



Fall 2023 Charter Challenge Backgrounder Memorandum



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OVERVIEW OF FACTS

[1] This case centres on the workplace dismissal of Ray Sinclair. Ray was employed as a City Planner at the Missinaba Regional Municipality (the “**Municipality**”) in Wissanotti, Ontario.

[2] For clarity and ease of reference, below is a timeline of the agreed facts of this case. More details can be found in the complete set of facts.

[3] Ray was born in May 1994, making him currently 29 years old. He grew up in Fresno, Ontario. He is a cisgender East Asian man and identifies as gay.

[4] Ray left home to attend Robson University after having achieved strong grades in high school. Ray struggled during his first two years of university. After being placed on academic probation after his second year in university, Ray’s parents insisted he attend counselling. Ray began seeing a psychiatrist on campus, who diagnosed him with attention deficit hyperactivity disorder (“**ADHD**”) and prescribed medication to help treat it. After commencing therapy and taking medication to treat his ADHD, Ray’s grades improved and he began forming strong friendships on campus.

[5] In **October 2016**, after graduating from university, Ray was hired as a Records Clerk at the Planning Department of the Municipality in Wissanotti, Ontario.

[6] In **March 2020**, at the onset of the COVID-19 pandemic, Ray and all other employees in the Planning Department began working remotely.

[7] By **October 2020**, Ray had stopped taking his ADHD medication regularly.

[8] Ray’s performance at work began to decline. The Director of Human Resources for the Planning Department, Simbra Gomer, became concerned with Ray’s performance and asked to meet with Ray in **mid-November 2020**. In this meeting, Ray became emotional and blurted out that he was struggling with his ADHD and other personal issues.

[9] Ray’s leave began in **December 2020**.

[10] In **March 2021**, Ray told Simbra that he was ready to start work again and intended to stay in Fresno for the foreseeable future. Simbra mentioned that the Municipality was considering requiring employees to return to work in person in the coming months.

[11] Ray received two doses of an approved COVID-19 vaccine in **May and July 2021**.

[12] Ray excelled upon his return to work and was given a promotion to City Planner in **September 2021**.

[13] Near the end of **September 2021**, the Municipality began encouraging – but not requiring – employees to return to work in person for one or two days each week. Simbra reminded him that while it was not yet a formal requirement to work in person at the office, the Municipality could begin requiring more regular attendance in the office.

[14] Ray drove to Wissanotti every few weeks to stay in a hotel so that he could work from the office for a couple of days and meet his co-workers in person.

[15] At the onset of the Omicron wave of COVID-19 in **December 2021**, the Municipality returned to fully remote work.

[16] In **February 2022**, both of Ray’s parents were killed in a car accident. Ray took bereavement leave in **February and March 2022**.

[17] In **March 2022**, the Council of the Municipality approved the Flexible Work Arrangements Policy (the “**Policy**”) to set minimum standards for municipal employees regarding flexible working arrangements.

[18] Ray returned from bereavement leave at the **end of March 2022**.

[19] The Planning Department’s Flexible Work Plan required employees to work in person at the municipal office two days a week. Ray’s position was deemed “in person essential” under the Policy as he was directly managing a team of planners, and it would require him to be in Wissanotti for site visits.

[20] Simbra agreed that Ray should be given a temporary accommodation because of his recent family tragedy and his ADHD diagnosis. Ray was not required to move to Wissanotti immediately and could work remotely from Fresno for two more months, before being required to move to Wissanotti by the **beginning of June 2022**.

[21] Once settled in Wissanotti, Simbra agreed that Ray would initially only be required to attend the office once a week – on Wednesdays. However, Simbra told Ray that the Municipality’s expectation would be that Ray gradually transition to full compliance with the department’s flexible work plan, including the requirement that he attend the office three days per week.

[22] Simbra also informed Ray that all employees in the Planning Department were now subject to monitoring while working remotely.

