. As in *Eldridge* and *Pridgen*, the CAA, in providing the government service of air transit to the public, it is carrying out a specific governmental objective as mandated by section 21 of the *RAA Act*. The CAA is therefore subject to *Charter* scrutiny in the manner in which it carries out that objective.

55. While a "public purpose" test is inadequate to determine whether the CAA is subject to the *Charter*, a government objective is. The responsibility for air transit has always been with

[37] *Stoffman v. Vancouver General* Hospital [1990] S.C.J. No. 125, paragraph 96. [Applicant's Book of Authorities, TAB 15]
[38] *Pridgen*, paragraph 47. [Applicant's Book of Authorities, TAB 21]

the government. Providing air transit is not merely a general public purpose, but rather a government objective similar to those in *Eldridge* and *Pridgen*.

The danger of the government's abdication of responsibility under the *Charter*

56. Contrary to established law, the CAA argues that government can delegate its way out of fulfilling *Charter* obligations.

57. In *Godbout v. Longueuil (Ville)*, LaForest J. stated:

> Comparing McKinney, Harrison and Stoffman on the one hand to Douglas and Lavigne on the other makes clear what I take to be an important idea governing the application of the Canadian Charter to entities other than Parliament, the provincial legislatures or the federal or provincial governments; namely, that where such entities are, in reality, "governmental" in nature -- as evidenced by such things as the degree of government control exercised over them, or by the governmental quality of the functions they perform -- they cannot escape Charter scrutiny. In other words, the ambit of s. 32 is wide enough to include all entities that are essentially governmental in nature and is not restricted merely to those that are formally part of the structure of the federal or provincial governments. This is not to say, of course, that the Charter applies only to those entities (other than Parliament, the provincial legislatures and the federal and provincial governments) that are, by their nature, governmental. Indeed, it may be that particular entities will be subject to Charter scrutiny in respect of certain governmental activities they perform, even if the entities themselves cannot accurately be described as "governmental" per se; see, e.g., Re Klein and Law Society of Upper Canada reflex, (1985), 50 O.R. (2d) 118 (Div. Ct.), at p. 157, where Callaghan J. held for the majority that even though the Law Society of Upper Canada is not itself governmental in nature, it may nevertheless be subject to the Charter in performing what amount to governmental functions. Rather, it is simply to say that where an entity can accurately be described as "governmental in nature", it will be subject in its activities to Charter review. Thus, the Charter applied to Douglas College (in Douglas) and to the Council of Regents (in Lavigne) because those bodies were wholly controlled by government and were, in essence, emanations of the provincial legislatures that created them. Since the same could not be said of the institutions under examination in McKinney, Harrison and Stoffman (and since none of those institutions was implementing a specific government policy or programme in adopting its mandatory retirement regulations), the Charter did not apply in those cases.

> The possibility that the Canadian Charter might apply to entities other than Parliament, the provincial legislatures and the federal or provincial governments is, of course, explicitly contemplated by the language of s. 32(1) inasmuch as entities that are controlled by government or that perform truly governmental functions are themselves "matters within the authority" of the particular legislative body that created them. Moreover, interpreting s. 32 as including governmental entities other than those explicitly listed therein is entirely sensible from a practical perspective. Were the Charter to apply only to those bodies that are institutionally part of government but not to those that are -- as a simple matter of fact -- governmental in nature (or performing a governmental act), the federal government and the provinces could easily shirk their Charter obligations by conferring certain of their powers on other entities and having those entities carry out what are, in reality, governmental activities or policies. In other words, Parliament, the provincial legislatures and the federal and provincial executives could simply create bodies distinct from themselves, vest those bodies with the power to perform governmental functions and, thereby, avoid the constraints imposed upon their activities through the operation of the Charter. Clearly, this course of action would indirectly narrow the ambit of protection afforded by the Charter in a manner that could hardly have been intended and with consequences that are, to say the least, undesirable. Indeed, in view of their fundamental importance, Charter rights must be safeguarded from possible attempts to narrow their scope unduly or to circumvent altogether the obligations they engender. [39]

III. CONCLUSION

58. If this Court does not find that the element of statutory compulsion exists, then the *Charter* applies to the CAA under *Eldridge* due to the fact that it acts in furtherance of a specific government program or policy- the facilitation or the provision of air transit services to the public.[40]

59. It is not necessary to demonstrate the element of government control for the CAA to fall under the scrutiny of the *Charter* under the *Eldridge* analysis.

60. In *Eldridge*, Justice La Forest, on behalf of the Court, further discussed how one determines whether the *Charter* applies in a particular case. At paragraph 42, his Lordship said:

[39] *Godbout*, paragraph 33-35. [Applicant's Book of Authorities, TAB 23]
[40] *Eldridge*, paragraph 42. [Applicant's Book of Authorities, TAB 18]

> It seems clear, then, that a private entity may be subject to the Charter in respect of certain inherently governmental actions. The factors that might serve to ground a finding that an activity engaged in by a private entity is "governmental" in nature do not readily admit of any a priori elucidation. McKinney makes it clear, however, that the Charter applies to private entities in so far as they act in furtherance of a specific governmental program or policy. In these circumstances, while it is a private actor that actually implements the program, it is government that retains responsibility for it. The rationale for this principle is readily apparent. Just as governments are not permitted to escape Charter scrutiny by entering into commercial contracts or other "private" arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities.[41]

61. The CAA operates government-owned public property. This property is compatible with the function of the airport and the public concourse is not a private space. This alone disposes the issue, as protection for section 2(b) is found on this basis.

62. In the alternative, the CAA is either government controlled or a statutory actor, functioning to fulfill a government objective. If this court finds that the CAA acted under its power as a statutory actor to prohibit the peaceful expression of opinion in the airport's public areas, this action comes under the purview of the *Charter*. In the further alternative, the CAA is still subject to the *Charter* as it functions to fulfill a government purpose in providing air transit to the public.

63. The CAA administers the federal government objective of providing air transit services to the public, yet the CAA wishes to behave like a private corporation by seeking to ban the peaceful expression of opinion on government-owned, public property. This flies in the face of *Commonwealth,* in which Justices Lamer and Sopinka state:

> …The very nature of the relationship existing between citizens and the elected government provides that the latter will own places for the citizens' benefit and use, unlike a private owner who benefits personally from the places he owns.[42]

[41] *Eldridge*, paragraph 42. [Applicant's Book of Authorities, TAB 18]
[42] *Commonwealth*, paragraph 14. [Applicant's Book of Authorities, TAB 12]

All of which is respectfully submitted,

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