[21] Ray accepted Simbra’s offer and began work remotely. Ray moved to Wissanotti on **June 1, 2022.**

[22] In **mid-June**, a pipe broke in his parents’ house in Fresno and flooded the basement, causing significant damage. Ray asked Simbra’s permission to work entirely remotely for two weeks while dealing with the repairs. Simbra denied Ray’s request for more remote work time and advised him that he was being put on a performance improvement plan.

[23] On **Wednesday, July 13**, Ray could not focus at the office and left at lunch together with other colleagues who were going home to look after their children. Once at home, Ray sent several angry messages to a colleague over Google Meet, expressing his anger at the Policy and at Simbra personally.

[24] On **July 18, 2022**, Simbra called Ray into a meeting and informed him that he was being terminated, effective immediately, with six months’ salary and benefits in lieu of notice.

[25] Following his termination, Ray commenced an application in Ontario Superior Court of Justice to challenge the policy under which his employment was terminated. Ray claimed that the policy infringed his rights to life, liberty, security of the person, and equality under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the “**Charter**”).

[26] Ray’s case was heard in the Ontario Superior Court of Justice by Justice Demoe in **August 2022.**

[27] Justice Demoe dismissed Ray’s application in **September 2022** holding that the Policy does not violate section 7 or section 15 of the *Charter*.

[28] Ray has been granted leave to the Ontario Court of Appeal.

ENGAGED LAW

[30] The relevant provisions of the *Charter* are as follows:

Reasonable Limits

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[...]

Life, liberty and security of the person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[...]

Equality rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Section (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[...]

Remedies

24.(1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

ISSUES AND ARGUMENTS

1. Does the Policy infringe Ray Sinclair’s rights to life, liberty, and security of the person under section 7 of the *Charter*?

[31] The structure of s. 7 requires the following two-part analysis:

- (a) Is there an infringement of the right to life, liberty, or security of the person?
- (b) If so, is the infringement contrary to the principles of fundamental justice?

[32] This test is contextual. A court must evaluate the nature and scope of the right claimed and the seriousness of the *Charter* violation with an eye to social and legislative contexts. This case arguably infringes the s. 7 rights to liberty and security of the person. As such, some detail as to the content of these rights is provided below.

[33] The right to liberty, at its core, protects the meaning of being an autonomous person. It applies to protect choices that are fundamentally or inherently personal. It has been interpreted to protect individuals from physical restraint (or interference) and the making of fundamental personal choices, such as the choice of medical treatment and the making of parental decisions about the upbringing of their children.

[34] The right to security of the person protects, among other things, the bodily integrity of a person in a physical sense. It is engaged by the government causing a risk to a person’s health, or a direct interference with the physical person through the use of force. By extension, s. 7 has been held to protect an individual’s ability to make choices affecting his or her own body, including the right to refuse medical treatment.

[35] Security of the person has also been held to apply to a person’s psychological well-being where the government’s actions can be reasonably foreseeable to have a significant detrimental impact on one’s psyche.

[36] That said, the government is constitutionally permitted to deprive its citizens of life, liberty, and security of the person so long as the deprivation is in accordance with the principles of fundamental justice. For example, the Supreme Court of Canada (the “**SCC**”) has held that “the best interests of children” is a principle akin to a principle of fundamental justice that can justify a deprivation of an individual’s liberty or security of the person so long as it is done so with the goal of advancing the child’s best interests.

[37] There are nevertheless limits to how s. 7 rights can be proscribed. The SCC has held that *overly broad, vague, arbitrary, or grossly disproportionate* attempts to limit s. 7 rights will not be consistent with the principles of fundamental justice.

[38] *Overbreadth* refers to a situation where the law is too expansive and interferes with some conduct that bears no connection to its objective. For example, a law aimed at protecting children from sexual predators by prohibiting public offenders from loitering in public parks has been found to be overly broad. This is because the law prohibited offenders who did not pose a danger to children from attending parks at which children were not likely to be present.

[39] *Arbitrariness* arises where there is no rational connection between the object of the law and the way in which it seeks to achieve that objective. For example, the requirement that abortions be approved by therapeutic abortion committees, whose purpose was to protect

women’s health, was held to be arbitrary because the requirement caused delays in accessing abortions, and these delays, in turn, were detrimental to women’s health.

[40] *Gross disproportionality* describes governmental actions that are so extreme that they are disproportionate to any legitimate government interest. For example, a law criminalizing safe injection sites was held to be grossly disproportionate to the objective of promoting public health and safety. This was because the sites saved lives and decreased the risk of death and disease associated with drug use. The inquiry focuses on the law’s purpose as compared to its negative effects on the individual’s rights. A grossly disproportionate effect on even one individual is sufficient to violate the principles of fundamental justice.

[41] Crucially, the assessment of whether there is *arbitrariness, overbreadth, or gross disproportionality* must be done at the individual level. The question, under the s. 7 limitations analysis, is whether the law had a grossly disproportionate, overbroad, or arbitrary effect on the individual claimant.

(1) Potential Appellant Submissions (Missinaba Regional Municipality)

[42] The right to liberty guarantees not only freedom from physical restraint but also the freedom for an individual to make important life choices without the interference of the government. The crux of the argument here lies in whether or not a workplace policy that mandates a certain amount of time to appear in person convincingly constrains one’s freedom.

[43] The Municipality is going to want to root its arguments in Justice Demoe’s reasons laid out in her dismissal of Ray’s application in September 2022.

[44] The right to liberty protected by s. 7 primarily pertains to personal liberty and freedom from physical or psychological restraint imposed by the government. It is not typically interpreted as encompassing the freedom to choose one's place of employment or how they appear at it.

[45] The freedom to choose one's place of employment is generally not considered a fundamental right protected by s. 7. While employment is undoubtedly an essential aspect of one's life and well-being, the *Charter* does not explicitly guarantee a specific right to work wherever one desires. Employment-related rights and issues are often addressed through labour laws, employment contracts, and human rights legislation rather than under s. 7 of the *Charter*.

[46] Justice Demoe explains that the *Charter's* guarantee of “liberty” protects fundamental choices that are central to individual dignity and independence. However, it does not protect a right to work wherever and whenever one chooses without considering employer needs and the specific demands of the job. She stated that accepting such a broad interpretation would mean recognizing positive rights under the *Charter*, which has been previously considered and rejected for this specific section. The Municipality will want to emphasize this point.

[47] Further, Justice Demoe acknowledged that the guarantee of liberty protects the right to choose where to make one's home, and in this case, the Policy infringed Ray’s right to liberty

by requiring him to live within a certain proximity of his office. Despite the infringement, she concluded that the policy is in compliance with the principles of fundamental justice and, therefore, does not violate s. 7. The policy is deemed not *arbitrary, overbroad, or grossly disproportionate* as it only applies to employees in specific essential positions that require in-person attendance at the office; this was substantiated by Councillor Nat McCrae’s sworn evidence as well.

[48] Justice Demoe emphasized that the Municipality carefully and reasonably assessed which positions necessitated in-person attendance and limited the Policy's scope accordingly. Furthermore, she pointed out that Ray’s individual circumstances were taken into account and accommodated under the policy.

[49] In terms of the right to security of the person, this is focused on ensuring the physical and psychological health of the individual. The Court has ruled that daily or ordinary stresses due to government action are not infringements, but that the violations must be serious. The Municipality is going to want to argue that the Policy does not rise to this level of severity, as did Justice Demoe along with rejecting the argument that economic security should be read into this right.

(2) Potential Respondent Submissions (Ray Sinclair)

[44] On the other side, it may be persuasive to use the previously held interpretation that s. 7 extends, too, to “inherently private choices” that go to the “core of what it means to enjoy individual dignity and independence” from the [Godbout v. Longueuil \(City\)](#) and [Association of Justice Counsel v. Canada \(Attorney General\)](#) SCC cases.

[46] Sinclair may argue that the right to liberty includes the fundamental choice of deciding where to make one's home, which has become even more significant in recent years as more people work from home. The requirement for Mr. Sinclair to live near his office constitutes an unwarranted intrusion by the Municipality into his personal choice of residence.

[47] The Municipality designated certain positions as “in person essential” in what may be an arbitrary manner, without consulting employees. Mr. Sinclair will want to highlight the fact that he was able to perform effectively in his role as a City Planner during periods when all employees were working remotely. Additionally, he will want to bring in the justice’s point that the Policy’s case-by-case flexibility in granting increased working flexibility indicates its *arbitrariness*. This arbitrariness could also be argued to be seen through Councillor McCrae’s concession that human resources directors did not ask for supporting documentation when approving a request for increased flexibility due to family care needs.

[48] Sinclair may even take this further, arguing that implicit in section 7 is the concept of respect for individual privacy. Individual privacy is a fundamental value that is reflected not only in this section but also throughout the *Charter* and in other quasi-constitutional statutes.

[49] Sinclair should argue that the policy infringes on Mr. Sinclair's right to privacy, and that this infringement is evident because the policy forces Mr. Sinclair to move and allows for the monitoring of his working activities without a clear, justifiable rationale for doing so.

[48] Having now laid out the reasons for an infringement being presented, the respondent will then turn their attention to section 1 of the *Charter* and argue that the Policy's infringement of s. 7 cannot be justified. He can acknowledge and concede that fostering a collaborative and

productive working environment is a *legitimate objective*, but assert that the Policy is not *rationally connected* to achieving these aims, is not *minimally impairing* of individual rights, and has a *disproportionate* impact on his rights.

2. Does the Policy infringe Ray Sinclair’s equality rights under section 15 of the Charter?

[49] The test for determining whether s. 15(1) is infringed consists of two stages:

- a) Does the law in question create a distinction based on an enumerated or analogous ground?
- b) Does this distinction create a disadvantage by perpetuating prejudice or stereotyping?

[50] With respect to the first stage, a court must first find the purpose or effect of an impugned law creates a distinction between groups of people. If a court finds that the distinction exists because of an enumerated or analogous ground, the court will proceed to the second stage of the analysis. An enumerated ground is one that is specifically listed in s. 15(1), i.e., race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. An analogous ground is one that is similar in nature to an express ground but not prescribed in s.

15(1). Courts have found the following to be analogous grounds:

- Sexual orientation ([Vriend v. Alberta](#))
- Marital status ([Hodge v. Canada \[Minister of Human Resource Development\]](#))
- Citizenship ([Andrews v. Law Society of British Columbia](#))
- Place of residence for Indigenous people ([Corbiere v. Canada \[Minister of Indian and Northern Affairs\]](#))

[51] The criteria for a new analogous ground are:

- a) The ground has to be analogous or similar in nature to the already prescribed enumerated grounds.
- b) The ground has to be distinctive of a discrete and insular minority. It must be unique to that minority.
- c) The ground must have personal characteristics that are either impossible to change or can only be changed at great personal cost.
- d) The ground must have characteristics that are involuntary and not voluntarily chosen by the person belonging to that group.

[52] The following are differences have been held not to be s. 15(1) *Charter* protected analogous grounds:

- Employment status
- Province of residence
- Persons charged with war crimes
- Persons bringing claims against the Crown
- Marijuana usage

[53] Assuming a purposeful or effective distinction is created based on an enumerated or analogous ground, the second stage is an inquiry as to whether the distinction creates a disadvantage through discrimination by perpetuating prejudice or stereotyping. These two factors, prejudice and stereotyping, are not exhaustive but are important indicators of discrimination.

[54] Prejudice is defined as holding pejorative attitudes based on strongly held views about the capacities or limits of individuals or the groups in which they are a member. Historical disadvantage or demonstrations of existing prejudice are relevant to finding whether a distinction under the first stage of the s. 15(1) test perpetuates prejudice.

[55] Stereotyping is an attitude that disadvantages individuals, or the groups in which they are a member, by attributing perceived characteristics of a group to the individual – regardless of the individual’s actual capacities or circumstances. Prejudicial attitudes are perpetuated by legislation that leads a reasonable observer to conclude that the *Charter* claimant is less worthy of respect or less capable as a result of an immutable personal characteristic.

[56] A variety of contextual factors were identified by the SCC in [*Law v. Canada \(Minister of Employment and Immigration\)*](#) as relevant to proof of discrimination. Factors that may march towards a finding of discrimination include: pre-existing disadvantage; the degree of correspondence between the grounds of the claim and the actual characteristics or circumstances of the claimant; and the ameliorative effects of the impugned law upon a disadvantaged group. However, it is settled law that the simple fact that a factor is present or absent does not necessarily mean a s. 15(1) claim will succeed or fail. The assessment is contextual in each case.

(1) Potential Appellant Submissions (Missinaba Regional Municipality)

[49] As in the previous section, the Municipality is going to want to consult Justice Demoe’s reasons for not finding an infringement of section 15 of the *Charter* in this case.

[50] Justice Demoe acknowledged that the Policy creates a distinction based on the protected ground of disability, but she held that the Policy is thoughtfully designed to accommodate individuals with disabilities. She also noted that Mr. Sinclair has benefited from these accommodations, as well as from other accommodations that existed before the Policy was implemented.

[52] The Municipality could also bring in the cross-examination testimony from Dr. Rema Singh in which she conceded that in-office work may actually help certain individuals with ADHD instead of being a burden.

[53] Justice Demoe also rejected Mr. Sinclair's argument that “family status” should be considered an analogous ground of discrimination under s. 15. She did not accept Mr. Sinclair’s claim that being required to live near the office should be seen as a form of discrimination based on family status.

(2) Potential Respondent Submissions (Ray Sinclair)

[52] On the other hand, Mr. Sinclair is going to want to argue that the Policy infringes section 15 because, in its impact, it creates a distinction based on the protected ground of disability and imposes a burden on Mr. Sinclair for this reason. He can argue that it was clear from the evidence presented that individuals with diverse mental health needs, such as Mr. Sinclair, should not be compelled to return to the workplace when a reasonable alternative exists. He can argue that the Policy did not sufficiently accommodate his disability and is not justified under section 1 of the *Charter*.

[54] Mr. Sinclair will similarly want to turn to Dr. Singh’s affidavit in which she laid out the benefits of remote work policies to those individuals with ADHD. The respondent will want to clearly counter the appellant’s use of Dr. Singh’s evidence and highlight that Dr. Singh stated that outcomes are based on individual needs and diagnoses.

[55] When it comes to the “family status” piece, Mr. Sinclair will want to argue that the time has come to recognize it as an analogous ground, as Justice Demoe did. Again, he can bring in Dr. Singh’s affidavit in which she lays out the disproportionate burnout and lack of support among workers living alone.

[56] Additionally, he can point to the fact that the Policy granted benefits (such as child care and elder care) to certain employees based on their family status, while these benefits were not available to Mr. Sinclair, who is single.

3. If the answer to either of questions 1 or 2 is “yes”, is the infringement a reasonable limitation on those rights that is demonstrably justified in a free and democratic society?

[57] If the court finds that the Policy violates ss. 7 or 15(1) of the *Charter*, the onus shifts to the Municipality to justify the infringement. To justify a *Charter* violation, the Crown must satisfy the [R v Oakes](#) test, which consists of the following steps:

- a. Was the limit on the right or the breach “prescribed by law”?
- b. Was there a pressing and substantial objective or purpose for the limit on the right?
- c. Was the limit or breach proportionate?

[58] Step three, proportionality, has three further considerations, which are:

- a. Whether there was a rational connection between the infringement and the benefit sought on the basis of reason or logic;
- b. Whether there was minimal impairment of the rights protected; and
- c. Whether there was proportionality between the deleterious effects of the measures that infringe the *Charter* rights or freedoms and the salutary effects of the objective.

[59] The distinction between the rational connection and minimal impairment considerations from the third and final proportionality consideration was described by the SCC in [*Thomson Newspapers Co. v. Canada \(Attorney General\)*](#) as follows:

The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the *Charter* right in question, but rather the relationship between the ends of the legislation and the means employed ... The third stage of the proportionality analysis provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*.

[60] Furthermore, there are some parallels between ss. 7 and 1 of the *Charter*. The text of s. 7 indicates that one’s life, liberty, and security of the person may be taken away by the government so long as the deprivation is done according to the “principles of fundamental justice”. As such, s. 7 has a specific rights limitations clause just as s. 1 limits the rights and freedoms in the *Charter* generally. The important distinction is that the s. 7 limitation deals with whether there are individual circumstances that warrant the limitation of the individual’s

right. Section 1, on the other hand, deals with whether overarching public goals warrant the limitation of the individual’s right or freedom.

(1) Potential Appellant Submissions (Missinaba Regional Municipality)

[61] There should be no argument about the Policy being *prescribed by law* as it is enacted by a municipal body, the council, and well within their jurisdiction.

[62] The real first question here is whether the Policy's objective is *pressing and substantial*. In the context of a workplace policy, the objective could be to ensure effective work operations, maintain a collaborative work environment, or address security and privacy concerns. If the objective is deemed important, it would meet the first part of the *Oakes* test. As a general standard, the government does not often have difficulty showing the pressing and substantial nature of a law.

[63] The Municipality may also want to argue that these goals, to create a cohesive team at work, are even more pressing and substantial coming out of the COVID-19 pandemic. Indeed, they could point to Councillor McCrae’s evidence that demonstrated overall employee productivity declined during this period, increased employee turnover and feelings of disconnection. Similar points were stated during Dr. Singh’s cross-examination.

[64] The test would now proceed to the second stage: *proportionality*. First, the limitation of the right must be *rationaly connected* to the objective of the law in question. Any limitation to a *Charter* right cannot be arbitrary, or unconnected to the purpose of the law. For example, in *Oakes*, the SCC found that there was no rational connection between the requirement that an

accused disprove intent to traffic and the purpose of the law, to prevent drug trafficking.

The court found that the government did not satisfy the rational connection element of the *Oakes* test.

[65] Here, the Municipality would need to prove that there is a rational connection between the Policy's objective and the requirement that “in person essential” employees be in the office for two days a week. If the employer can demonstrate that this in-person presence is necessary to achieve the stated objectives, it may meet this part of the test. This is not a difficult argument to make.

[66] Next, the test would move to consider whether there is minimal impairment to the *Charter* rights in question. This is a crucial factor. The Policy must be the least intrusive means to achieve the objective. If the Municipality can show that there is no less restrictive alternative that would meet the same goals (e.g., remote-work options), this part of the test may be satisfied. The Municipality may want to point out that in-person attendance is only mandated for less than 50% of weekly work days (i.e., the minority), for example.

[67] Finally, the analysis would move to the last stage, examining the *proportionality* of the Policy. This part of the *Oakes* test is concerned with the overall benefits and effects of the law in question. Here, courts seek to balance the negative effects of any limitation of a right with the positive effects that the law may have on society as a whole. It asks if the limit on the right is proportional to the importance of that law’s purpose. It also asks whether the benefits of the law are greater than any negative effects produced by a limitation on a right.

[68] If the policy's benefits (e.g., productivity, collaboration, fostering connection) outweigh the limitations on employees’ freedom to work remotely, it may meet this part. Again, the Municipality will want to rely on Councillor McCrae’s evidence and Dr. Singh’s cross-examination here. Moreover, they will want to point out that the Policy applies only to a certain category of employees.

(2) Potential Respondent Submissions (Ray Sinclair)

[69] For the reasons stated above, Mr. Sinclair is going to want to focus his argument on the third step of the *Oakes* test: *proportionality*. It is in here that the most convincing arguments against the Policy lie. Sinclair can argue that the Policy is not rationally connected to these aims [of fostering collaborative and productive working environment], is not minimally impairing, and has a disproportionate impact on his rights.

[70] In speaking about the *rational connection* between the limit and the objective, Mr. Sinclair will want to bring in his past performance while working remotely as well as the study of 2,500 knowledge industry workers that Dr. Singh referenced in her expert opinion. This would potentially illustrate that the Policy may not have a rational connection to the stated objective. If the Municipality cannot demonstrate a clear and direct link between the two days of in-office work and the stated objective (e.g., productivity, collaboration, connection), it may fail the rational connection requirement. (Remember that the onus is on the Municipality here.)

[71] The *minimal impairment* stage of the test is a little bit trickier, but, again, remember that Mr. Sinclair does not have the burden to justify the infringement. Sinclair may want to focus

his argument on the productivity piece of the stated rationale for the Policy (and stay away from the collaboration and connection dimensions as they are weaker arguments). He performed exceptionally well while working remotely during the pandemic and even received a promotion during that time; this goes against one of the principal aims of the Policy.

[72] In terms of proportionality, Mr. Sinclair is going to want to argue that requiring in-office work disproportionality impacts employees with disabilities, limiting their ability to work and enjoy the benefits of employment. Again, he can turn to Dr. Singh’s expert opinion here.

4. If an infringement is found and cannot be upheld as a reasonable limitation on Ray Sinclair’s *Charter* rights, is this an appropriate case for an award of damages pursuant to section 24(1) of the *Charter*?

[73] Just like *Charter* rights, the *Charter* remedies demand a generous and expansive approach. This means that at least, the remedy selected must be responsive and effective. While the plain language of section 24(1) and the generous and expansive approach affords a broad power to the courts, judges tend to be cautious. The court’s choice of remedy must be guided by the effectiveness of the remedy in vindicating *Charter* rights, respect for the separation of powers and the appropriate role of democratic bodies, recognition of the court’s functional and institutional limits, and, fairness to the parties in the case. The public interest should also be considered.

(1) Potential Appellant Submissions (Missinaba Regional Municipality)

[74] If the Municipality gets to this stage, it has not gone well for them as the courts would have found an unjustifiable infringement of the respondent’s *Charter* right(s). Therefore, the Municipality is going to want to argue why damages are not the appropriate remedy and point to, say, an amendment or retraction of the Policy or simply carving out an exception for Mr. Sinclair.

[75] Otherwise, the Municipality could take any number of routes to lay out why awarding damages would not be appropriate in this specific case. They could point to the budgetary implications of doing so, arguing that it could divert resources away from other important public services or programs. They could point to the fact that it may set of precedent for abuse by other claimants (even those in their own city). They could argue that it may have a chilling effect on other municipalities, causing government entities to be excessively cautious or avoid taking necessary actions due to the fear of potential financial liability.

(2) Potential Respondent Submissions (Ray Sinclair)

[76] As stated above, there are strong arguments in favour of awarding damages under Section 24(1). In fact, the SCC stated in *Mills v The Queen* that “difficult to imagine language which could give the court a wider and less fettered discretion”.

[77] Given that Mr. Sinclair was fired and is far past the period accounted for in his six-month severance, he can argue that he should be compensated for lost wages as well as for the emotional harm suffered during a vulnerable, tragic period in his life. He may also want to take

a broader deterrence stance, encouraging the court to award damages in order to send a message to other entities that this kind of discriminatory Policy will not pass a challenge in the future.